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⁽¹⁾ Text with EEA relevance

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Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

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II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION

of 29 June 2011

on State aid granted by France to the Institut Français du Pétrole (Case C 35/08 (ex NN 11/08))

(notified under document C(2011) 4483)

(Only the French text is authentic)

(Text with EEA relevance)

(2012/26/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union ⁽¹⁾, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area ⁽²⁾, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above ⁽³⁾,

Whereas:

Institut Français du Pétrole ⁽⁴⁾, the French authorities informed the Commission, by letter dated 18 July 2006, registered as received on 19 July 2006, that on 7 July 2006 the Institut Français du Pétrole (IFP), which had formerly been a trade body (*établissement professionnel*) within the meaning of the legislation known as Law No 43-612 of 17 November 1943 on the management of trade interests (*loi sur la gestion des intérêts professionnels*), had now been converted into a publicly owned industrial and commercial establishment (*établissement public à caractère industriel et commercial* — 'EPIC'). This conversion was evidenced in two documents which the French authorities enclosed with their letter: i) Decree No 2006-797 of 6 July 2006 establishing the constitution of the publicly owned establishment IFP (*décret portant statuts de l'établissement public IFP*), and ii) Article 95 of Programme Law No 2005-781 of 13 July 2005 establishing the energy policy guidelines (*loi de programme fixant les orientations de la politique énergétique*), under which the Decree cited above had been issued.

- (2) By letters dated 3 August 2007 and 7 May 2008, the Commission requested information from the French authorities; they replied by letters dated 28 September 2007 and 26 June 2008 respectively.

1 PROCEDURE

- (1) In the course of a formal investigation in State aid case No C 51/05, concerning aid granted by France to the

- (3) On 16 July 2008, in a previous case, the Commission adopted a decision on a first measure implemented by

⁽¹⁾ OJ C 83, 30.3.2010, p. 47. With effect from 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the Treaty on the Functioning of the European Union (TFEU); the two sets of provisions are, in substance, identical. For the purposes of this decision, references to Articles 107 and 108 of the TFEU should be understood as references to Articles 87 and 88, respectively, of the EC Treaty where appropriate. A certain number of changes in terminology have also been made by the TFEU, such as the change from 'Community' to 'Union' and from 'common market' to 'internal market'.

⁽²⁾ OJ L 1, 3.1.1994, p. 1.

⁽³⁾ OJ C 259, 11.10.2008, p. 12.

⁽⁴⁾ The Institut Français du Pétrole has since been renamed the 'Institut Français du Pétrole Énergies Nouvelles', with effect from 13 July 2010. This name change was made by Article 81 of Law No 2010-788 of 12 July 2010 on national commitment to the environment (*loi portant engagement national pour l'environnement*) (the 'Grenelle 2 Law'). (IFP press release of 13 July 2010, available at Internet site <http://www.ifpenergiesnouvelles.fr/actualites/communiqués-de-presse/>, site consulted on 28 June 2011).

France to assist the IFP group ('decision C 51/2005')⁽⁵⁾. In that decision, the Commission stressed that the question of the existence of additional State aid, in the form of a potential unlimited State guarantee stemming from the EPIC status of IFP, would be the subject of a separate investigation in another proceeding.

- (4) This second proceeding under Article 108(2) TFEU was the subject of a Commission decision dated 16 July 2008 ('the opening decision')⁽⁶⁾, taken pursuant to Article 4(4) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty⁽⁷⁾ ('the Procedural Regulation'), against the unlimited State guarantee from which the IFP group was potentially benefiting.
- (5) The Commission published the opening decision in the *Official Journal of the European Union* on 11 October 2008, asking interested parties to submit their comments on the measure.
- (6) The Commission received observations from France by letter dated 14 October 2008.
- (7) By letter dated 6 November 2008, registered as received by the Commission on the same day, the legal advisers of UOP Ltd ('UOP') informed the Commission that their client wished to comment on the measure. In view of the time needed for translation, they asked for extra time until 30 November 2008 in which to send their comments. By letter dated 7 November 2008, the Commission accepted that this request was justified and agreed to extend the deadline for UOP's reply until 30 November 2008. By letter dated 28 November 2008, registered as received by the Commission on the same day, UOP's legal advisers forwarded their client's comments on the opening decision.
- (8) In the same letter of 28 November 2008 UOP's legal advisers sought permission for their client to submit additional comments in the course of the proceeding. By letter dated 17 December 2008, the Commission acceded to this request, agreeing to extend the deadline for UOP's reply until 23 January 2009 to enable it to submit any additional comments. By letter dated 23 January 2009, UOP's legal advisers forwarded additional comments from their client.

- (9) By letter dated 6 May 2009, the Commission communicated to the French authorities all the comments made by UOP on the opening decision, where necessary in a confidential version. It asked them to send it their comments by 8 June 2009 at the latest. By letter dated 2 June 2009, the French authorities requested that this time limit be extended until 22 June 2009, since, in their view, the comments submitted by the third party required detailed and in-depth analysis and the consultation of several ministerial departments. By letter dated 9 June 2009, the Commission agreed to this extension until 22 June 2009. By letter dated 22 June 2009, the French authorities forwarded their observations on the comments made by UOP.
- (10) By letter dated 29 July 2009, the Commission asked the French authorities for additional information, requesting a reply by 24 August 2009. By letter dated 19 August 2009, the French authorities asked for an extension until 7 September 2009, to which the Commission acceded by letter dated 20 August 2009. The French authorities finally provided the information requested by letter dated 8 September 2009.
- (11) By letter dated 20 November 2009, the Commission requested further information from the French authorities, asking for a reply within twenty days. By letter dated 14 December 2009, the French authorities asked for an extension until 22 January 2010, which the Commission granted by letter dated 18 December 2009. The French authorities finally supplied the information requested by letter dated 13 January 2010.
- (12) On 20 May 2010, a meeting organised by the Commission was held in Brussels to discuss with the French authorities the consequences for the present case of the decision adopted by the Commission on 26 January 2010 concerning State aid granted to La Poste by State aid measure No C 56/07 (ex E 15/05) ('decision C 56/2007')⁽⁸⁾. La Poste was an entity governed by public law which up to that time had a status that could be deemed equivalent to that of an EPIC⁽⁹⁾, and the case concerning it (the 'La Poste case' or the 'postal case') presented significant similarities with the measure at issue, so much so that the French authorities had put forward the same arguments,

⁽⁸⁾ OJ L 274, 19.10.2010, p. 1.

⁽⁹⁾ On this question, see in particular recital 19 of decision C 56/2007. Before its conversion into a public limited company in 2010, the EPIC status of La Poste derived from a case-law classification: in a judgment of 18 January 2001, the Court of Cassation (Second Civil Division) found that La Poste was to be deemed equivalent to an EPIC, thereby upholding the findings of a judgment of the Douai Court of Appeal of 22 October 1998. Moreover, in a report submitted to the French Senate in 2003, the Senate Economic Affairs Committee stated that it was common knowledge that, since the reform of 1990, the parent, La Poste, had a legal form similar to that of an EPIC.

⁽⁵⁾ Commission Decision 2009/157/EC of 16 July 2008 on the aid measure implemented by France for the IFP Group (C 51/05 (ex NN 84/05)) (OJ L 53, 26.2.2009, p. 13).

⁽⁶⁾ Commission Decision of 16 July 2008 on State aid C 35/08 (ex NN 11/08) – Unlimited State guarantee for the IFP – Invitation to submit comments pursuant to Article 108(2) of the TFEU (OJ C 259, 11.10.2008, p. 12).

⁽⁷⁾ OJ L 83, 27.3.1999, p. 1.

mutatis mutandis, in their comments on each of the two cases. On 4 June 2010, a list of additional questions was sent to France by e-mail, since the Commission wished to receive a written contribution from the French authorities on the various points covered during this meeting. On 16 July 2010, the French authorities supplied the information requested.

- (13) By letter dated 29 September 2010, the Commission asked the French authorities to transmit additional information, requesting a reply within 20 days. By letter dated 7 October 2010, the French authorities asked for an extension until 26 November 2010; the Commission agreed by letter dated 8 October 2010. The French authorities finally provided the information requested by letter dated 26 November 2010.

2 THE IFP GROUP

- (14) As indicated by the Commission in the opening decision and in decision C 51/2005 ⁽¹⁰⁾, IFP performs three tasks:

— research and development in the fields of oil and gas prospecting and refining and petrochemicals technologies,

— the training of engineers and technicians, and

— the provision of sector information and documentation.

A contract of objectives with the State lays down the broad lines of its work for five years at a time.

- (15) Furthermore, IFP directly and indirectly controls commercial enterprises with which it has concluded exclusive research and licensing agreements. On the basis of a body of consistent evidence, the details of which are recalled in recital 137, the Commission considered in decision C 51/2005 that the combination

of the public limited companies Axens, Beicip-Franlab and Prosernat, together with their parent, IFP, constituted an economic group (the 'IFP group') for purposes of competition law.

- (16) Axens is active in the market for catalysts and technologies for the refining and petrochemicals industries, and in 2006, when the legal form of its parent changed, its consolidated turnover was EUR 308,45 million. IFP and Axens are linked by two exclusive framework licensing and product licensing agreements and an industrial research agreement ⁽¹¹⁾. The subsidiary pays the parent royalties under the licensing agreements and remuneration [...] (*) for access to IFP's research capacity.
- (17) Beicip-Franlab specialises in the publication and distribution of deposits exploration software and in consultancy and advisory services. In 2006, its turnover was EUR 42 million. An exclusive development, marketing and use agreement, signed in 2003 for a period of ten years, provides that Beicip-Franlab [receives proposals from IFP relating to the results of its research] (**) into the algorithms, models and methodologies [constituting the outcome of the research of] (**) IFP in the field of deposit exploration, and may request permission from IFP to produce products on that basis. Beicip-Franlab covers all of the product development costs borne by IFP. In addition, Beicip-Franlab makes various additional payments [...] (*) to cover maintenance and rights of use. An amendment was signed in 2005, which modifies the payment arrangements while at the same time retaining the principle of total coverage of development costs by Beicip-Franlab.

⁽¹¹⁾ This refers to:

- (a) a ten-year exclusive framework licensing agreement under which the subsidiary may use IFP's present and future intellectual property rights essentially in processes in its field of activity to provide engineering services to customers in connection with those processes and to transmit to them the right to use the related technologies in the form of patent licence sub-grants;
- (b) a ten-year exclusive product licensing agreement under which the subsidiary may use IFP's present and future technology in its field of activity to manufacture and sell to its customers catalysts, adsorbents, captation masses, equipment, and other products and software developed by IFP; and
- (c) a ten-year industrial research agreement under which [IFP offers its subsidiary the results of its research in the field of refining and petrochemicals in order that it may, if it so wishes, pursue the research in a joint project with IFP and then exploit the said results.] (**) Failing that, IFP can offer these results to another enterprise. Each partner bears the costs of its participation in the research project, and at project end IFP holds the ownership rights to the products and processes while its subsidiary holds the ownership rights to the industrialisation stages of the products and processes.

(*) To ensure that confidential information is not disclosed, parts of this text have been omitted. Those parts are indicated by three full stops enclosed in square brackets and marked with an asterisk.

(**) To ensure that confidential information is not disclosed, parts of this text have been replaced. They paraphrase the concealed information to ensure that the decision is comprehensible and coherent. Those parts are indicated between square brackets and are followed by two asterisks.

⁽¹⁰⁾ See part 2.1 ('The IFP Group') in both the opening decision and decision C 51/2005.

(18) Prosernat provides consultancy and other services and supplies gas treatment and sulphur recovery plants. In 2006, its turnover was EUR 49,9 million. On 18 August 2003 IFP and Prosernat signed a framework licensing agreement and an industrial research agreement, with retroactive effect from 1 January 2002, for a period of 10 years. Under these agreements, Prosernat has an exclusive licence for the patents of IFP and [IFP offers it the results of its] (**) research [...] (*) in the field of gas treatment and sulphur recovery technologies. Prosernat pays its parent a fee out of the annual turnover for the licence for the processes, and a fee on a case-by-case basis for equipment. The IFP's remuneration for Prosernat's access to the results of the research work amounts to [...] (*) % of Prosernat's global annual turnover.

(19) In accordance with Article 6 of decision C 51/2005, a clause was inserted in 2009 in the exclusive agreements governing the remuneration to IFP to be paid by its subsidiaries Axens et Prosernat ⁽¹²⁾, so as to ensure that IFP received a minimum variable remuneration, covering at least 25 % of the costs of feasibility studies preparatory to industrial research activities, 50 % of the costs of industrial research and, where appropriate, 75 % of the costs of pre-competitive development activities, within the meaning of the Community framework for state aid for research and development of 17 February 1996 ('the 1996 R&D Framework') ⁽¹³⁾, carried out by IFP in the subsidiaries' fields of activity ⁽¹⁴⁾.

(20) In accordance with the opening decision, the investigation of the measure should take account of the potential impact of the State guarantee arising from the EPIC status of IFP on all the activities of the IFP group, including the publicly owned establishment IFP and its three subsidiaries governed by private law ⁽¹⁵⁾.

3 DESCRIPTION OF THE MEASURE

(21) Until 2006, IFP was a legal person governed by private law, a trade body within the meaning of Law No 43-612

⁽¹²⁾ By letter dated 18 June 2009, the French authorities sent the Commission a copy of the amendments to the contracts between IFP and its subsidiaries Axens and Prosernat in accordance with Article 6 of decision C 51/2005. Concerning Axens, the amendment [...] (*) was signed [in] (**) 2009 by [...] (*) IFP and [...] (*) Axens. Concerning Prosernat, the amendment [...] (*) was signed [in] (**) 2009 by [...] (*) IFP and [...] (*) Prosernat.

⁽¹³⁾ Communication from the Commission – Community framework for State aid for research and development (OJ C 45, 17.2.1996, p. 5).

⁽¹⁴⁾ This minimum remuneration in fact limits the aid to each subsidiary to a maximum of 75 % of the costs of feasibility studies preparatory to industrial research activities, 50 % of the costs of industrial research and, where appropriate, 25 % of the costs of pre-competitive development activities.

⁽¹⁵⁾ Recital 18 of the opening decision states that the Commission intends to examine the effects of the conversion of IFP into an EPIC on the publicly owned establishment IFP and its subsidiaries, as a single market operator. Recital 36 of the opening decision states that this single entity is considered to be a potential beneficiary of the unlimited State guarantee.

of 17 November 1943 on the management of trade interests, placed under the economic and financial supervision of the French Government.

(22) The principle that IFP was to be converted into an EPIC was laid down in Article 95 of Programme Law No 2005-781 of 13 July 2005 establishing the energy policy guidelines. The conversion became effective from the publication in the *Journal Officiel de la République Française* of Decree No 2006-797 of 6 July 2006 establishing the constitution of the publicly owned establishment IFP.

(23) From the date of its change of legal form, IFP, as an EPIC, became a legal person governed by public law ⁽¹⁶⁾.

(24) The legal implications of the EPIC form are explained in detail in part 2 of decision C 56/2007 ('Description of the measure') and in part 3.2.1 of the opening decision, to which the Commission refers *mutatis mutandis*.

4 REASONS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

(25) In the opening decision, the Commission began by expressing doubts about the special arrangements governing the bankruptcy of EPICs, which departed from the ordinary law on such matters. It considered that these were akin to an unlimited State guarantee mechanism which mobilised public resources:

— EPICs, as legal entities governed by public law, are not subject to insolvency and bankruptcy procedures, by virtue of the general principle of the immunity from seizure of the assets of legal entities governed by public law, which has been recognised by the French courts, including the Court of Cassation ⁽¹⁷⁾, since the late nineteenth century. For further details, the Commission refers to section 3.2.1.1 of the opening decision, recitals 38 to 40 ⁽¹⁸⁾.

⁽¹⁶⁾ In France, in addition to the public authorities proper, such as the State and the local authorities, there are two main categories of legal entities governed by public law, namely publicly owned establishments and public interest groups, introduced by the Law of 15 July 1982. Within publicly owned establishments, a distinction of principle can be drawn between publicly owned administrative establishments (EPAs), which perform traditional administrative tasks, and publicly owned industrial and commercial establishments (EPICs), which perform economic activities.

⁽¹⁷⁾ See judgment of 21 December 1987 (First Civil Division).

⁽¹⁸⁾ The same arguments are developed at greater length in section 2.1 of decision C 56/2007, recitals 20 to 22.

- EPICs are subject to the Law of 16 July 1980 and its implementing rules. These expressly identify the State as the authority responsible for covering the debts of publicly owned establishments. They confer on it important prerogatives, such as the issuing of a mandatory payment order and the creation of sufficient resources, and organise a principle of last-resort State liability for the debts of legal entities governed by public law. For further details, the Commission refers to section 3.2.1.2 of the opening decision, recitals 41 to 45 ⁽¹⁹⁾.
 - In the event of the winding up of an EPIC, the general principle applies that its debts will be transferred to the State or to another public entity ⁽²⁰⁾, which means that creditors of an EPIC have an assurance that they will not lose the money they are owed by a publicly owned establishment. For further details, the Commission refers to section 3.2.1.3 of the opening decision, recitals 46 to 51 ⁽²¹⁾.
 - EPICs may possibly also have preferential access to Treasury imprest accounts. For further details, the Commission refers to section 3.2.1.4 of the opening decision, recital 52 ⁽²²⁾.
- (26) As explained in recitals 65 to 74 of the opening decision, to which the Commission refers for more details, the clarifications to legislation and regulations proposed by the French authorities did not at first sight seem sufficient to assuage these doubts.
- (27) The Commission said that it could not be ruled out that there might be a selective economic advantage, mainly through funding terms considered more favourable, even if IFP and its subsidiaries were not the subject of a financial rating by an external rating agency. The IFP group might also have been advantaged in its dealings with customers and suppliers in so far as they believed their claims to be covered by a State guarantee. Consequently, it could not be ruled out at the
- preliminary examination stage that in the case of the supply or purchase of goods or services involving a claim, the suppliers or customers concerned would grant terms to IFP that were better than those they would have granted to an undertaking not benefiting from a State guarantee.
- (28) On the basis of the information available at the end of its preliminary examination, the Commission considered that the unlimited nature of the guarantee, especially as regards its duration, amount and scope, made it extremely difficult to calculate the amount of the market premium that IFP ought to pay the State for such protection.
- (29) Finally, the Commission doubted whether the aid was compatible with the internal market, particular because it did not at first sight appear to be intended to facilitate the development of certain economic activities or regions.

5 OBSERVATIONS AND PROPOSALS PUT FORWARD BY THE FRENCH AUTHORITIES

5.1 INITIAL OBSERVATIONS BY THE FRENCH AUTHORITIES

- (30) Following the opening decision cited above, the French authorities submitted observations and proposals to the Commission by letter dated 14 October 2008. That letter supplemented the observations and proposals set out in the previous letters from the French authorities ⁽²³⁾ that were summarised in the opening decision.
- (31) In their observations of 14 October 2008, the French authorities pointed out, as a preliminary point, that the procedure against the IFP group had been initiated in parallel to the postal case cited above; they said they were therefore reiterating the same arguments *mutatis mutandis* as those they developed during the examination of that case ⁽²⁴⁾. Despite these similarities, the French authorities nevertheless wished to draw attention to the specific features of IFP: it was a research organisation assigned a three-fold task in the general interest (research, training and documentation), with an overwhelming majority of non-economic activities, and this justified the public funding granted to it. Moreover, they specified the reasons for its conversion into EPIC form, which they said was intended to ensure that IFP's legal form was consistent with the nature of its activities and its method of funding; relinquishing the form of trade body governed by private law would bring IFP closer to the public sphere.

⁽¹⁹⁾ See also section 2.2 of decision C 56/2007, recitals 23 to 30.

⁽²⁰⁾ Pursuant to Article 21 of the Decree of 6 July 2006, 'In matters of financial management and accounting, the publicly owned establishment IFP is subject to the rules applicable to industrial and commercial establishments.' Even though the publicly owned establishment IFP does not have a public accountant, there is evidence to suggest that EPICs which do not have a public accountant would also, in the event of their being closed down, have their debts transferred to the State or to another publicly owned establishment. The Commission refers to the examples of Charbonnages de France and ERAP, cited in recitals 49 and 50 of the opening decision, which show that where an EPIC is to be wound up — even an EPIC without a public accountant — a transfer of its rights and obligations to another public entity or to the State is not only possible, but clearly expected by the market.

⁽²¹⁾ See also section 2.3 of decision C 56/2007, recitals 31 to 36.

⁽²²⁾ See also section 2.4 of decision C 56/2007, recital 37.

⁽²³⁾ See in particular, the letters from the French authorities dated 18 July 2006, 30 January 2008 and 26 June 2008.

⁽²⁴⁾ The Commission emphasises that these arguments have already been presented in section 3 ('Observations and proposals by the French authorities') of decision C 56/2007. To simplify the presentation, the Commission will therefore refer to that decision as often as possible.

- (32) The French authorities disputed the existence of State aid, since, in their opinion, two of the conditions laid down in Article 107(1) TFEU were not met: the mechanism at issue did not involve any transfer of State resources (5.1.1) and did not confer any advantage on IFP (5.1.2).

5.1.1 THERE IS NO GUARANTEE IMPUTABLE TO THE STATE INVOLVING A TRANSFER OF STATE RESOURCES

- (33) According to the French authorities, (A) publicly owned establishments do not enjoy any guarantee because of their legal form, and (B) the Commission's argument in the opening decision is flawed.

A. No unlimited State guarantee

- (34) As explained in recitals 41 to 45 of decision C 56/2007, to which the Commission refers *mutatis mutandis*, the French authorities develop five pleas in law in support of their arguments.

- (35) First, no legislation or decision lays down the principle that the State would, out of principle, indefinitely guarantee the debts of EPICs.

- (36) Second, the Council of State has found against the existence of guarantees, in particular in its judgment in *Société de l'hôtel d'Albe* ⁽²⁵⁾ and in its two judgments in the *Campoloro* case ⁽²⁶⁾.

- (37) Third, the Organic Law of 1 August 2001 governing the Finance Act (the 'LOLF') lays down that only a provision of a finance act can create a guarantee ⁽²⁷⁾, and the Council of State explicitly confirmed this in its 2006 annual report ⁽²⁸⁾. According to the expert called upon by the French authorities in the postal case cited above ⁽²⁹⁾, therefore, it has been legally impossible to give an implied guarantee since the full entry into force of the Organic Law governing the Finance Act on 1 January 2005. Debts contracted since 1 January 2005 are therefore not covered by an implied guarantee. As for debts incurred before 1 January 2005, the expert takes the view that, in the absence of a court judgment, it is impossible to determine whether it might be held that implied guarantees given before 1 January 2005 which

were not expressly authorised by a finance act retain their validity on the basis of respect for the constitutionally protected rights of creditors.

- (38) Fourth, France considers that if EPICs enjoyed a State guarantee, the change in their legal form would require the introduction of new measures to protect creditors' rights. Since such a mechanism has never been introduced ⁽³⁰⁾, France concludes conversely that EPICs do not benefit from any State guarantee.

- (39) Fifth, the French authorities refer to an article by Mr Labetoulle, a former president of the litigation division of the Council of State, according to which 'in law, there is nothing automatic about the granting, enjoyment and scope of this guarantee [a State guarantee that applies automatically to State-owned public establishments]' ⁽³¹⁾.

B. Flawed Commission argument ⁽³²⁾

- (40) The French authorities consider that, as far as EPICs are concerned, (a) the reimbursement of individual claims is not guaranteed, and (b) there is no assurance of the continued existence of the publicly owned establishment or of its obligations.

a) The reimbursement of individual claims is not guaranteed

- (41) As explained in recitals 46 to 49 of decision C 56/2007, to which the Commission refers *mutatis mutandis*, the French authorities consider that the Law of 16 July 1980 cannot serve as a basis for a guarantee. In the light of the legislative history of the Law, an interpretation of the *Campoloro* decisions of 10 November 1999 ⁽³³⁾ and 18 November 2005 ⁽³⁴⁾, and the academic literature on the subject ⁽³⁵⁾, France argues that the Law of 16 July 1980 does not impose an obligation on the State to commit its own resources. The expression 'y pourvoit' ('shall do so') in Article 1 confers on the State only a power of 'substitution' for the

⁽²⁵⁾ Council of State judgment, *Société de l'hôtel d'Albe*, 1 April 1938, reported in *Receuil*, p. 341.

⁽²⁶⁾ Council of State judgments in the *Campoloro* case (10 November 1999 and 18 November 2005). See recital 59 of the opening decision.

⁽²⁷⁾ See the observations submitted by the French authorities in the postal case on 23 January 2008 and 27 October 2009, to which they have referred *mutatis mutandis* in the present IFP case.

⁽²⁸⁾ See 2006 Council of State report, p. 69.

⁽²⁹⁾ See the observations submitted by the French authorities on 27 October 2009 in connection with decision C 56/2007.

⁽³⁰⁾ The French authorities emphasise that an express guarantee had to be granted when the Administration of Posts and Telecommunications was converted into an independent legal person in 1991, whereas that would not have been necessary if the new La Poste, as an establishment equivalent to an EPIC, had enjoyed a State guarantee by virtue of its legal form. Likewise, express guarantees have been granted to ERAP and the French Development Agency (*Agence Française du Développement*), which are both EPICs.

⁽³¹⁾ D. Labetoulle, 'La responsabilité des AAI dotées de la personnalité morale: coup d'arrêt à l'idée de "garantie de l'État"', *RJEP/CJEG* No 635, October 2006.

⁽³²⁾ See the observations submitted by the French authorities in the postal case on 23 January 2008.

⁽³³⁾ Council of State, *Société de gestion du port de Campoloro*, 10 November 1999, reported in *Receuil* p. 3409.

⁽³⁴⁾ Council of State, *Société de gestion du port de Campoloro*, 18 November 2005.

⁽³⁵⁾ P. Bon, 'Le Préfet face à l'inexécution par une collectivité territoriale d'un jugement la condamnant pécuniairement', *RFDA*, March-April 2006, p. 341. C. Landais & F. Lenica, 'Le pouvoir de substitution du préfet en cas d'inexécution de la chose jugée par les collectivités territoriales', *AJDA*, 23 January 2006, p. 137.

executive of the person whom it replaces, in the exercise of which it is a matter of principle that the substitute has the same powers as the person replaced. When acting as a substitute, therefore, the State may exercise only the powers of that executive, which do not include access to the State budget, and the granting of an exceptional subsidy is outside the scope of the power of substitution.

the possibility of bankruptcy, and has not established that IFP cannot go bankrupt, nor that insolvency proceedings are impossible: the Law of 1985 is merely a procedural law, and the fact that EPICs lie outside its scope does not mean that administration, winding-up or ad hoc bankruptcy proceedings cannot be brought against them.

(42) Furthermore, as indicated in recitals 50 to 53 of decision C 56/2007, to which the Commission refers *mutatis mutandis*, the French authorities maintain that the State cannot incur strict liability solely on the ground of a lack of assets. According to the French authorities, any guarantee requires the guarantor to accept the fact of the guarantee. Where liability arises out of responsibility for a fault or, in the case of strict liability, for the consequences of one's own actions, there can be no question of a guarantee. According to France, the liability of the State cannot be incurred on the sole ground that the prefect or supervising authority was unable to take any measures that could allow the claim to be repaid because of the financial and asset situation of the publicly owned establishment. There is no fault: inaction on the part of the prefect or the supervising authority is not necessarily a fault. The French authorities recognise that when implementing the procedure laid down by the Law of 16 July 1980 the representative of the State is subject to the requirement of continuity of the public service, but consider that even if a court were to order that a creditor be compensated, such compensation would merely place the creditor in the same position that he would have been in under ordinary law, because under ordinary law the asset would have been sold and the body of creditors would have received the corresponding sum. There is therefore be no advantage to the creditor.

b) *The continued existence of IFP or of its obligations is not guaranteed*

(43) As explained in recitals 54 to 56 of decision C 56/2007, to which the Commission refers *mutatis mutandis*, the French authorities consider that the inapplicability to legal persons governed by public law of the administration and winding-up procedures provided for under ordinary law does not exclude the possibility of the bankruptcy of an EPIC or prevent bankruptcy proceedings being brought against it. They challenge the Commission's analysis, which is based on its Notice on State aid in the form of guarantees ('the Guarantees Notice')⁽³⁶⁾, and consider that in the case in point the Commission has not demonstrated the existence of 'more favourable funding terms' attributable to the exclusion of

(44) Moreover, as explained in recitals 57 to 67 of decision C 56/2007, to which the Commission refers *mutatis mutandis*, the French authorities maintain that the application of the 'procedure' introduced by the Law of 16 July 1980, rather than the collective procedure under ordinary law, does not confer any advantage on the creditor. To assess whether the application of a specific procedure in the event of insolvency confers an advantage on the entity subject to the procedure as compared with undertakings subject to commercial law, they challenge the need to fulfil the criteria of publicity⁽³⁷⁾ and equivalence⁽³⁸⁾ referred to by the Commission in recital 81 of the opening decision⁽³⁹⁾, but they use these same criteria to analyse the procedure established by the Law of 16 July 1980. As regards the publicity criterion, they consider that the procedure is correctly identified by the rating agencies as applicable in the event of the insolvency of an EPIC; as regards the equivalence criterion, they draw a distinction depending on whether or not there is a requirement for continuity of the public service, at the same time noting that the financial situation of IFP and its subsidiaries makes it unlikely that IFP might be short of assets, since available funds and investments at the end of 2007 (EUR 150,3 million) represented approximately five times the amount of borrowings and financial liabilities (EUR 25,2 million):

(a) If there is no requirement for continuity of the public service, in the event of lack of assets of the publicly owned establishment, application of the procedure introduced by the Law of 1980 would not place the creditors in a more favourable position than if the procedure under ordinary law had been applied: they would recover the same amount as the creditors of an entity subject to commercial law, i.e. the proceeds from the sale of the assets, and would no longer have any redress at the end of the

⁽³⁶⁾ Commission Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees, OJ C 71, 11.3.2000, p. 14.

⁽³⁷⁾ The procedure which would be followed in the event of the insolvency of IFP should be defined and publicised.

⁽³⁸⁾ This procedure should be either the private-law procedure or a procedure which confers on the creditors of the publicly owned establishment IFP rights no greater than those they would have had under commercial law.

⁽³⁹⁾ According to the French authorities, compliance with these criteria is sufficient, albeit not necessary, to rule out the existence of any advantage. In their opinion, it would be counter-intuitive to regard the alleged existence of a doubt about the procedure applicable in the event of insolvency to be reflected in more favourable funding terms.

procedure⁽⁴⁰⁾, since, according to France, the State cannot be held liable solely on the ground of lack of assets. Only two aspects would be different:

- The absence of a single procedure for all creditors: unlike the procedure under private law, whereby claims are processed *en masse* and creditors are satisfied in decreasing order of priority and *pro rata* from the amounts available, the procedure introduced by the Law of 16 July 1980 requires creditors to take action to protect their rights. The approach of the Law of 16 July 1980 is ‘first come, first served’.
- It is the representative of the State who, under the supervision of the administrative court (monitoring for gross negligence as established by the Council of State in the *Campoloro* judgment cited above), takes on the role equivalent to that of the liquidator and court-appointed administrator.

- (b) In the event that the continuity of the public service has to be guaranteed, the French authorities admit that the representative of the State, when exercising the powers conferred by the Law of 16 July 1980, could decide not to sell certain assets needed to perform a public service task. This failure to sell certain assets would then be reflected, if the State did not pay compensation, in lower proceeds from the assets and a corresponding reduction in the amounts recoverable by creditors. According to the French authorities, such a procedure would not confer on IFP's creditors rights greater than those they would have had under commercial law. However, the French authorities admit that, in such an event, the State might incur strict liability, and would have to compensate creditors for the loss they had suffered (not exceeding the market value of the assets retained by the State for the continuity

of the public service). The creditors would therefore potentially be reinstated in the same situation as that which would have resulted from the application of ordinary law. The French authorities conclude that the procedure introduced by the Law of 16 July 1980 does not confer any advantage over the procedure under ordinary law and that there is therefore no justification for subjecting IFP directly to a procedure such as that which applies under ordinary law.

- (45) In the opening decision, in particular in recital 82, the Commission referred specifically to the French consolidating instruction No 02-060-M95 of 18 July 2002, on the financial and accounting regulation of national publicly owned industrial and commercial establishments, and to the guide to the financial organisation of the creation, conversion and abolition of national publicly owned establishments and of public interest groups (*Guide sur l'organisation financière des créations, transformations et suppressions des établissements publics nationaux et des groupements d'intérêt*) of 14 November 2006; as explained in recital 68 of decision C 56/2007, to which the Commission refers *mutatis mutandis*, the French authorities contend that the instruments in question are neither applicable nor transferable to IFP.

- (46) Concerning the recapitalisation of IFP's subsidiaries, the French authorities take the view firstly that the question raised in recital 80 of the opening decision should be considered not in order to establish the existence of any State guarantee, but rather in order to measure the potential effects of such a guarantee, which could place IFP and its subsidiaries in a preferential situation on account of the easier terms for recapitalisation. They argue that the Commission's argument is based on two incorrect ideas:

- On the one hand, the Commission commits an error in its reasoning regarding any support that IFP could provide to its subsidiaries through an intra-group transfer, since the conditions on which the parent of a group can support one of its subsidiaries in difficulty are strictly regulated by company law, even if it is a legal person governed by public law⁽⁴¹⁾, and are totally unrelated to the concept of undertaking within the meaning of competition law.

⁽⁴⁰⁾ According to France, in such circumstances, the undertaking would initially be required to open negotiations with its creditors in order to establish a plan for rescheduling liabilities. Next, if the plan were judged unsatisfactory or if it did not bring the financial difficulties to an end, and in the absence of a new agreement with creditors, the creditors – or some of them – could refer the case to the competent court to obtain a judgment against the debtor and therefore have their claim recognised. The procedure introduced by the Law of 16 July 1980 would then be implemented. Where necessary, the procedure could result in the supervising authority stepping into the shoes of the executive of IFP to take the decisions needed for the payment of its debts using IFP's resources. According to the French authorities, if the procedure introduced by the Law of 16 July 1980 were to founder for lack of assets at IFP, and if the supervising authority were therefore faced with an impossible task, not having any more assets to sell in order to generate the resources needed to pay the amount due, the procedure provided for by the Law of 16 July 1980 would be terminated.

⁽⁴¹⁾ Pursuant to Article L. 225-248 of the Commercial Code, if a company's equity capital falls below half of its share capital, the general meeting must record this and decide whether the company should be prematurely dissolved. If it is decided to continue the activity of the company, the company must, no later than the end of the second financial year after that in which the losses were recorded, reconstitute its equity to a value at least equivalent to half the share capital, and reduce the share capital if the equity has not been reconstituted otherwise.

— On the other hand, the French authorities deny that the EPIC status of IFP, with any possible State guarantee that such a status might imply, enables it to recapitalise its subsidiaries more easily than group parent companies with a legal form governed by private law. According to the French authorities, the fact that a company temporarily bears the losses of one of its subsidiaries is part of the normal operation of a group, as the European Union court has already recognised⁽⁴²⁾, and the intervention of a public investor acting according to the same rules of conduct as a private investor is not considered to contain State aid elements within the meaning of Article 107(1) TFEU⁽⁴³⁾. This is the case in particular for IFP, which has the legal possibility (and not the obligation) to recapitalise a subsidiary in difficulties according to the same assessment criteria as any prudent investor. Finally, the French authorities deny that EPICs have any possibility at all of 'direct access' to 'Treasury imprest accounts'. They say that the budgetary mechanism of the 'financial assistance account', regulated by Article 24 of the Organic Law governing the Finance Act, provides for the constitution of appropriations accounts, capped by the Finance Act, which allow the State to grant advance payments to various bodies, if it wishes and if it is able to do so (in particular in the light of European Union law). According to the French authorities, EPICs have not got 'direct access' to these accounts.

5.1.2 NO ADVANTAGE IS CONFERRED ON IFP OR ITS SUBSIDIARIES

(47) The French authorities consider, first, that it cannot be concluded from the Guarantees Notice cited above that an advantage exists in the present case; second, that an extension to IFP's subsidiaries, which are public limited companies under ordinary law, of any advantages from which IFP might benefit on account of its EPIC status would be in contradiction with the Commission's decision-making practice; and third, that no proof has been given of an actual economic advantage to IFP and its subsidiaries in the present case.

(48) The French authorities consider that the Commission misinterprets point 1.2 of the Guarantees Notice cited above, which provides that 'The Commission also regards as aid in the form of a guarantee the more favourable funding terms obtained by enterprises whose legal form rules out bankruptcy or other insolvency procedures or provides an explicit State guarantee or coverage of losses by the State':

— Firstly, the French authorities deny that IFP, as an EPIC, possesses a legal status which rules out any

bankruptcy or insolvency proceedings. In any event, they say, the Commission has not proved this, but provided evidence to show only that IFP's status would not allow the application of one specific procedure (namely the procedure introduced by the Law of 25 January 1985).

— Secondly, the French authorities deny that the fact that under the law and its own constitution a body cannot be made the subject of bankruptcy or insolvency proceedings automatically secures it more favourable funding terms on the market. In order to conclude that an enterprise is receiving aid in the form of a guarantee, the Commission must first, in application of point 1.2 of the Guarantees Notice cited above, demonstrate that it does indeed receive more favourable funding terms.

(49) The French authorities contend that in the opening decision, when examining potential advantages to IFP's subsidiaries arising out of the existence of an unlimited guarantee for their parent EPIC, the Commission disregarded its own decision-making practice. They say the Commission's line of reasoning contradicts the approach it took at the time of the creation of La Banque Postale⁽⁴⁴⁾. Like IFP's subsidiaries, La Banque Postale was a public limited company wholly owned by an entity similar to an EPIC. Leaving aside the commitments given by France in that case, the Commission took the view that the legal status of public limited company under ordinary law was by itself sufficient to rule out the possibility of an unlimited guarantee to the subsidiary. Following the same reasoning, according to the French authorities, it must be held that IFP's subsidiaries, which likewise have the legal form of public limited company under ordinary law, do not benefit from any unlimited guarantee conferred by the status of EPIC.

(50) Finally, the French authorities contend that the Commission has not demonstrated the existence of an actual economic advantage to IFP and its subsidiaries, and in the opening decision merely refers to funding terms 'considered' more favourable, without providing actual proof. European Union case-law requires the Commission to show that IFP's EPIC status has in fact enabled it to obtain more favourable funding terms⁽⁴⁵⁾. The French authorities say that in the course of the procedure they

⁽⁴²⁾ Court of Justice in Case C-303/88 *Italy v Commission* [1991] ECR I-1433, paragraph 21.

⁽⁴³⁾ See in particular Court of Justice in Case C-482/99 *France v Commission (Stardust Marine)* [2002] ECR I-4397, paragraphs 68 to 83.

⁽⁴⁴⁾ European Commission, 21 December 2005, State aid measure No N 531/2005 – France – Measures relating to the creation and operation of Banque Postale.

⁽⁴⁵⁾ Court of First Instance in Case T-68/03 *Olympiaki Aeroporia Ypiresies AE v Commission*, not yet reported in the ECR; to the same effect see also Court of First Instance in Case T-266/02 *Deutsche Post AG v. Commission*, not yet reported in the ECR, paragraph 92: 'Moreover, the Commission must check whether the beneficiary of aid has received an actual advantage'.

provided evidence to show that IFP's EPIC status had not procured and would not procure any financial advantage to IFP and its subsidiaries; in particular, the conversion of IFP was carried out with due regard for a general principle of continuity, especially in terms of its activity, organisation, accounting and financial regime (resources and accounting and financial rules) and tax treatment.

(51) The French authorities consider that the factors above demonstrate that:

- the financial situation of IFP and its subsidiaries is sound, which makes the question of possible bankruptcy and consequently last-resort State intervention irrelevant;
- the terms for the short-term funding of IFP and its subsidiaries are different for each of these entities, and result from specific negotiations conducted on a one-to-one basis with their respective banks;
- the relations that IFP and its subsidiaries maintain with their suppliers and customers do not give rise to preferential conditions resulting from an expectation on the part of these suppliers and customers of a State guarantee.

(52) The French authorities conclude from this that:

- the analysis set out by the Commission in its opening decision is questionable: IFP and its subsidiaries do not enjoy any State guarantee;
- the Commission has not demonstrated the existence of an advantage to IFP and its subsidiaries deriving from IFP's EPIC status;
- the Commission has not, therefore, demonstrated the existence of State aid to IFP and its subsidiaries.

5.2 PROPOSALS BY THE FRENCH AUTHORITIES

(53) Nonetheless, in order to dispel any doubts on the part of the Commission, the French authorities have indicated that they are willing to implement the following measures if the Commission agrees to close the procedure by a decision finding that no aid is involved, in accordance with Article 7(2) of the Procedural Regulation cited above:

- clarification of the Decree implementing the Law of 16 July 1980;

— incorporation of a reference spelling out the absence of a guarantee in IFP's contracts involving a claim;

— incorporation of a reference spelling out the absence of a guarantee in the financing contracts of IFP's subsidiaries.

5.2.1 CLARIFICATION OF THE DECREE IMPLEMENTING THE LAW OF 16 JULY 1980

(54) As specified in recitals 94 to 96 of decision C 56/2007, to which the Commission refers *mutatis mutandis*, the French authorities propose clarifying the interpretation of the Law of 16 July 1980 by amending the fourth subparagraph of Article 3(1) of the Decree implementing the Law ⁽⁴⁶⁾. The proposed amendment is intended, they say, to dispel any misgivings concerning the scope of the expression 'shall do so' (*y pourvoit*) in the organisation of the supervisory power conferred on the prefect or on the supervising authority; the prefect or supervising authority would now have to release resources from the budget of the regional or local authority or the establishment concerned ⁽⁴⁷⁾. According to the French authorities, this proposal would prevent the representative of the State, when exercising his supervisory power, from increasing the resources of the authority or establishment concerned by means of a subsidy from the State or an injection of public resources.

5.2.2 INCORPORATION OF A REFERENCE SPELLING OUT THE ABSENCE OF A GUARANTEE IN IFP'S CONTRACTS INVOLVING A CLAIM

(55) As explained in recitals 97 to 100 of decision C 56/2007 cited above, to which the Commission refers *mutatis mutandis*, the French authorities challenge the Commission's view ⁽⁴⁸⁾ that the State can be held liable solely on the grounds of the insolvency of IFP. However, they put forward a proposal based on the plea of accepted risk (*l'exception de risque accepté*, see the

⁽⁴⁶⁾ Decree No 81-501. When the French authorities made their proposal, the implementing decree was Decree No 81-501 of 12 May 1981 implementing the Law of 16 July 1980 on penalties imposed in administrative cases and compliance with judgments by legal persons governed by public law and on the Reports and Studies Section of the Council of State.

⁽⁴⁷⁾ As amended, the provision in the Decree would read: 'If the notice given has had no effect by the time these deadlines expire, the representative of the State or the authority responsible for supervision shall enter the expenditure in the budget of the defaulting authority or publicly owned establishment. The representative of the State or the authority responsible for supervision shall, as appropriate, release the necessary resources from the budget of the defaulting authority or establishment, either by reducing the appropriations allocated to other expenditures and still available or by increasing resources' (the amendment is shown in italic).

⁽⁴⁸⁾ The French authorities refer to recital 68 of the opening decision, in which the Commission takes the view that the proposal by the French authorities to amend the Decree implementing the Law of 16 July 1980 'does not exclude the possibility that, where the resources of the publicly owned establishment IFP are exhausted, the creditor who has not obtained repayment of his claim under application of the Law of 16 July 1980 could bring legal action to render the State liable on the basis of a breach of the principle of equality before public burdens'.

judgments of the Council of State in *Sille*⁽⁴⁹⁾ and *Meunier*⁽⁵⁰⁾) under which, as they suggested in the postal case, IFP's creditors would be officially informed that their claim does not enjoy a State guarantee and that, in the event of insolvency, the State will not be obliged to substitute itself for the undertaking financially to pay the claim. Consequently, the parties concerned would be exposing themselves to risk in full knowledge of the facts, and could not claim any right to compensation. The French authorities therefore undertake, jointly with IFP, to include the following statement in the financing contract for each transaction (for all instruments covered by a contract):

'The issue/programme/loan does not enjoy any form of direct or indirect State guarantee. In the event of insolvency, the State would not be obliged to act as financial substitute for IFP for payment of the claim.'

- (56) As explained in recital 101 of decision C 56/2007 cited above, to which the Commission refers *mutatis mutandis*, the French authorities have also noted the misgivings set out by the Commission in recital 71 of the opening decision, which indicated that the plea of accepted risk was a rule established by case-law that could develop; that it was based on secondary law instruments which could be annulled in the event of conflict; and, finally, that the proposal of the French authorities did not cover all possible scenarios, since debts could be not only financial but also commercial or other forms of debt again.
- (57) As specified in recitals 102 to 104 of decision C 56/2007, to which the Commission refers *mutatis mutandis*, after reiterating their opposition in principle to the Commission's position that the State may incur

⁽⁴⁹⁾ Council of State, *Sille*, 16 November 1998: 'First, as the judges in the court of first instance decided, while the public authorities can be held liable, even without fault, on the grounds of the principle of the equality of citizens before public burdens, where a measure lawfully adopted has the effect of causing a special loss of a certain degree of gravity to a natural or legal person, that does not hold true in this case, because Mr Sille, in his capacity as a real-estate professional, could not be unaware of the risks necessarily involved in the execution of a building project such as that projected, in respect of which it was necessary, in particular, to amend the provisions of the land-use plan and obtain the agreement of the local council. Mr Sille should have contemplated the possibility that if the findings of the public enquiry were negative or if the project encountered hostility it might be abandoned by the local authority. Having taken the risk in full knowledge of the facts, he cannot to any purpose maintain that he has suffered an abnormal loss and that the local authority must bear the substantial consequences for him arising from the shelving of the project'.

⁽⁵⁰⁾ Council of State, *Meunier*, 10 July 1996: 'When it concluded from the choice of such a place for the location of the business and from a letter from the mayor concerning the possibility of land slip that the interested party had accepted in full knowledge of the facts the risks of instability to which his establishment was exposed, the Administrative Appeal Court made a final decision on the facts. When it took the view that the loss resulting from a situation to which the interested party had knowingly exposed himself did not give him grounds for compensation, the Court did not fail to apply the rules governing the liability of legal persons governed by public law'.

strict liability solely on the grounds of IFP's the lack of assets, the French authorities have provided additional information to address these misgivings:

- (a) The French authorities consider that the Commission's first objection would seem to say that even if there is no actual provision to this effect in the national law of a Member State, the mere risk of a change in the case-law, i.e. a change in national law, is enough to create State aid. The Commission cannot argue that there is State aid because of a possible change in the law, which in this case is highly improbable, the plea of accepted risk being a general principle of public law that has been confirmed by case-law on many occasions, has never been contradicted, and has been widely commented.
- (b) Concerning the second objection, the French authorities recognise that statute law and regulations take precedence over contracts, and that a disputed clause can always be annulled. However, they consider that the objection does not in fact refer to any higher-ranking text, that it is not substantiated, and therefore has no weight.
- (c) Finally, as regards the third objection, the French authorities consider that it is based on a mere supposition of a possible belief or expectation among suppliers that their claims enjoy a State guarantee, a supposition which cannot by itself serve to demonstrate the existence of an advantage, but must be corroborated by information establishing that IFP and its subsidiaries have actually benefited from an economic advantage of this kind.
- (58) Nevertheless, as specified in recital 106 of decision C 56/2007, to which the Commission refers *mutatis mutandis*, the French authorities indicate that they are willing to extend their proposal to include a statement concerning the absence of a guarantee to include all contracts involving a claim, so as to explicitly rule out any risk that the State might incur strict liability on the basis solely of the insolvency of IFP.
- 5.2.3 INCORPORATION OF A REFERENCE SPELLING OUT THE ABSENCE OF A GUARANTEE IN THE FINANCING CONTRACTS OF IFP'S SUBSIDIARIES AXENS, BEICIP-FRANLAB AND PROSERNAT
- (59) To supplement the proposed mechanism, the French authorities make an additional proposal to the Commission, similar to that made on the creation of La Banque Postale, with regard to the terms on which IFP's subsidiaries (Axens, Beicip-Franlab and Prosernat) are able to borrow on the market, under which an undertaking would be given that in the financing contract for each transaction (for all instruments covered by a contract) the following clause would be included in writing: 'Pursuant to French law (in particular the need for express statutory authority for each guarantee), the present financing transaction shall not enjoy any form of direct or indirect State guarantee'.

- (60) As specified in recitals 107 to 110 of decision C 56/2007, to which the Commission refers *mutatis mutandis*, the French authorities consider that the two clarification measures proposed (the details of which are set out in recitals 55 and 59) would allow the creditors of IFP and its subsidiaries to be made fully aware of their rights, so that France could not be held 'responsible for the expectations created in the minds of IFP's creditors concerning the existence of a guarantee', or regarded as voluntarily maintaining an opaque legal situation that procures an advantage for IFP and is liable to commit the State's resources, as the Commission indicated in recital 87 of the opening decision.

5.3 ADDITIONAL OBSERVATIONS FROM THE FRENCH AUTHORITIES

- (61) By letters dated 16 July 2010 and 26 November 2010, the French authorities provided additional information which in their opinion showed that there was no State aid to IFP.
- (62) In their letter dated 16 July 2010, as a preliminary point, they say that in the *France Télécom* case the European Union courts held that in order to establish the existence of State aid the Commission was obliged to demonstrate that there was a real advantage⁽⁵¹⁾. They consider that in this case, the unlimited guarantee which according to the Commission arises from IFP's legal form in reality confers no economic advantage on it. In their letter dated 26 November 2010, the French authorities say that in their opinion the burden of proof lies with the Commission. They draw attention to the requirements laid down in European Union case-law with regard to proof and reasoning, more especially by the General Court in the *France Telecom* case cited above and by the Court of Justice in *Krantz*⁽⁵²⁾ and more recently in *Deutsche Post AG*⁽⁵³⁾. The French authorities consider that the analysis presented by the Commission in this case is based 'more on hypotheses than on an analysis *in concreto*'.
- (63) Furthermore, in the view of the French authorities, the Commission considers that IFP could benefit from an advantage at three levels: (i) that of its relations with

banks and financial institutions, (ii) that of its relations with suppliers, and (iii) that of its relations with third-party industrial partners that make use of its research services.

- (64) The French authorities consider that in its dealings with banks and financial institutions IFP has so far drawn no economic advantage from its EPIC status. They provide evidence to show that: (i) over the long term, IFP recorded zero debt in the years 2005, 2006 and 2007⁽⁵⁴⁾ and in 2008 and 2009, (ii) over the medium term, although IFP each year negotiated overdraft facilities with various banking institutions, it obtained rates comparable to market rates and in any case has never made use of these credit lines, and finally (iii) over the short term, IFP's debt was close to zero or at zero during the period under review.
- (65) As regards its dealings with suppliers, the French authorities consider that IFP, as a contracting authority, is subject to the disclosure and competitive procurement obligations laid down in Order (*ordonnance*) No 2005-649 of 6 June 2005⁽⁵⁵⁾, and consequently that it cannot benefit from any advantage. In their letter dated 26 November 2010, the French authorities reiterate this analysis, and say that in their opinion the fact that IFP's orders are subject to a tendering procedure in accordance Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts⁽⁵⁶⁾ constitutes a guarantee sufficient to avoid distortion of competition in the market. According to France IFP has ensured competition between its suppliers, in line with the obligations arising from European Union law, and consequently cannot be accused of enjoying an unlawful advantage, at least in the absence of any specific evidence to that effect. The French authorities stress that recourse to electronic purchasing has been facilitated precisely in order to improve efficiency of public procurement: for example, recital 13 of Directive 2004/18/EC indicates that 'This purchasing technique allows the contracting authority ... to have a particularly broad range of tenders ... and ensure optimum use of public funds through broad competition.' They refer to a Commission report which concluded that the public procurement legislation had had a positive impact in terms of lowering prices, the fall being presented as the 'social benefit' of fairer competition between tenderers⁽⁵⁷⁾. By imputing these economies to IFP's EPIC status, the Commission is at odds with the spirit of the Directive, which sees the selection procedures as the key vector for better competition leading to a reduction in public procurement costs.

⁽⁵¹⁾ General Court in Joined Cases T-425/04, T-444/04, T-450/04 and T-456/04 *France and Others v Commission*, 21 May 2010, not yet reported in the ECR. The Court found that the Commission had failed to show that a draft contract for a shareholders' loan that had not been signed or put into effect by France Télécom might have produced an improvement in France Télécom's economic position by comparison with the situation in which it found itself (paragraph 254), and that the Commission could not presume, on the sole basis of a unilateral offer by the State to grant a loan of a certain amount, that that offer would confer economic advantages on the beneficiary, without taking account of the conditions governing the performance of the loan contract, in particular those regarding the granting and the repayment of the loan, especially as the beneficiary had not accepted the offer but had confined itself to funding on the terms prevailing in the market (paragraph 255).

⁽⁵²⁾ Case C-69/88 [1990] ECR I-583.

⁽⁵³⁾ Case C-399/08, 2 September 2010, not yet reported in the ECR.

⁽⁵⁴⁾ The French authorities refer to their letters dated 7 May and 9 June 2008.

⁽⁵⁵⁾ The French authorities refer to their reply to the Commission letter dated 3 August 2007.

⁽⁵⁶⁾ OJ L 134, 30.4.2004, p. 114.

⁽⁵⁷⁾ European Commission, *A Report on the Functioning of Public Procurement Markets in the EU*, 3 February 2004.

(66) Finally, with regard to IFP's dealings with its customers, France says that the contract research activities concerned are the services provided by IFP at the request of a customer, third party or subsidiary, on a subject which comes within the scope of IFP's task, does not involve strategic interests for IFP in terms of ownership of the results, is of a nature to enrich IFP's knowledge and skills in the conduct of the public R&D programmes that it carries out, and does not come within the exclusive field of activities of its subsidiaries. The French authorities note that the research services that these customers acquire call for specific equipment and expertise.

(67) France contends that even if IFP were to benefit from its EPIC status in the performance of these economic activities, the advantage would have no material impact on the market. In particular, it would not be liable to distort competition or to affect trade between Member States. Over the period since the change of IFP's status (which occurred in July 2006), the French authorities nevertheless acknowledge that IFP may potentially have benefited from a reduction in charges as a result of the lack of subscription to performance bonds, but say that on the basis of the sums usually charged by banks and insurance companies to provide this type of service the amount involved is negligible. The French authorities conclude that any such effect would not have the character of an advantage, which calls into question the very existence of State aid to IFP.

6 COMMENTS FROM THIRD PARTIES AND FROM THE FRENCH AUTHORITIES

6.1 OBSERVATIONS FROM UOP

(68) In its letter dated 28 November 2008, UOP submits that it has an interest in the proceedings⁽⁵⁸⁾, and goes on to put forward some general observations and to argue that the entity that it refers to as 'IFP/Axens' receives State aid:

— IFP/Axens, consisting of the publicly owned establishment and its subsidiary Axens, is undeniably perceived by the market as a public entity (5.1.1);

⁽⁵⁸⁾ UOP states that it operates in the markets for the supply of products and services to the petroleum refining, gas treatment and petrochemicals production industries and to most manufacturing industries. More specifically, it indicates that it designs, implements and authorises the exploitation of licences, and provides maintenance of process technologies for such things as oil conversion, clean fuel production, fuel desulphurisation and petrochemicals. It also states that it produces catalysts, molecular filters, adsorbents and other specialised equipment. It states that it is present in various European Union Member States (Austria, Belgium, the Czech Republic, Denmark, France, Germany, Hungary, Ireland, Italy, Netherlands, Portugal, Poland, Slovak Republic, Spain, Sweden and the United Kingdom), that it has representations in Belgium, France and Germany, and that it has two production plants, one in Brimsdown, Enfield, United Kingdom, and the other in Reggio Calabria, Italy.

— the award of EPIC status to IFP/Axens has allowed and continues to allow significant distortion of competition in the process technologies market in which UOP operates, as it confers advantages in relations with suppliers, capital providers and customers (5.1.2).

6.1.1 MARKET PERCEPTION OF IFP/AXENS

(69) According to UOP, the French authorities' argument that Axens is a separate economic entity, like the other IFP subsidiaries, is untenable. The Commission, argues UOP, has rightly pointed out that (i) Axens is wholly owned by IFP; (ii) the implementation by Axens of the R&D of IFP reflects strategic priorities decided by the State; (iii) the managers of the publicly owned establishment IFP participate in the management of Axens; (iv) Axens has an exclusive contract with IFP, which is crucial to the subsidiary's economic activity; and (v) there is in particular an agreement providing for first call on and provision of staff.

(70) UOP adds that the image IFP and Axens present of their relationship, and the market perception of their relationship, also constitute decisive factors:

— IFP and Axens present themselves on the market as a single economic entity, 'IFP/Axens'. Axens's Internet site mentions in particular that the company is 'backed by nearly fifty years of R&D and industrial success'⁽⁵⁹⁾. Axens's advertisements for its technology refer to IFP. Axens and IFP staff sometimes visit their licensees together.

— The industrial press illustrates the market perception of IFP/Axens as a single economic entity. UOP encloses extracts from press cuttings referring to the activities of 'IFP/Axens' in the field of process technology licences, or alternatively referring to such licences being provided by IFP via its subsidiary Axens. UOP also provides examples of articles or presentations in which Axens staff have given the impression that Axens is seen by IFP as comprising the entire activities of the industrial and procatalysis divisions.

6.1.2 THE ADVANTAGES CONFERRED BY THE EPIC STATUS

(71) UOP indicates that the fact that Axens is perceived by both suppliers and customers as disposing of unlimited State resources to finance its activities gives it a significant market edge. Even supposing that this is only a market perception, its importance is magnified in the context of the world economic crisis.

⁽⁵⁹⁾ UOP refers to the web page <http://www.axens.net/about/history.html>, consulted on 20 November 2008.

(72) As regards customers, the guarantees offered by IFP/Axens are of particular significance in a market where customers take account of long-term economic considerations before opting for a given technology. Taking the example of 'aromatic compounds', UOP explains, in substance, that before implementing such technologies, customers have to make very significant investments in the design and construction of the production infrastructures, which takes several years of work. However, the success of these industrial complexes is linked to the performance of the technologies used, with customers generally requiring them to be guaranteed by the seller of the processes⁽⁶⁰⁾. If the required performance level is not achieved, they will not hesitate to hold the assignee responsible and to require compliance with strict obligations regarding compensation. The long-term solvency of the assignee is consequently an important factor in the choice made by purchasers, not only for compliance with contractual obligations, but also for the prospects offered in the field of R&D as pledges of future improvements in the performance of the process acquired. IFP/Axens, perceived by the market as depending on the State, therefore has an advantage over its competitors, since purchasers have no particular reason to doubt its long-term survival.

(73) As regards suppliers, UOP considers that preferential terms may be granted to IFP/Axens as compared with its competitors; UOP cites the contracts signed jointly by IFP and Axens mentioned in the opening decision.

(74) As regards the financial markets, UOP considers that IFP/Axens benefits from preferential terms and interest rates on the capital markets as a result of the role of guarantor of last resort played by the State. Furthermore, in a context of financial crisis, the presence of the State, and the security it represents for investors, makes it possible to attract private capital at a time of shortage. Competing undertakings cannot obtain access to comparable funding, or can obtain it only on far less favourable economic terms. According to UOP, the effects of the economic and financial crisis have strengthened the potential of the measure to distort competition still further.

(75) In its letter dated 23 January 2009, UOP refers to its previous observations and to those sent in the course of the proceedings that led to decision C 51/2005 cited above. UOP considers that this information provides sufficient evidence of the importance of the solvency of co-contractors on the process licensing market concerned. It reiterates the argument that the customers of the IFP/Axens entity assume they are in a trading relationship with a State body, the long-term viability

of which ensures that there is no risk. Finally, UOP asks the Commission to analyse the agreements between Axens and its customers, indicating that it is convinced that they contain no clause that would limit liability to Axens alone.

6.2 COMMENTS FROM THE FRENCH AUTHORITIES ON UOP'S OBSERVATIONS

(76) In their letter dated 22 June 2009, the French authorities consider that UOP's comments are based on assertions that are mistaken, or in some cases entirely false, and in any event are not founded on any evidence that might demonstrate the existence of State aid to IFP or Axens.

(77) In substance, the French authorities deny any relevance to the allegation made that 'IFP/Axens' is perceived by the market as a public entity benefiting from advantages in relation to customers, suppliers and the financial markets, and reject the assertion that this 'IFP/Axens' is a State body whose long-term viability is assured.

(78) The French authorities develop two arguments:

— firstly, 'IFP/Axens' is not a State body with unlimited resources at its disposal; moreover, there is no proof that this entity is perceived as such on the market (6.2.1);

— secondly, IFP's EPIC status confers no market advantage on Axens (6.2.2).

6.2.1 'IFP/AXENS' IS NOT A STATE BODY WITH UNLIMITED RESOURCES

(79) The French authorities contend that contrary to UOP's affirmations the suppliers and customers of 'IFP/Axens' do not perceive this undertaking as a State body with unlimited resources.

(80) Firstly, the French authorities refer to the legal analysis which they have sent the Commission and to their previous comments, which, they maintain, show that IFP's EPIC status confers no State guarantee of any kind.

(81) Secondly, the French authorities note that UOP relies on an alleged belief in an unlimited State guarantee for IFP/Axens, a belief which has no existence in law and which is not by itself sufficient to demonstrate that there is State aid.

⁽⁶⁰⁾ For example, regarding the volume and purity of the product flows, or the consumption of raw materials.

(82) Thirdly, even supposing that IFP does enjoy a State guarantee – which the French authorities deny – it is not true that any such guarantee would automatically extend to IFP's subsidiaries on the ground that IFP and its subsidiaries form an economic group for purposes of competition law. France argues that IFP's subsidiaries, and especially Axens, are private-law bodies subject to company law, and would not be covered by such a guarantee, especially because UOP's theory of the automatic extension of guarantees within a group is contrary to the principle of the autonomy of subsidiaries. The concept of a group may have a meaning in competition law, but it is not recognised in company law, and the granting of guarantees within a group is subject to strict conditions of form and substance. This is the case in particular for IFP: Article 7 of IFP's constitution provides for authorisation by the board of directors. In addition, the French authorities consider that the Commission has already taken note of this point, since it accepted that the legal status of Banque Postale, a legal person governed by private law, sufficed in itself to rule out the existence of any unlimited guarantee to Banque Postale⁽⁶¹⁾.

6.2.2 AXENS DOES NOT DERIVE ANY ADVANTAGE ON THE MARKET FROM IFP'S EPIC STATUS

(83) UOP has argued, the French authorities say, that the market is likewise of the belief that the IFP/Axens entity is a State body with unlimited resources, and enjoys advantages in relation to customers, suppliers and creditors; but the French authorities contend that this argument is not based on any reliable evidence, and is undeniably refuted by the facts.

(84) The French authorities have submitted an internal memo from Axens's legal and contracts department, entitled 'Principles of legal security of Axens'⁽⁶²⁾, which explains the relations between IFP and Axens. These relations are explicitly governed by the general rule that Axens does not ask for any guarantee from its parent for any reason whatsoever. The French authorities specify that no exception is possible to this rule that there can be no guarantee. The principle is also spelt out in full in the document, in the following terms: 'IFP does not guarantee Axens's acts or omissions'. The French authorities say that this rule applies to any contract or project that Axens might possibly conclude or conduct with customers, with suppliers or on the financial markets.

6.2.2.1 *The relations between Axens and its customers*

(85) UOP argues, say the French authorities, that the public guarantee has important implications for Axens's long-term financial situation, especially in the light of the

contractual guarantees and maintenance obligations traditionally provided for in licensing agreements⁽⁶³⁾; but there is no justification for this argument, nor has UOP substantiated the reasons why it is convinced that the Commission will not identify any provision limiting liability to Axens alone.

(86) The French authorities contend that the rule described in recital 84, according to which the subsidiary is not to apply for any guarantee from the parent, also applies to any guarantee that Axens might negotiate or conclude with a customer. They illustrate their argument with the example of aromatic compounds mentioned by UOP in its observations. They say that as a general rule, Axens chooses to limit its liability to a certain fraction of the fee [...] (*). This guarantee limitation policy, which is one of the 'Principles of legal security of Axens', is consequently quite different from the customs of other undertakings operating in this field, which, according to the French authorities, are in the habit of granting unlimited guarantees in certain cases.

(87) Finally, the French authorities argue that the obligations regarding maintenance or repairs applicable in the event of a claim would not bring into play any financial cover on the part of IFP:

(a) in the event of default by Axens, the capacity offered by its civil liability insurers through the various insurance policies under its world programme is well in excess of the maximum liability of Axens contractually agreed with its licensees;

(b) the capacity for immediate or rapid mobilisation of Axens' resources is also very considerable, in particular because of its low debt level;

(c) the agreements between IFP and Axens explicitly limit IFP's liability in the event of default on the part of one of Axens' licensees to sums which are necessarily small, as they are correlated to the fee received by IFP;

(d) Axens' civil liability insurer expressly waives any recourse against IFP, for any reason whatsoever.

⁽⁶¹⁾ The French authorities refer to footnote 3 to decision N 531/2005 cited above.

⁽⁶²⁾ This memo has been in existence since [...] (*), and has been updated and endorsed regularly by [...] (*). The French authorities forwarded version [...] (*) as an annex to their letter.

⁽⁶³⁾ The French authorities refer to the letter from UOP dated 23 January 2009, which they say takes up the arguments developed under point 3(b) of the letter dated 28 November 2008.

(88) The French authorities conclude that UOP's assertions concerning advantages allegedly obtained by Axens on the process licensing market are invalidated especially by the fact that Axens has continually conducted a policy of limiting guarantees of liability granted to its customers.

(89) In their letter dated 8 September 2009, the French authorities state that the limitation of liability to customers is provided for in both the framework licensing agreement⁽⁶⁴⁾ and the product licensing agreement⁽⁶⁵⁾ concluded between IFP and Axens, which entered into force on 1 January 2001. These two agreements provide that if Axens can prove that its default originates in the services supplied by IFP, the financial liability of the latter will be limited to a percentage⁽⁶⁶⁾ of the sums in fact collected by IFP in fee *pro rata* to the sales transaction that forms the basis of the claim (product licence), and to the unit subject to a sub-licence or to the sales transaction carried out under a sub-licence that forms the basis of the claim (framework licence). In other words, IFP's liability can never extend beyond 100 % of the sums received. Moreover, the framework licence provides that Axens is responsible for financial guarantees granted to sub-licensees with regard to technical performance of the processes. This means that IFP is not liable for technical guarantees given by Axens to its customers.

(90) In addition, it should be pointed out that the licensing agreements between Axens and its customers provide, conversely, that Axens' financial liability is generally confined to [...] (*) % of the royalties paid for each unit for which a claim is made. If for commercial reasons the guarantee given by Axens to its customer proves to be higher than that given to it by IFP, IFP's liability is totally independent of that of Axens. The same principle is applied to any licence that IFP grants to third parties other than its subsidiaries.

(91) Finally, the French authorities add that when IFP performs services (studies, research to order, tests, etc.) for its customers, whether subsidiaries or firms outside the group, IFP always seeks to limit its liability. The liability accepted by IFP then consists in a commitment to rectify the work carried out, while at financial level the principle is that the liability is limited to [...] (*) % of the remuneration actually received, with a maximum which

may reach up to [...] (*) % depending on the case. Therefore if the customer considers that the work carried out by IFP is defective, IFP can never be obliged to repeat the work *ad infinitum*.

6.2.2.2 *The relations between Axens and its suppliers and the funding terms on the financial markets*

(92) The French authorities deny any relevance to the assertion by UOP that the alleged belief in the existence of unlimited financial resources available to Axens secures it preferential terms from either its suppliers or the financial markets. France says that UOP has not provided the slightest proof in support of this allegation.

(93) The French authorities consider that the rule described in recital 84, according to which the subsidiary is not to apply for any guarantee from the parent, is sufficient to invalidate the hypothesis put forward by UOP.

(94) Furthermore, as regards Axens's borrowing terms on the financial markets, and the terms available to Beicip-Franlab and Prosernat, the French authorities point out that they are prepared to give the Commission an undertaking that a clause would be included in writing in the financing contract for every transaction stating that 'Pursuant to French law (in particular the need for express statutory authority for each guarantee), the present financing transaction shall not enjoy any form of direct or indirect State guarantee'⁽⁶⁷⁾.

7 ASSESSMENT

7.1 EXISTENCE OF STATE AID WITHIN THE MEANING OF ARTICLE 107(1) TFEU

(95) Article 107(1) TFEU reads: 'Save as otherwise provided in the Treaties, 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.'

(96) To establish the existence of State aid in the present case it must first be considered whether the EPIC status granted by France to IFP on 7 July 2006 involves the use of State resources (7.1.1) to provide an unlimited public guarantee covering economic activities (7.1.2). The extent of the cover by the State guarantee and the nature of the activities covered will allow the scope of this decision to be defined (7.1.3), and it will then have to be considered whether the measure in question confers a selective advantage on the IFP group (7.1.4) which may affect trade between Member States (7.1.5).

⁽⁶⁴⁾ Under this framework licensing system Axens may use IFP's present and future intellectual property rights essentially in processes in its field of activity to provide engineering services to customers in connection with those processes and to transmit to them the right to use the related technologies in the form of patent licence sub-grants.

⁽⁶⁵⁾ Under this product licensing system Axens may use IFP's present and future technology in its field of activity to manufacture and sell to its customers catalysts, adsorbents, captation masses, equipment, and other products and software developed by IFP.

⁽⁶⁶⁾ [...] (*).

⁽⁶⁷⁾ Letter from the French authorities dated 13 October 2008, paragraph 203.

7.1.1 USE OF STATE RESOURCES IN THE FORM OF AN UNLIMITED GUARANTEE

(97) In view of its particular structure as an economic group for purposes of competition law, it is necessary to assess the potential impact of the unlimited State guarantee arising from the EPIC status of the publicly owned establishment IFP on the whole of the IFP group, i.e. on the publicly owned establishment itself and on its subsidiaries, by proceeding in two stages:

- As regards the publicly owned establishment IFP, the impact of the unlimited guarantee arises directly from its EPIC status: as a legal person governed by public law, IFP is not subject to the ordinary law governing the administration and winding up of firms in difficulty. In the light of this particularity, the parent of the IFP group may carry on economic activities itself, under more advantageous conditions than other market participants not benefiting from comparable protection (7.1.1.1).
- As regards the activities carried out directly by the IFP subsidiaries governed by private law, which, for their part, are entirely subject to the ordinary law of bankruptcy, any direct liability of the publicly owned establishment, and therefore of the State, seems impossible. If a subsidiary's assets are insufficient, therefore, it has to be considered whether the creditors of Axens, Prosernat and Beicip-Franlab could benefit from an indirect mechanism whereby the parent would be liable for its subsidiaries, equivalent to a guarantee mechanism (7.1.1.2).

7.1.1.1 *Unlimited State guarantee to IFP conferred by its EPIC status*

- (98) In decision C 56/2007, the Commission concluded⁽⁶⁸⁾ that the special factors intrinsically linked to the legal form of La Poste as a publicly owned establishment⁽⁶⁹⁾, and in particular the existence of a guarantee ensuring the payment of individual claims and the continued existence of La Poste or its obligations or both, implied that the State performed the role of guarantor of last resort in respect of the economic activities of the publicly owned establishment.
- (99) In the present case, the Commission considers that the arguments set out in decision C 56/2007 can essentially be transposed to the EPIC status of the publicly owned establishment IFP, and that IFP also enjoys a special legal position with regard to the payment of its creditors and its continuation in business in the event of insolvency. For the purposes of the present analysis, therefore, the

Commission will refer to the arguments set out in section 4.1, 'Classification as aid', of decision C 56/2007.

A. *Guarantee of payment of individual claims*

- (100) It is first necessary to consider the argument of the French authorities that the existence of a State guarantee in favour of EPICs is ruled out by the legislation or the case-law, before showing that in the event that IFP were in default its creditors would benefit from a more favourable procedure than the creditors of undertakings governed by ordinary law.

a) *Rejection of the arguments of the French authorities*

- (101) Contrary to the French authorities' affirmation, the Commission is able to conclude that French law does acknowledge the existence of implied guarantees, and in particular the existence of a State guarantee deriving from the status of publicly owned establishment. The Commission rejects the arguments of the French authorities for the following reasons.
- (102) Firstly, where the French authorities assert that there is no legislation or decision laying down the principle that the State is to guarantee the debts of EPICs, the Commission refers to recitals 120 and 121 of decision C 56/2007, *mutatis mutandis*. The Commission considers, on the contrary, that although it is true that there is no legislation or decision confirming or excluding the existence of an express State guarantee in favour of EPICs, this absence does not mean that there can be no implied guarantee.
- (103) Secondly, where the French authorities consider that the courts have held that there is no such guarantee, notably in the judgments in *Société de l'hôtel d'Albe*⁽⁷⁰⁾ and *Campoloro*⁽⁷¹⁾, the Commission refers to recitals 122 to 124 of decision C 56/2007, *mutatis mutandis*. In *Société de l'hôtel d'Albe*, as the Commission expert pointed out in the postal case, the judgment did not refer to the precise situation in which the guarantee would come into play⁽⁷²⁾. In *Campoloro*⁽⁷³⁾, the Commission considers, on the contrary, that the judgments establish a scheme of State liability in proceedings for the recovery of the debts of publicly owned establishments which displays all the characteristics of a guarantee mechanism.

⁽⁶⁸⁾ See section 4.1.1 C, 'Conclusion regarding the existence of a state guarantee in favour of La Poste', recitals 251 to 255 of decision C 56/2007.

⁽⁶⁹⁾ As specified in recital 12 (footnote No 11), this legal status was likened to an EPIC before the change in form of La Poste to that of a public limited company.

⁽⁷⁰⁾ Council of State, *Société de l'hôtel d'Albe*, 1 April 1938, *Recueil* p. 341.

⁽⁷¹⁾ Council of State judgments in the *Campoloro* case, 10 November 1999 and 18 November 2005.

⁽⁷²⁾ In this judgment, the Council of State merely refused to grant an application brought by a creditor directly against the Minister for Public Works. It found that a guarantee would come into play in the event of insolvency; a guarantee mechanism did not require the State to pay a debt of a publicly owned establishment whenever a creditor so requested.

⁽⁷³⁾ The Commission refers to its analysis of the *Campoloro* case in section 4.1.1.A(b)(3) of decision C 56/2007.

- (104) Thirdly, in the postal case the French authorities argued that the debts contracted by EPICs since the entry into force of the Organic Law governing the Finance Act on 1 January 2005 did not qualify for an implied guarantee: the Commission considers that this argument cannot hold:
- (a) The Commission emphasises that the change of legal form of the publicly owned establishment IFP occurred on 7 July 2006, i.e. after the entry into force of the Organic Law governing the Finance Act. Under such circumstances, it is not necessary to examine the arguments put forward by the French authorities' expert in the postal case regarding debts contracted before 1 January 2005, despite the fact that the French authorities refer to this *mutatis mutandis* in their comments. Debts contracted by IFP before 1 January 2005 were contracted by a trade body within the meaning of Law No 43-612 of 17 November 1943 on the management of trade interests, and therefore by a legal person governed by private law, and consequently could not be covered, at the time they were entered into⁽⁷⁴⁾, by the unlimited guarantee conferred by the EPIC status.
 - (b) The Commission nevertheless notes, as its expert pointed out in the postal case, and as it explained in recital 130 of decision C 56/2007, to which it refers *mutatis mutandis*, that the obligation to enter State guarantees in a Finance Act is confined to the 'giving' (*octroi*) of such guarantees. To 'give' a guarantee the State must confer a guarantee on an organisation or an operation by an express manifestation of its intention. The scope of the obligation to enter guarantees in the Finance Act does not extend to guarantees that arise out of the legal form of an organisation, or out of an obligation established in case-law, which are guarantees of an implied and automatic character. This category is not the result of a decision of the State, but of the fact that the State places itself in an existing legal framework, the guarantee being only one effect of that framework⁽⁷⁵⁾.
- (74) However, in the case of insufficient assets of the publicly owned establishment IFP subsequent to its change in legal form, all its creditors, irrespective of when their claim arose, would be in a comparable situation, all finding that the ordinary law relating to compulsory administration or winding up of undertakings in difficulty did not apply to the publicly owned establishment IFP. All the creditors of the publicly owned establishment IFP would be assured of seeing their claims finally paid, as explained under point A(b).
- (75) The fact that the existence of this second category is outside the scope of Article 34 of the Organic Law governing the Finance Act explains why the rule established by the case-law on guarantees given by concessionaires has continued beyond 2001. It also explains why when the State is a shareholder or partner in a company or grouping whose debts are covered under the Commercial Code by an unlimited guarantee, the State is not required to specify that fact in a Finance Act. The Commission wishes to point out in this respect that the guarantee examined here derives from the EPIC status of the publicly owned establishment IFP, that this is a guarantee operating between the State and the publicly owned establishment IFP (the latter's creditors being only indirect beneficiaries thereof), and that this guarantee covers not only the payment of individual claims, but also the continued existence of IFP or its obligations or both.
- (c) The Commission concludes, as it did in recital 131 of decision C 56/2007, to which it refers *mutatis mutandis*, that the argument put forward by the French authorities on the basis of the Organic Law governing the Finance Act is not convincing, because the fact that it is not stated in any Finance Act that the State extends a guarantee to IFP by virtue of its legal form does not mean that there is no implied guarantee. The Commission is not in any event bound by the description of the measure as a 'guarantee' for purposes of French law, or by the fact that a guarantee is or is not caught by the Organic Law governing the Finance Act. The only relevant consideration is how the measure is to be described for purposes of Union law. Union law recognises the existence of an implied guarantee once a Member State legally has to repay a claim on another person in the event of that person's defaulting⁽⁷⁶⁾.
- (105) Fourthly, the Commission rejects the argument of the French authorities that, if a State guarantee does exist in favour of EPICs, any establishment of a new EPIC (including by change of legal form) would necessitate measures to preserve the rights of creditors arising before the change, and that conversely (*modus tollens*), since no such mechanism has ever been set up⁽⁷⁷⁾, no guarantee exists in favour of the publicly owned establishment IFP:
- (a) As pointed out by the Commission's expert in the postal case, and as recalled in recital 133 of decision C 56/2007, to which it refers *mutatis mutandis*, the Commission considers that this assertion is based on too broad an interpretation of the constitutional protection of the right of property.
 - (b) The Commission takes the view, as it did in recital 134 of decision C 56/2007, to which it refers *mutatis mutandis*, that in the same way, when an EPIC is converted into a company that can be made the subject of court proceedings for administration or winding up, the right of property does not require that a specific measure be taken to preserve the entitlements of creditors, and that the fact that no such measure has been taken does not constitute evidence that there is no implied guarantee.
 - (c) The Commission adds that, as explained in recitals 135 and 136 of decision C 56/2007, to which it refers *mutatis mutandis*, the fact that the French
- (76) General Court in Case T-442/03 *SIC v Commission* [2008] ECR II-1161, paragraphs 124-127. See also the Guarantees Notice.
- (77) In particular, no such mechanism was set up at the time of the conversion of IFP, France Télécom, Gaz de France, EDF or ADP.

authorities decided to give an express guarantee to La Poste when it obtained a legal form equivalent to that of an EPIC in 1990 ⁽⁷⁸⁾ does not mean that there was no implied guarantee before that date.

Finance Act and is contrary to the subsequent case-law of the Council of State: in recital 104 above, and in decision C 56/2007, the Commission concluded that the Organic Law governing the Finance Act did not stand in the way of an implied guarantee given by the State to IFP.

(106) Finally, as regards the article by Mr Labetoulle cited by the French authorities ⁽⁷⁹⁾, and its analysis of the *Campoloro* case-law ⁽⁸⁰⁾, the Commission refers to the part of the present decision relating to the liability of the State and to section 4.1.1 A(b)(3) of decision C 56/2007

(107) Contrary to the argument put forward by the French authorities, who contend that such a guarantee is excluded by the legislation, the Commission notes that the existence of implied guarantees arising out of the legal form of publicly owned establishments is confirmed by a memorandum of the Council of State drawn up in 1995 in the *Crédit Lyonnais* case, which took the view that the organisation concerned enjoyed an implied guarantee given by the State by reason merely of its character as a publicly owned establishment ⁽⁸¹⁾.

(108) As explained in recitals 142 to 145 of decision C 56/2007, to which it refers *mutatis mutandis*, the Commission does not share the interpretation put forward by the French authorities that this opinion of the Council of State cannot be transposed to the case of IFP. The opinion makes no reference to the aims of the establishment or to whether or not a public accountant is present within it. Moreover, the French authorities do not explain why, in their view, this opinion should apply to publicly owned establishments only if they have a public accountant. The Commission rejects the arguments put forward by the French authorities to the effect that the opinion is not applicable because it predates the Organic Law governing the

(109) Finally, as indicated in recitals 146 and 147 of decision C 56/2007, to which it refers *mutatis mutandis*, the Commission notes the memorandum from the Minister for Economic Affairs, Finance and Industry dated 22 July 2003, concerning a 'Census of implied and express guarantee arrangements granted by the State', which confirms that there are implied State guarantees that derive from an administrative or legislative act which 'produces and entails financial consequences for the State'. That memorandum shows that a State guarantee can derive from legal acts of very different kinds ⁽⁸²⁾ and indicates that the setting up of a publicly owned establishment may entail an implied guarantee given by the State to the establishment's creditors ⁽⁸³⁾.

b) A creditor of IFP can be sure that his claim will be repaid.

(110) Following the example of the argument in section 4.1.1.A(b) of decision C 56/2007, to which it refers *mutatis mutandis*, the Commission will now set out to demonstrate that in the event of a default by IFP, its creditors would be in a more favourable position than that of creditors of an enterprise governed by commercial law.

(111) Firstly, in the case of publicly owned establishments, the conventional obstacles to the settlement of a claim against a body governed by private law are not applicable. On the basis of the factors detailed at greater length in recitals 150 to 154 of decision C 56/2007, to which it refers *mutatis mutandis*, the Commission concludes on this first point that:

— unlike the creditors of undertakings governed by commercial law, creditors of IFP (which is not subject to the ordinary law governing the compulsory administration or winding up of firms in difficulty) are not in danger of seeing their claim cancelled in whole or in part as an outcome of compulsory winding-up proceedings;

⁽⁷⁸⁾ Contrariwise, the French authorities argued that, if La Poste had enjoyed a State guarantee by virtue of its legal form, there would have been no need to give an express guarantee for the debts contracted by the old Administration of Posts and Telecommunications which were transferred to La Poste. But, they argued, such a guarantee was in fact given, in an order dated 31 December 1990.

⁽⁷⁹⁾ D. Labetoulle, 'La responsabilité des AAI dotées de la personnalité morale: coup d'arrêt à l'idée de "garantie de l'Etat"', *RJEP/CJEG* No 635, October 2006.

⁽⁸⁰⁾ On this point, the Commission also refers to section 4.1.1.A(b)(3) of decision C 56/2007.

⁽⁸¹⁾ The Commission refers to recitals 139 to 141 of decision C 56/2007. The following part of the memorandum was published in the annual report for 1995 (p. 219): 'In connection with the draft law on State involvement in the recovery plans for *Crédit Lyonnais* and *Comptoir des Entrepreneurs*, the Council of State ... took the view that there was a State guarantee for this establishment which derived without any express legislative provision from the very fact that it was a publicly owned establishment'.

⁽⁸²⁾ See point 5 in the annex to that memorandum, which lists different acts including for example 'a ministerial letter, or any other basis'.

⁽⁸³⁾ In an explanatory note attached to the memorandum, in part 3, under the heading 'Experience of calls made on guarantees and the judgments of the Council have clarified a number of textbook cases of guarantees which need to be identified', it is indicated that 'Some legal forms by their structure entail a liability on the part of their shareholders; this is true in particular of [the forms of partnership known as] the *société en nom collectif*, or SNC, and the *groupement momentané d'entreprises*, or GIE. With these last two forms, third parties will always seek out the State shareholder. The same applies to the creation of publicly owned establishments and to some shareholdings in public limited companies'.

— the fact that IFP has legal personality is no bar to the existence of a guarantee given by the State;

— in the absence of any express limitation on the State's liability in respect of IFP, IFP's creditors may legitimately act on the principle that the State will bear the debts of IFP, even though IFP possesses legal personality.

1980 and the measures implementing it provide for the deferral of a payment order, and nowhere envisage a cessation of payments, and thereby give creditors to understand that there are or that there will be the resources necessary to settle a claim they hold on the public entity. These two factors lead to it consider that a shortage of funds will be covered, if necessary by the State, or is temporary only. But winding-up procedures never provide for the possibility that a third party can become liable for the debts of the insolvent party, except of course in the case of a guarantor.

(112) Secondly, in the case of the recovery of the debts of a publicly owned establishment that has been found by a court to be in default, the procedure laid down in the Law of 16 July 1980 (and in implementing provisions⁽⁸⁴⁾) is, for the reasons explained in recitals 113 to 117, more favourable to IFP's creditors than insolvency proceedings in the courts under ordinary law, in so far as it is not liable to result in the cancellation of their claim on IFP.

(113) In accordance with the analysis developed in recitals 157 to 161 of decision C 56/2007, to which it refers *mutatis mutandis*, the Commission notes firstly that the Law of 1980⁽⁸⁵⁾ and its implementing provisions⁽⁸⁶⁾ designate the State as the authority responsible for covering the debts of publicly owned establishments, and confer important prerogatives on the State: the mandatory payment order and the creation of sufficient resources.

(114) Following the example of the argument in recitals 162 to 168 of decision C 56/2007, to which it refers *mutatis mutandis*, the Commission considers that the specific procedure laid down by the Law of 1980 and the measures implementing it is a procedure only for the recovery of claims, and not for winding up, and that at the end of the procedure the claim is not cancelled, whereas at the end of winding-up proceedings under ordinary law a judgment terminating the proceedings on the ground that the assets are insufficient, without penalty, prevents creditors from pursuing the proceedings further. The Commission also notes that the Law of

(115) In accordance with the analysis developed in recitals 170 to 180 of decision C 56/2007, to which it refers *mutatis mutandis*, the Commission considers that in the event of a shortage of funds, French legislation authorises or indeed encourages the State to provide capital to publicly owned establishments, rather than expecting them to secure conventional bank loans; the 'additional resources' referred to in the Law of 16 July 1980 may consist of contributions of this kind. The Commission also considers that the relevant legislation is known to creditors, who consequently have good reason to believe that the supervising authority will be in a position to secure the resources necessary to ensure that their claims are satisfied. Consequently, the Commission takes the view that the probability that a creditor might not succeed in obtaining satisfaction of his claim under the procedures laid down by the Law of 16 July 1980 is low.

(116) However, contrary to the conclusion it drew in respect of La Poste in decision C 56/2007, the Commission observes that in this case the resources of its own that IFP would be able to mobilise are relatively high, since, as the French authorities have explained (see recital 44), available funds and investments at the end of 2007 (EUR 150,3 million) represented approximately five times the amount of borrowings and financial liabilities (EUR 25,2 million). Consequently, the Commission recognises that in its present financial position, it seems unlikely, at least in the near future, that a shortage of own resources could lead to IFP being unable to meet its debts and give rise to the need for State intervention.

⁽⁸⁴⁾ The section of this decision describing the measure explains the terms of the Law of 16 July 1980, the Decree of 20 May 2008 replacing the Decree of 12 May 1981, and the Circular of 16 October 1989.

⁽⁸⁵⁾ The Law of 16 July 1980 provides that 'if the decision-making body of the authority or establishment has not released or created the resources ... the supervising authority shall do so, and if necessary shall issue a mandatory payment order'.

⁽⁸⁶⁾ The Decree of 12 May 1981, which on this point remains unchanged by the amending Decree of 2008, states that the representative of the State or the authority responsible for supervision 'shall, as appropriate, release the necessary resources, either by reducing the appropriations allocated to other expenditures and still available, or by increasing resources'.

(117) Although it is unlikely at present, it cannot be ruled out that IFP might experience such a shortage of assets in the longer term. In such circumstances, the fact that resources cannot be mobilised by selling assets means that use has to be made of other guarantee mechanisms (advances, efforts to establish a liability on the part of the State, etc.). Furthermore, in the event of a default on the

part of IFP, the fact that the legislature has laid down rules protecting the assets might then be invoked in any dispute in which it was alleged that there was a strict liability resting on the State⁽⁸⁷⁾. On this point, the Commission takes note of the argument put forward by the French authorities⁽⁸⁸⁾ according to which even if the State considers an asset belonging to a publicly owned establishment to be 'indispensable' for the provision of a public service, and therefore objects to its sale, it is not bound to compensate via a guarantee mechanism. The Commission notes, however, that the French authorities have acknowledged that in applying the procedure laid down in the Law of 16 July 1980 the representative of the State is bound by the requirement of continuity of public service (although they deny that IFP can benefit as a result)⁽⁸⁹⁾. The Commission therefore considers that such a choice by the public authorities to prevent sales of assets in order to maintain a public service means that the State might incur strict liability for a breach of the principle of equality before public burdens.

will not as a general rule recover the whole of their claims, and the enterprise being wound up will not usually have its debts paid by a third party.

(118) Thirdly, for the reasons already set out in recitals 185 to 226 of decision C 56/2007, to which it refers *mutatis mutandis*, the Commission considers that, in the unlikely event that the procedure laid down by the Law of 16 July 1980 does not result in payment of creditors, the courses still open to them to render the State liable have the characteristics of a guarantee mechanism.

(119) Although the French authorities consider that the State has in principle no liability, whether for a fault on its part or in the absence of any such fault⁽⁹⁰⁾, they acknowledge that, if there is a requirement of continuity of public service that is binding on the representative of the State in the procedure laid down by the Law of 16 July 1980, a court may order that the creditor be compensated. But in that event the French authorities consider that the creditor is not given any advantage, as the compensation he receives is comparable to that which he would have received under ordinary law. The Commission draws attention, however, to certain specific features of the special scheme introduced by the Law of 1980: under the ordinary law governing compulsory winding up, creditors (and especially unsecured creditors)

(120) The French authorities also further deny that any possibility of compensation of creditors that may be opened up if the State is held liable can be considered equivalent to a guarantee. The Commission takes the view, however, that, in the procedure for the recovery of the debts of the public bodies referred to in the Law of 16 July 1980, the liability of the State, with or without fault, is indeed equivalent to a guarantee mechanism for purposes of European Union law, because it ensures creditors that if IFP should default the State will be required to meet their claims. The judgment of the European Court of Human Rights ('ECHR') in *Société de gestion du port de Campoloro et Société fermière de Campoloro v France*⁽⁹¹⁾ (the *Campoloro* case) also points to the existence of an automatic guarantee.

(121) Finally, as shown in recitals 181 to 184 of decision C 56/2007, to which it refers *mutatis mutandis*, the Commission considers that the French authorities' proposal for a clarification of the Decree implementing the Law of 1980 is not sufficient to prevent an increase in resources from being achieved by an injection of public funds.

(a) The French authorities propose to amend the Decree implementing the Law of 1980 as follows (the amendment is shown in *italic*): 'If the notice given has had no effect by the time these deadlines expire, the representative of the State or the authority responsible for supervision shall enter the expenditure in the budget of the defaulting authority or publicly owned establishment. The representative of the State or the authority responsible for supervision shall, as appropriate, release the necessary resources *from the budget of the defaulting authority or establishment* either by reducing the appropriations allocated to other expenditures and still available or by increasing resources'.

(b) However, as the Commission pointed out in recital 67 of the opening decision, neither in its present wording nor in the amended wording proposed by the French authorities does the legislation prevent an increase in resources from being made possible by a subsidy or injection of public funds.

⁽⁸⁷⁾ The Commission refers to section 4.1.1.A(b)(3) of decision C 56/2007.

⁽⁸⁸⁾ In a memorandum submitted on 27 October 2009 in the postal case, the French authorities denied that it was 'impossible' to mobilise own capital and reserves, on the basis of two arguments: the first of these, however, related to the prices charged by La Poste, and cannot be transposed to the circumstances of the present case, since IFP's prices, unlike those of La Poste, are not subject to sectoral regulation.

⁽⁸⁹⁾ The Commission refers to points 112 and 113 of the memorandum sent by the French authorities on 23 January 2008 in the postal case.

⁽⁹⁰⁾ For further details on the position of the French authorities, see section 3.1.1.B(a)(2) of decision C 56/2007.

⁽⁹¹⁾ ECHR, *Société de gestion du port de Campoloro and Société fermière de Campoloro v France*, 6 December 2006, No 57516/00. In the *Campoloro* case the ECHR made the State liable for all of the sums owed to the applicant companies by the Commune of Santa-Maria-Poggio.

(122) For the reasons already set out in recitals 204 to 211 of decision C 56/2007, to which it refers *mutatis mutandis*, the Commission also considers that the ECHR's judgment in the *Campoloro* case demonstrates that, in this instance, the liability accepted by the French State operates as an implied guarantee of the public authorities' liabilities and is not linked to any condition relating to injury.

(a) The Commission notes more specifically that the ECHR rejected the arguments of the French authorities which attempted to base their case ⁽⁹²⁾ on the absence of, firstly, an operative event imputable to the State and, secondly, a guarantee on the part of the State to public authorities possessing legal personality, and accepted the contrary arguments of the applicants ⁽⁹³⁾.

(b) The ECHR found that there had been a breach of Article 6-1 of the European Convention on Human Rights ('the Convention'), and added that the judgments had to be implemented and that a State authority could not use lack of resources as a pretext for not honouring a debt based on a judicial decision. The ECHR also found that there had been a breach of

⁽⁹²⁾ The judgment states that (Commission translation) '[The French Government] considers that only objective reasons concerned exclusively with its being materially impossible for the commune to release sufficient resources have delayed the complete enforcement of the judgments ... The Government therefore maintains that the non-enforcement of the judgments given is not the result of a deliberate refusal to enforce them on the part of the national authorities, State or commune. The absence of funds is not a pretext, but a reality due to the insolvency of the debtor legal person ... The non-payment of the debt is due entirely to the commune's financial difficulties, and these circumstances do not appear to be such as either to release the authority from its obligations or to transfer the burden of its debt to the State (Council of State, commune of Batz-sur-Mer, 25 September 1970). There is no legal basis under national law for substituting the State for the commune where the payment of compensation is concerned. Nor can Article 6-1 of the Convention form the basis of any such substitution in so far as a solution of that kind would be contrary to the very concept of legal personality, which presupposes autonomy and a distinct set of assets'.

⁽⁹³⁾ (Commission translation) 'That is why no arrangements to soften the blow have been made under national law to confront a situation of default on the part of the commune. The State cannot offload its obligation to implement judicial decisions by invoking the absence of funds or the autonomy of regional or local authorities – an autonomy that it has not been able to guarantee to date, since the commune is in no position to pay its debts. The applicants therefore denounce the State's incapacity to adopt positive measures that would have enabled the commune to contribute in accordance with its obligation ... The applicants note that, in its judgment of 18 November 2005, the Council of State held that the legislature intended to give the representative of the State, in the event of a local or regional authority's not being able to implement a judicial decision, the power to take the place of that authority's decision-making bodies in order to release or create the resources enabling the judicial decision concerned to be fully implemented. It is on the basis of these omissions on the part of the French State that the applicants demand both acknowledgement of Article 6-1's having been breached and the resulting compensation – an initiative that no more contradicts the concept of legal personality than it does the concepts of independence and of a distinct set of assets'.

Article 1 of Protocol No 1 to the Convention, the applicants having suffered interference with their property rights on account of a huge and special burden due to the non-payment of the sums which they should have received ⁽⁹⁴⁾. In the light of the above, the ECHR charged the whole of the debtor communes' debt to the State ⁽⁹⁵⁾.

(c) The Commission considers that this judgment has three important implications:

— Subject to the applicants obtaining a court judgment recognising their claim, the liability of the State functions as an implied guarantee ⁽⁹⁶⁾, in so far as the French State is required to pay the whole of the debt of the public body ⁽⁹⁷⁾ and no distinction is made between debt conceivably due to the public authority's insolvency and possible defaults imputable to the State (the ECHR did not at any time seek to identify an act or omission imputable to the State, and looked no further than the debtor's insolvent status).

— This liability covers the debts of public authorities possessed, however, of legal personality. The existence of legal personality and of assets specific to the authority was expressly invoked by the French Government in its opposition to holding the French State liable, but this argument was rejected by the ECHR.

— The scope of the State guarantee extends to include public authorities dependent on the State. The guarantee is therefore intrinsically connected with the debtor's public-law legal form.

(d) Moreover, the Commission notes that the solution adopted by the ECHR in the *Campoloro* case is not an isolated one and stems from a well established

⁽⁹⁴⁾ (Commission translation) 'The interested parties' inability to have these judgments implemented constitutes interference with those parties' property rights – interference such as is referred to in the first sentence of the first paragraph of Article 1 of Protocol No 1. The Government has provided no justification at all for such interference, and the Court considers that lack of resources cannot legitimise the omission concerned ... In sum, the Court considers that the applicant companies have been, and are still, subject to a huge and special burden due to the non-payment of the sums from which they should have benefited in implementation of the aforesaid judgments dated 10 July 1992. There has therefore been a breach of Article 1 of Protocol No 1'.

⁽⁹⁵⁾ (Commission translation) 'In view of the above, the Court holds that it is for the defendant State to pay the applicants or, if appropriate, their legal successors, the sums (including interest) due to them as from the delivery, on 10 July 1992, of the judgments of the Bastia administrative tribunal (*ibid.*) until the day on which this judgment is given'.

⁽⁹⁶⁾ The Commission wishes to emphasise that the terms used by the ECHR do not refer to a possible liability on the part of the State but hold that it is the responsibility of the State to 'ensure' that payment is made. Such terms relate more to the concept of a guarantee than to that of liability.

⁽⁹⁷⁾ A judicial mechanism under national law can therefore be interpreted as an implied guarantee.

line of case-law, notably in the judgments in the cases *Artico v Italy* ⁽⁹⁸⁾ and *Bourdov v Russia* ⁽⁹⁹⁾.

- (123) For the reasons already set out in recitals 212 to 220 of decision C 56/2007, to which it refers *mutatis mutandis*, the Commission considers that the observations made by the French authorities are not of a nature to invalidate this reasoning. As it argued in the postal case, in recital 222 of decision C 56/2007, and in the opening decision, the Commission concludes that, as French law currently stands, a creditor of IFP who has not obtained the payment of his claim by recourse to the procedures introduced by the Law of 16 July 1980 may receive all of the sums corresponding to the unmet claim by invoking the State's last-resort liability. This is the opposite of what happens within the framework of winding-up proceedings under ordinary law, where the reimbursement of the creditor is limited by the value of the available assets. In consequence of the above, the Commission considers that the State's liability is treated as a guarantee, it is not the subject of any limitation by French legislation, and is intrinsically linked to the public-law legal form possessed by the debtor body.
- (124) Furthermore, for the reasons already set out in recitals 223 to 226 of decision C 56/2007, to which it refers *mutatis mutandis*, the Commission takes note of the French proposal to include a clause in all IFP contracts involving claims so as to limit any risk of triggering the State's strict liability based on IFP's insolvency alone. It considers that such a legal framework would remain fragile and that there are doubts about its durability, because the plea of accepted risk is a rule established by case-law, which could always evolve. The Commission considers, however, that such a proposal is inherently inadequate as it does not cover all eventualities: it would not mean that the State guarantee could never come into play for any type of liability (in particular non-contractual liability and criminal liability). Moreover, it is impossible to make it contractually clear to its debtors that the State will not be liable for IFP's debts, as IFP may find itself indebted towards a third party through a variety of judicial mechanisms, in particular if it were to absorb another entity holding claims by initially unidentifiable third parties ⁽¹⁰⁰⁾.

⁽⁹⁸⁾ ECHR, *Artico v Italy*, 13 May 1980, Series A, No 37: The ECHR decided that, where a failure to act was imputable to an entity other than the State, it was for the State, as giver of the guarantee provided for in Article 6-1, to act in such a way that the applicant in practice enjoyed the right conferred on him by that Article.

⁽⁹⁹⁾ ECHR, *Bourdov v Russia*, 19 March 1997, No 59498/00: Here too the Court held that an authority of the State could not use lack of resources as a pretext for not honouring its debt.

⁽¹⁰⁰⁾ The Commission refers in particular to its arguments presented in decision C 56/2007 relating to the effect on State liability of the absorption by a publicly owned establishment of another structure, the rights and obligations of which are transferred to it at the same time. If it were subsequently to meet that structure's debts towards a third party, no contract or other legal document would have laid down that the State was not required to pay the debts of this publicly owned establishment towards creditors of the absorbed structure, since such a situation could not have been foreseen *ex ante*. Thus, through a mechanism (such as merger or absorption) for converting certain public sector structures, the publicly owned establishment IFP could acquire debts towards third parties, without its being possible contractually to provide in advance for a limitation of the guarantee on the part of the State.

Ultimately, as regards the individual claims held by third parties, the Commission considers that only a text of general scope applicable in any situation and to any type of third party, indicating that the State is not the guarantor of IFP, would be enough to eliminate the unlimited guarantee. In addition, even if the French proposals were to make it quite impossible for a creditor of IFP to hold the State liable for paying its claim (something which in the Commission's view has not been shown), such proposals would not enable it to be clearly established what would happen in the event of IFP becoming insolvent ⁽¹⁰¹⁾.

- (125) Fourthly, even if he were to fail obtain satisfaction, the creditor of a publicly owned establishment could invoke legal effects arising from a legitimate mistake he made at the time the claim arose, when he believed that the claim would always be honoured.
- (126) For the reasons already set out in recitals 227, 228 (first to third indents) and 229 of decision C 56/2007, to which it refers *mutatis mutandis*, the Commission believes that the theory of appearance ⁽¹⁰²⁾ provides confirmation that the creditors of IFP would be justified in believing, on the basis of a body of consistent evidence, that such a guarantee does indeed exist (even assuming, *quod non*, that the fact that IFP has the legal form of an EPIC is not of a nature to confer on it, in law, an unlimited guarantee given by the French State). The main relevant indices in relation to the theory of appearance derive firstly from the fact that a variety of legislative instruments (Law of 16 July 1980 and the measures implementing it) or official (budgetary) documents lead the creditor to believe that the State would take over EPICs' debts in the event of their having a shortage of funds or that it would assume liability for those debts; secondly from the fact that the lack of clarification by the French authorities of the legal situation following the *Campoloro* case and of the initial proceedings undertaken by the Commission on the legal form of EPICs also increases creditors' confidence that

⁽¹⁰¹⁾ As will be shown in section B of this part, a creditor of IFP who had not been able to have his individual claim met by requesting payment could always hope to obtain payment within the framework of an overall State-financed restructuring of the publicly owned establishment IFP.

⁽¹⁰²⁾ The concept of legitimate error such as to impart legal effects is linked to the theory of appearance. According to Cornu's *Vocabulaire Juridique*, appearance is 'the aspect resulting – intentionally or otherwise – from the combination of external signs through which states and functions (status as representative, heir, owner, etc.) normally manifest themselves and that give rise to the belief that the person invested with these signs really does possess such a state or function'. The theory of appearance is a 'theory of the courts according to which appearance alone is enough to produce effects in respect of third parties who, following a legitimate error, have been unaware of the real state of affairs'. The theory of appearance is used in case-law (ECHR, 7 June 2001, *Kress*) and in private law to impart legal effects to a contract in respect of which one of the parties has legitimately relied on simple appearance. The examples of apparent domicile or, in public law, of *de facto* officials whose decisions can remain legitimate may also be cited. This theory has the advantage of making it easier to demonstrate the existence of a legal attribute or legal effect not expressly and explicitly affirmed by any legislation.

such a guarantee does in fact exist; and finally from the fact that the lack of any clear indication as to the effects of a situation in which an EPIC is in default also militates in favour of this view.

- (127) In the present case, the Commission wishes to add that prior to 7 July 2006, any creditors of the publicly owned establishment IFP were in a contractual relationship with a trade body within the meaning of Law No 43-612 of 17 November 1943 on the management of trade interests, a body which was a legal person governed by private law, and which they had no reason to think could be covered by a State guarantee of any kind. Consequently, the theory of appearance can in any event be applied only with regard to claims arising after the change of status of the publicly owned establishment IFP.
- (128) Following the conclusions of its expert in the postal case, the Commission has arrived at the view that, as regards claims arising after 7 July 2006, even if, in the scenario championed by the French authorities, it was in error that a creditor came to consider that the State was required to guarantee the debts of publicly owned establishments and of IFP in particular, his error would be legitimate given the above-mentioned factors, and the law could impart effects to it. If, exceptionally, the creditor did not succeed in obtaining the payment of his claim, he could nevertheless rest assured that there was no likelihood of the claim being cancelled.

B. Guarantee of the continued existence of IFP and/or of its obligations

- (129) For the reasons already set out in recitals 230 to 250 of decision C 56/2007, to which it refers *mutatis mutandis*, the Commission considers that even if, within a reasonable period and after the use of the procedures described in the previous section, the creditor of an EPIC does not succeed in obtaining the payment of his claim, he will be secure in the knowledge that the claim will not be cancelled, in contrast to the situation of a creditor of a company constituted under private law in liquidation, who has no guarantee that his claim will have to be met.
- (130) The Commission stresses that there is no public authority-motivated winding up/closing down of publicly owned establishments in which the rights and obligations of the establishments are also cancelled: in the event of publicly owned establishments being closed down by decision of a public authority – and despite the fact that no legislation expressly provides for this – experience and certain basic principles of administrative law tend to show that the rights and obligations of publicly owned establishments that are closed down as such are always taken over by another body and, failing that, by the State. In other words, the debts

of publicly owned establishments are always transferred to another legal person, which cannot refuse them, so that each creditor can therefore be certain that the right arising from his claim may be invoked against another body and that his claim will not, therefore, be cancelled.

- (131) The Commission refers to the detail of the analysis presented in recitals 233 to 250 of decision C 56/2007, based on the study carried out by its expert in the postal case on organic developments affecting publicly owned establishments, which identifies three reasons why publicly owned establishments may be closed ⁽¹⁰³⁾: the case of publicly owned establishments which have reached the ends of their lives, the case of publicly owned establishments being closed because the tasks assigned to them no longer need to be carried out, and the case, most frequently encountered, that the tasks assigned to them have been transferred elsewhere, necessarily implying a transfer of the rights and obligations.
- (a) On the basis of this expert report, it can be considered firstly that although there is no overall judicial scheme for organising the closing down of publicly owned establishments, experience shows that the legislation always provides for transferring the rights and obligations of the establishment that is to be closed either to the State or to the body that is to take over its task ⁽¹⁰⁴⁾.
- (b) Secondly, there is generally a transfer of 'rights and obligations' (with the term 'obligations' undoubtedly referring to debts), sometimes a transfer of 'assets' ⁽¹⁰⁵⁾ (a formulation that would also include debts). The only example found of the pure and simple closing down of a publicly owned establishment involved, in any case, the transfer of the 'debts' themselves to other entities governed by public law ⁽¹⁰⁶⁾.
- (c) Thirdly, even when the task disappears, the publicly owned establishment's rights and obligations are, in practice, taken over by another body.

⁽¹⁰³⁾ Distinction drawn on the basis of the arguments in the thesis of S. Carpi-Petit, *Les successions en droit administratif*, PUR, 2006.

⁽¹⁰⁴⁾ To the Commission's knowledge, there are no instances of legal texts envisaging the extinction of the debts.

⁽¹⁰⁵⁾ According to Cornu's *Vocabulaire juridique*, by 'assets' (*patrimoine*) is meant a 'collection of the property and obligations of one and the same person (that is to say of his duties and charges assessable in monetary terms)'.

⁽¹⁰⁶⁾ The Commission expert in the postal case refers to the only known example of a publicly owned establishment which reached the end of its life: the winding up of the Université thématique d'Agen (Decree of 15 July 2002, *Journal Officiel de la République Française*, 23 July 2002). Article 1 of this Decree provides that the liquidator is responsible for 'proposing to the Minister for Higher Education that the assets, claims, debts and balance of the liquidation account remaining at the end of the winding-up period be distributed between Bordeaux I and Bordeaux IV universities'. It is thus expressly provided that the debts of the publicly owned establishment which has been wound up are to be transferred to other legal persons governed by public law.

(d) Fourthly and finally, the practice described in the study is in accordance with codifying instruction No 02-060-M95 of 18 July 2002 and the guide to the financial organisation of the creation, conversion and abolition of national publicly owned establishments, cited above ⁽¹⁰⁷⁾, namely that the rights and obligations of a wound-up EPIC go either to the State or to the legal entity that will take over the establishment's task.

(132) Guided by its expert in the postal case, the Commission concludes that the debts of publicly owned establishments are in practice always transferred to another legal entity governed by public law in the event of the closing down of the publicly owned establishment that carried out the task concerned. The creditors of these publicly owned establishments, such as IFP, therefore have a guarantee that their unpaid claims will not be cancelled.

C. Conclusion regarding the existence of a State guarantee in favour of IFP

(133) On the basis of the evidence of the existence of a guarantee ensuring the payment of individual claims and the continued existence of IFP's obligations, the Commission concludes that, from the change in the legal form of the publicly owned establishment IFP which occurred on 7 July 2006:

- the creditors of IFP do not encounter the usual private and public law limitations on the payment of a claim in full;
- in recovering the sums owed to them, the creditors of IFP may have recourse to specific procedures authorising the State to force the debtor body to settle the claim;
- nowhere does French law give the creditors of IFP to understand that IFP could face, for good, a situation in which it had a shortage of funds;
- the budgetary documents give the impression that, if there is a shortage of funds, the State could give an exceptional grant to public sector bodies, of which IFP is one;
- if the procedures described above do not enable the creditor to obtain satisfaction, he can hold the State liable in order to obtain the payment of his claim in full;

— if the actions envisaged above were to be spread out over time, the creditor can be certain that his claim will not be cancelled, even if IFP were to be subject to structural development.

(134) These special factors are intrinsically linked to IFP's legal form as a publicly owned establishment and imply that the State performs the role of guarantor of last resort. It may therefore be legitimately concluded that IFP benefits from an unlimited guarantee on the part of the French State by virtue of its legal form as an EPIC.

(135) The unlimited State guarantee to IFP results in a transfer of State resources within the meaning of point 2.1 of the Guarantees Notice. IFP pays no premium for this guarantee. There is thus both an advantage to the establishment and a drain on public resources, as the State waives the remuneration that normally accompanies guarantees. In addition, the guarantee creates the risk of a potential and future claim on the resources of the State, which could find itself obliged to pay IFP's debts ⁽¹⁰⁸⁾.

(136) Finally, the State's unlimited guarantee to IFP is imputable to the State, because it derives from the combination of IFP's public-law legal form, principles of national law, and two legislative acts, namely the Law of 25 January 1985, now the Commercial Code, and Law No 80-539 of 16 July 1980 and the measures implementing it.

7.1.1.2 *The unlimited guarantee does not cover IFP's private-law subsidiaries*

(137) As the Commission already indicated in its decision on case C 51/2005 ⁽¹⁰⁹⁾, in the opening decision in the present case, and in section 2 above ('The IFP group'), IFP and its subsidiaries Axens, Beicip-Franlab and Prosernat form an economic group for purposes of competition law: the economic integration of the publicly owned establishment IFP and its subsidiaries Axens, Beicip-Franlab and Prosernat is sufficiently strong to justify such a conclusion, because the publicly owned establishment IFP holds 100 % of Axens's capital and 100 % of Beicip-Franlab's capital directly, and 100 % of Prosernat's capital indirectly; it exercises control of its subsidiaries through the presence of IFP managers in the subsidiaries' decision-making bodies; it expresses its opinion in particular on the strategic planning and the key decisions for the future of the subsidiaries; and it is party to exclusive technology transfer agreements which are essential for the pursuit of its subsidiaries' economic activities (agreements that include reciprocal rights of first refusal ⁽¹¹⁰⁾) and to assignment contracts for the provision of premises and

⁽¹⁰⁷⁾ See recitals 25 (third indent) and 45, and footnote 20.

⁽¹⁰⁸⁾ General Court, Joined Cases T-204/97 and T-270/97 *EPAC v Commission* [2000] ECR II-2267, paragraphs 80 and 81.

⁽¹⁰⁹⁾ Section 7.1 of decision C 51/2005.

⁽¹¹⁰⁾ Articles 3-1, c) of the industrial research agreement between IFP and Axens and the industrial research agreement between IFP and Prosernat, and Article III.2 of the agreement between IFP and Beicip-Franlab.

staff. The precise scope of the State guarantee has therefore to be examined in order to establish whether, in the event of default by an IFP subsidiary governed by private law, public resources could be mobilised to compensate its creditors (in other words, whether or not the unlimited State guarantee covers the economic activities of IFP's subsidiaries).

- (138) UOP did not express an opinion on this point in its comments. Its arguments are based on market operators' perception of 'IFP/Axens' which, in its opinion, is liable to confer an advantage on the IFP group in relation to suppliers, customers or capital providers. This aspect will be examined in section 7.1.4 of this decision, which investigates the advantages which the IFP group derives from the measure.
- (139) On the other hand, as indicated in recital 47, the French authorities deny the existence of a State guarantee for IFP's subsidiaries, in particular because they have the legal form of public limited companies governed by ordinary law.
- (140) In section 7.1.1.1, the Commission showed that the publicly owned establishment IFP enjoyed an unlimited guarantee; it will now consider whether the creditors of IFP's private-law subsidiaries are covered by (A) a guarantee of payment of their individual claims or (B) a guarantee of the continued existence of their obligations in the event of insufficient assets.

A. Creditors of IFP's subsidiaries have no guarantee of payment of their individual claims

- (141) IFP's subsidiaries have the legal form of public limited companies. As legal persons governed by private law (unlike their controlling shareholder, which is a publicly owned establishment), they are fully subject to the compulsory administration and winding-up procedures provided for under ordinary law in France⁽¹¹¹⁾.
- (142) Before examining whether the controlling shareholder, the publicly owned establishment IFP, might have a vicarious liability that could be invoked for its subsidiaries (b), an account must be given of the

compulsory winding-up procedure under ordinary law to which these private-law subsidiaries would be subject in the event of cessation of payments (a).

a) Compulsory winding up under ordinary law

- (143) Supposing that an IFP subsidiary, a public limited company, was in default (in other words that it was no longer able to meet current liabilities out of its available assets), and that a reorganisation seemed manifestly impossible⁽¹¹²⁾, the procedure under ordinary law⁽¹¹³⁾ would lead to it being wound up compulsorily. The commencement of such proceedings⁽¹¹⁴⁾ would be requested, where appropriate, by a debtor within forty-five days at the latest following the cessation of payments (unless the debtor had already requested the commencement of conciliation proceedings). The purpose of such a compulsory winding up procedure would be to end the business activity of the undertaking or to sell its assets through a general or separate sale of its interests and property⁽¹¹⁵⁾. In the order commencing the winding up proceedings⁽¹¹⁶⁾, the court appoints a supervisory judge (*juge-commissaire*) and, as liquidator, a court-registered administrator (*mandataire judiciaire*) or another person chosen for competence in this field. Within a month of his appointment, the liquidator draws up a report on the situation of the undertaking and then carries out the liquidation operations and the verification⁽¹¹⁷⁾ of claims⁽¹¹⁸⁾. The proceeds of the liquidation are shared among the creditors according to their ranking (preferential and mortgage creditors, creditors secured by a special security over movable property, unsecured creditors, i.e. without preference, *pro rata* to their claims).
- (144) Where there are no longer any current liabilities and the liquidator has sufficient sums at his disposal to satisfy the creditors, or where continuing the winding up has become impossible due to lack of assets, the court

⁽¹¹²⁾ Cf. Article L. 640-1, subparagraph 1 of the Commercial Code.

⁽¹¹³⁾ The simplified procedure introduced by the Law of 26 July 2005 would not be applicable to the subsidiaries Axens, Beicip-Franlab and Prosernat. As specified in Article L. 641-2 of the Commercial Code, this simplified procedure is applicable if the debtor's assets include no immovable property, if the enterprise has employed no more than five employees during the six months prior to the commencement of the proceedings and if its turnover excluding tax is no more than EUR 750 000. In the case of compulsory winding up, these subsidiaries would therefore be subject to the ordinary-law procedure, which is summarised in recitals 143 and 144.

⁽¹¹⁴⁾ Cf. Article L. 640-4 of the Commercial Code.

⁽¹¹⁵⁾ Cf. Article L. 640-1 of the Commercial Code.

⁽¹¹⁶⁾ Cf. Article L. 641-1, second subparagraph, of the Commercial Code.

⁽¹¹⁷⁾ Cf. Article L. 641-4, first subparagraph, of the Commercial Code. The second subparagraph of the same Article specifies that unsecured claims (i.e. those not covered by any particular guarantee) are not verified in principle if it is clear that the proceeds of the asset sales will be totally absorbed by legal fees and preferential claims.

⁽¹¹⁸⁾ All creditors of the IFP subsidiary concerned whose claims predated the decision to open the proceedings have to send a statement of their claims to the representative of the creditors within a period of two months of the publication of the decision ordering the winding up in the Official Bulletin of Civil and Commercial Announcements (BODACC).

⁽¹¹¹⁾ It may be worth recalling that Article 2 of the Law of 25 January 1985, which has become Article L. 620-2 of the Commercial Code, provides that: 'Administration and winding-up procedures shall apply to traders, persons registered with the craftsmen's register, farmers and legal persons governed by private law' (emphasis added).

closes the winding up⁽¹¹⁹⁾. After closure of the proceedings, similar proceedings cannot be resumed against the debtor. In other words, a judgment terminating the winding-up proceedings owing to lack of assets prevents the creditors from bringing further proceedings against the debtor unless the claim results from a criminal conviction or rights attached to the person of the creditor⁽¹²⁰⁾.

b) *No guarantee mechanism for IFP's private-law subsidiaries*

(145) As the Commission expert explained in the postal case, in some commercial forms of enterprise, and in particular public limited companies (SAs) or private limited companies (SARLs), the members are not normally speaking obliged to pay the debts of the organisation in which they take part to an amount beyond their initial contribution. IFP's subsidiaries are public limited companies and fall squarely into this category. Therefore, in the IFP group, as in any other group of companies, in the event of default by a subsidiary with limited liability (in this case a public limited company), the liability of the parent (as for any other ordinary shareholder) is confined to the loss of its contributions, always assuming there are no suretyships, endorsements, guarantees, letters of intent or letters of comfort⁽¹²¹⁾ explicitly committing it.

(146) In view of the fact that IFP and its subsidiaries belong to the same economic group for purposes of competition law, it has to be considered whether or not, in the event of default on the part of one of these private-law subsidiaries, the relationship of economic dependency of the subsidiaries on their parent may in French company law automatically trigger the liability of the publicly owned establishment IFP, and consequently mobilise public resources, since the State is responsible for the bulk of IFP's financing and has implicitly guaranteed it as a publicly owned establishment.

⁽¹¹⁹⁾ Cf. Articles L. 643-9 and following of the Commercial Code.

⁽¹²⁰⁾ There are a few exceptions to the principle that proceedings against the debtor may not be resumed, in particular in the case of 1) personal bankruptcy of the debtor (*faillite personnelle*); 2) the debtor being found guilty of fraudulent or negligent bankruptcy (*banqueroute*); 3) previous compulsory winding up proceedings closed for lack of assets, less than five years before the opening of the current proceedings; 4) fraud in dealings with one or more creditors (the court then authorises the resumption of individual proceedings by any creditor against the debtor). Finally, proceedings may be resumed after closure on the grounds of insufficiency of assets if it appears that assets were not realised or that actions in the interests of the creditors were not taken during the proceedings.

⁽¹²¹⁾ According to Mestre (*Lamy Sociétés Commerciales*, 2003, No 1914), a letter of intent is defined as 'a document sent by a parent company to its subsidiary's creditor bank in which the parent company, in any of a number of ways, provides the bank with assurances regarding commitments given to the bank by the subsidiary'. According to Cozian, Viandier, and Deboissy, *Droit des Sociétés*, Litec, 16th edition, No 1992 *et seq.*, 'by signing the letter of intent, the parent company promises the creditor to ensure that the subsidiary is in a position to meet its commitments'. According to the information sent by the French authorities, the commitments of IFP's private-law subsidiaries are not explicitly guaranteed by the publicly owned establishment IFP.

(147) At the end of the present detailed examination, the Commission concludes that in French civil and commercial law, in the event of default by one of the subsidiaries, (i) its controlling shareholder will not in principle be liable, except where the controlling shareholder can be shown to have committed a fault in the management of its subsidiary. The plans to reform the Civil Code, recently contemplated then abandoned, which aimed precisely to extend the principle of vicarious liability to the relationship between parent and subsidiaries of a group, confirm *a contrario* (ii) that such a principle does not exist at present in French law.

i) *No general vicarious liability of a shareholder for its subsidiary*

(148) According to legal theory⁽¹²²⁾, the organisation of a group never by itself gives rise to a chain of liability. French law keeps to the principle of personal liability set out in Article 1382 of the Civil Code⁽¹²³⁾. Only an unlawful act which can be imputed to the conduct of the parent could open access to its assets.

(149) As a preliminary point, the parent of the IFP group is a legal person governed by public law, namely the publicly owned establishment IFP, which raises an additional difficulty: the question has first to be asked which court, an administrative court or an ordinary civil or criminal court, would have jurisdiction under the French system to establish whether when a legal person governed by private law is to be wound up compulsorily, and is controlled by a legal person governed by public law, there is any liability that rests on the controlling entity.

(150) As regards proceedings for liability because of insufficient assets⁽¹²⁴⁾, the Court of Conflicts of Jurisdiction (*Tribunal des conflits*) for long considered that the ordinary courts had jurisdiction where the legal person governed by public law was manager *de jure*⁽¹²⁵⁾, and that the administrative courts had jurisdiction where the legal person governed by public law was manager *de facto*⁽¹²⁶⁾. However, it seems that the jurisdiction of the administrative and the ordinary courts is now distinguished by reference to the nature of the service provided: whether it is an administrative public service, or an industrial or commercial activity.

⁽¹²²⁾ B. Grimonprez, 'Pour une responsabilité des sociétés mères du fait de leurs filiales', *Revue des sociétés*, 2009, p. 715, point 8.

⁽¹²³⁾ This is the general provision according to which a person must repair any damage caused through that person's fault to another.

⁽¹²⁴⁾ Cf. Article L. 651-2 of the Commercial Code.

⁽¹²⁵⁾ Court of Conflicts of Jurisdiction, *Commissaire de la République du Loiret v TGI d'Orléans*, 2 July 1984, *Recueil*, p. 449; *AJDA* 1984.562, concl. Lateboulle.

⁽¹²⁶⁾ Court of Conflicts of Jurisdiction, *Préfet de la Loire v Tribunal de commerce de Saint-Étienne*, 23 January 1989, *Recueil*, p. 291; *D.* 1989.367, concl. Ms F. Flipo; *D.* 1898.370, note P. Amselek and F. Derrida.

(a) Where an administrative public service is involved, the old rule, based on *de jure* or *de facto* management, seems to have been abandoned by the Court of Conflicts of Jurisdiction⁽¹²⁷⁾ in its *Département de la Dordogne* decision⁽¹²⁸⁾, where the Court decided that the administrative courts had jurisdiction because the service involved was an administrative public service, regardless of whether the legal person governed by public law was the *de jure* or *de facto* manager of the person governed by private law that actually performed the public service task. The Court recalled that in line with its judgment in *Blanco*⁽¹²⁹⁾ ‘the liability which may lie with the State or with other legal persons governed by public law by reason of damage attributed to their administrative public services is governed by public law’ (emphasis added), and that the situation was otherwise only where the law expressly so provided; the Court went on to find that in Law of 25 January 1985 on compulsory administration and winding-up procedures, (now codified in Articles L. 624-3 *et seq.* of the Commercial Code) the legislature had not, ‘by way of exception to the principles governing the liability of public-law persons, intended to confer jurisdiction on the ordinary courts for determining the civil liability of the State or other legal persons governed by public law in the performance of a duty to provide an administrative public service’ (emphasis added).

(b) Conversely, where an industrial or commercial activity is concerned, jurisdiction to determine the civil liability of a legal person governed by public law controlling a private person in liquidation clearly rests with the ordinary courts. In its judgment in *Société d’Économie Mixte Olympique d’Alès en Cévennes*⁽¹³⁰⁾, the Court of Conflicts of Jurisdiction held in particular that ‘although jurisdiction to determine the civil liability of the State or of other legal persons governed by public law in respect of the performance of a duty to provide an administrative public service rests with the administrative courts, such proceedings come under the jurisdiction of the ordinary courts where it is shown that the State or the legal person governed by public law is liable in respect of an industrial or commercial activity; there is no necessity to determine whether the public authority acted as manager *de jure* or *de facto*’

(emphasis added). In the case before it the Court of Conflicts of Jurisdiction ruled that the activities conducted by a public limited company with a board of directors and supervisory board (SEM Olympique d’Alès en Cévennes) were not of an administrative public service nature, on the basis of two considerations: the company’s object⁽¹³¹⁾ and its financing⁽¹³²⁾.

(151) As regards more specifically the public limited companies Axens, Beicip-Franlab and Prosernat, which are subsidiaries governed by private law controlled by the publicly owned establishment IFP, it emerges from the information contained in the file, especially that recalled in recital 159, that their object is economic and not administrative⁽¹³³⁾. In addition, the bulk of the resources of these companies comes from operating proceeds generated by their economic activities and not from public funding. Finally, it should be noted that these subsidiaries of a publicly owned establishment were set up as commercial companies on the initiative of a legal person governed by private law⁽¹³⁴⁾ (and not of a legal person governed by public law, because IFP was converted into an EPIC only on 7 July 2006). Therefore the industrial and commercial nature of the activities of Axens, Beicip-Franlab and Prosernat seems undeniable and, in the event of compulsory winding up by the court, jurisdiction to hear any case concerning liability against the publicly owned establishment IFP would undoubtedly lie with the ordinary courts.

(152) It must therefore be considered in what circumstances the controlling shareholder may be held liable in the light of the case-law of the Court of Cassation. In order to extend compulsory winding-up proceedings initiated in respect of a specific person (the subsidiary) so as to include another legal person (the parent), the conditions laid down are very strict. Confronted by

⁽¹²⁷⁾ Submissions of Government Commissioner, Emmanuel Glaser, in Case CE (3/8 SSR) *Département de la Dordogne*, 5 December 2005, req. No 259748; see in particular ‘La faillite d’un comité d’expansion économique entraîne-t-elle la responsabilité du département qui l’a créé?’, *Bulletin Juridique des Collectivités Locales* No 2/06, p. 138-143.

⁽¹²⁸⁾ Court of Conflicts of Jurisdiction, *Comité d’expansion de la Dordogne v Département de la Dordogne*, 15 November 1999, *Rec.*, p. 479; *AJDA* 1999.992, *chron.* Ms P. Fombeur and M. Guyomar.

⁽¹²⁹⁾ Court of Conflicts of Jurisdiction, 8 February 1873, *Rec.* 1er suppl 61, *concl.* David; *GAJA*, 15th edition, No 1.

⁽¹³⁰⁾ Court of Conflicts of Jurisdiction, *SEM Olympique d’Alès en Cévennes*, 20 November 2006, *Rec.*, *concl.* Stahl.

⁽¹³¹⁾ The object of SEM Olympique d’Alès en Cévennes was in particular to organise sports events for which an admission fee would be charged, the recruitment and training of players, and the promotion, by any appropriate means, of the town’s professional team.

⁽¹³²⁾ The financing of SEM Olympique d’Alès en Cévennes was ensured largely from the proceeds of spectators’ entry tickets, advertising, sponsoring and subsidies from the National Football League and the French Football Federation.

⁽¹³³⁾ In the case of Axens, marketing of catalysts and technologies for the refining and petrochemicals industries; in the case of Beicip-Franlab, publication and distribution of specialised software and consultancy and advisory services; and in the case of Prosernat, marketing of gas treatment and sulphur recovery plants and related services.

⁽¹³⁴⁾ As a trade body, IFP did not have the character of a publicly owned establishment, but of a legal person governed by private law (Council of State, 5/3 SSR, 7 December 1984, 16900 22572, published in *Recueil Lebon*). This interpretation was confirmed by an opinion delivered by the Finance Section of the Council of State in 1997, following a referral by the Minister for the Economy, Finance and Industry (Finance Section – Opinion No 360 991 of 26 August 1997).

a defaulting subsidiary, the victims of its actions have to prove misconduct on the part of the parent in order to obtain redress; this may in particular take the form of (a) denial by the parent of the legal personality of its subsidiary, or (b) mismanagement of the controlled company.

a) *Denial by the parent of the legal personality of the subsidiary*

(153) In its judgments the Court of Cassation has established that the liability of a parent company may extend to the actions of its subsidiaries in two exceptional cases: firstly, where the assets of the subsidiaries are inseparable from those of the parent (*confusion du patrimoine*), and secondly, where the subsidiaries are fictitious legal persons⁽¹³⁵⁾.

(154) The concept of inseparable assets⁽¹³⁶⁾ generally applies to a situation where the accounts of the two separate legal entities are such that it is impossible to determine to which of them a specific asset or liability belongs. However, to show that assets are inseparable it is not enough that there should be links, even close links, between the companies of the group. Likewise, the fact that partners or managers or even the registered office⁽¹³⁷⁾ are identical does not by itself mean that the assets are inseparable. The fact that relations within the group are formally defined in agreements between the parent company and its subsidiaries usually suffices to rule out any possibility of inseparability of assets⁽¹³⁸⁾.

(155) In two recent cases, *Metaleurop*⁽¹³⁹⁾ and *AOL Liberté*⁽¹⁴⁰⁾, the Court of Cassation seems actually to have tightened its approach to the conditions for the extension of proceedings to include the parent company of a group. Even very intensive integration of the group companies does not necessarily entail inseparability of assets. According to the legal literature, 'Neither the liquidity and exchange agreements between the two entities, nor the exchanges of staff, nor the advances of funds by the parent company, nor the parent company's control of the management of the subsidiary imply a general

disorder in the accounts that would justify the unification of the assets'⁽¹⁴¹⁾. It therefore seems to be particularly difficult to hold a parent company liable for the actions of one of its subsidiaries on the basis of the inseparability of their assets⁽¹⁴²⁾, with the level of proof required by the Court of Cassation being extremely high.

(156) In the present case, it has to be pointed out that the Commission has already found that 'IFP and the subsidiaries concerned are distinct legal entities and their accounts are separate'⁽¹⁴³⁾. In addition, the agreements signed between IFP and its subsidiaries, especially the agreements for exclusive technology transfer or the assignment of staff⁽¹⁴⁴⁾, do not produce general disorder in the accounts such as to justify unification of the assets within the meaning of the case-law of the Court of Cassation, since each service is specifically entered in the respective balance sheets of each entity of the IFP group, as will be established in particular in sections 7.1.4 and 7.3.

(157) To show that a subsidiary is a 'fictitious legal entity' it must be established that the constitution of the subsidiary is flawed for lack of intention to cooperate (*affectio societatis*) so that the subsidiary does not have a real existence as a company. The Court of Cassation⁽¹⁴⁵⁾ considers that there is a fictitious company where the legal person against which the proceedings are brought exists only apparently, by reason of a lack of any activity separate from that of the natural or legal person directing the business⁽¹⁴⁶⁾.

(158) On the basis of publicly available information⁽¹⁴⁷⁾, the Commission also notes that the publicly owned establishment IFP and Axens, Beicip-Franlab and Prosernat have neither the same contact information nor the same business premises:

(a) The publicly owned establishment IFP is registered in the Nanterre Trade and Companies Register

⁽¹³⁵⁾ Cf. Article L. 621-2, second subparagraph, of the Commercial Code: 'At the request of the administrator (court-registered or otherwise) or the public prosecution service, or by the court's own motion, proceedings that have commenced may be extended to one or more other persons where *their assets are inseparable* from those of the debtor or where *the legal person is fictitious*. The court that has commenced the initial proceedings shall remain competent for this purpose' (emphasis added).

⁽¹³⁶⁾ B. Grelon and C. Dessus-Larivière, 'La confusion de patrimoines au sein d'un groupe', *Rev. sociétés* 2006. 281, No 3.

⁽¹³⁷⁾ See in particular recital 158.

⁽¹³⁸⁾ Com. 16 October 2001, *Act. proc. coll.* 2001-20, No 256; Com. 8 January 2002, *Act. proc. coll.* 2002-6, No 70.

⁽¹³⁹⁾ Court of Cassation, Commercial Division, *Metaleurop*, 19 April 2005, No 05-10094, D. 2005. AJ. 1225, comments A. Lienhard and summary 2013, comments F.-X. Lucas; JCP E 2005. 721, note B. Rolland and chron. 1274, comments P. Petel.

⁽¹⁴⁰⁾ Com. 10 January 2006, *Rev. sociétés* 2006. 629, note P. Rousel Galle.

⁽¹⁴¹⁾ See footnote 117.

⁽¹⁴²⁾ P. Roussel Galle, note cited above; P. Delmotte, 'Les critères de la confusion de patrimoines dans la jurisprudence de la Cour de cassation', *RJDA* 2006-6. 539, No 14.

⁽¹⁴³⁾ Cf. recital 132 of Decision C 51/2005.

⁽¹⁴⁴⁾ And hence the fact, mentioned by UOP in its comments, that the staff of Axens and IFP sometimes visit their customers together.

⁽¹⁴⁵⁾ Com. 13 October 1998, *Bull. Joly* 1999. 58, note P. Seerloothen.

⁽¹⁴⁶⁾ Therefore, according to the authors of the parliamentary report cited in recital 165, a company established for the purpose of settling the debts of another company which is the subject of collective proceedings, whose activity it has continued in the same premises, with the same managers, the same clientele and the same franchise contract, constitutes under the case-law a fictitious company, which justifies the extension of the compulsory administration procedure.

⁽¹⁴⁷⁾ In particular from the following Internet sites: <http://www.ifpenergiesnouvelles.fr>; <http://www.axens.net/>; <http://www.beicip.com/index.php/eng>; <http://www.prosernat.com/en/>, consulted on 28 June 2011.

('RCS') under number B 775 729 155 and its registered office is located in Rueil-Malmaison ⁽¹⁴⁸⁾. IFP owns two establishments in France, in Solaize ⁽¹⁴⁹⁾ and Pau ⁽¹⁵⁰⁾ respectively.

(b) Axens is registered in the Nanterre RCS under number B 599 815 073 and its registered office is also located in Rueil-Malmaison, but at a different address from its parent ⁽¹⁵¹⁾. Its operating centres are also located in different sites from those of its parent, mostly outside France: in the United States, in Houston, Texas; Princeton, New Jersey; Savannah, Georgia; and Calvert City, Kentucky; in Canada, in Brockville, Ontario; in China, in Beijing; in Japan, in Tokyo; in India, in New Delhi; in Bahrain; and in Russia, in Moscow.

(c) Beicip-Franlab is registered in the Nanterre RCS under number B 679 804 047, and its registered office is also located in Rueil-Malmaison, but at a different address from its parent and Axens ⁽¹⁵²⁾. It has subsidiaries and offices in a large number of countries in the world, in particular in Bahrain; in Abu Dhabi; in Tripoli in Libya; in Kuala Lumpur in Malaysia; in Houston, Texas, in the United States; in Villahermosa in Mexico; in Rio de Janeiro in Brazil; and in Moscow in Russia.

(d) Prosernat is registered in the Nanterre RCS under number B 315 251 330 and its registered office is located in Puteaux ⁽¹⁵³⁾. The company states ⁽¹⁵⁴⁾ that it is present in some twenty countries throughout the world, including in South America (Argentina, Brazil, and Venezuela), Europe (United Kingdom, Italy, and Norway), North Africa (Algeria and Egypt), the Gulf countries (Saudi Arabia, United Arab Emirates, Kuwait, Oman, and Qatar), Iran, Russia, the Commonwealth of Independent States and South-East Asia.

(159) In addition, in this case, the economic activities engaged in by each of the subsidiaries are real, so that the companies cannot reasonably be classified as fictitious,

especially as the Court of Cassation is very exacting when it comes to categorising a legal person as 'fictitious' ⁽¹⁵⁵⁾.

(a) Axens, set up in 2001, engages in an economic activity in the market for catalysts and technologies for the refining and petrochemicals industries, for which it employs more than 600 people and through which it achieves an annual turnover of approximately EUR 300 million.

(b) Beicip-Franlab, set up in 1967, engages in a real activity in the publication and distribution of exploration-deposits software and in consultancy and advisory services. This activity involves over 100 employees and provides an annual turnover of approximately EUR 40 million.

(c) Prosernat, acquired in 2001, provides consultancy and other services and supplies gas treatment and sulphur recovery plants. The company employs about 70 people to carry out this activity and has a turnover of approximately EUR 50 million.

(160) Leaving aside the question of mismanagement, which will be examined in recitals 161 to 164, it is clear from the above that the extremely limited cases in which the case-law gives a parent company vicarious liability for its subsidiaries – the subsidiary is a fictitious legal entity or the assets of the subsidiary and the parent company are inseparable – are clearly not fulfilled in this case. Consequently, the Commission considers that if IFP's subsidiaries Axens, Beicip-Franlab and Prosernat were to be wound up the conditions for automatically holding IFP liable would not be met.

β) *Liability for mismanagement of the subsidiary by the parent*

(161) A fault in the exercise of supervision over a subsidiary may traditionally render the parent company liable ⁽¹⁵⁶⁾. Where the parent has committed a fault in the

⁽¹⁴⁸⁾ Address: 1 & 4, avenue de Bois-Préau, 92852 Rueil-Malmaison Cedex – France.

⁽¹⁴⁹⁾ Address: Rond-point de l'échangeur de Solaize, BP 3, 69360 Solaize – France.

⁽¹⁵⁰⁾ Address: Hélioparc Pau-Pyrénées, 2, avenue du Président Pierre Angot, 64000 Pau – France.

⁽¹⁵¹⁾ Address: 89, boulevard Franklin Roosevelt – BP 50802, 92508 Rueil-Malmaison Cedex – France.

⁽¹⁵²⁾ Address: 232, Avenue Napoléon Bonaparte – P.O. Box 213, 92502 Rueil-Malmaison – France.

⁽¹⁵³⁾ Address: 100 -101, Terrasse Boieldieu, 92800 Puteaux – France.

⁽¹⁵⁴⁾ Information consulted on 28 June 2011 on the following Internet site: http://www.prosernat.com/en/contactus/zoom_image_img20080715219.php.

⁽¹⁵⁵⁾ Court of Cassation, Commercial Division, 18 December 2007, No 06-14093.

⁽¹⁵⁶⁾ P. Delebecque, 'Groupes de sociétés et procédures collectives: confusion de patrimoines et responsabilités des membres du groupe', *Rev. proc. coll.* 1998/2, p. 129, see in particular No 14.

supervision that it has to exercise over the management of its subsidiaries, 'especially in the case of groups of companies, the case-law allows the parent company to be held liable' ⁽¹⁵⁷⁾. According to the literature, mismanagement by a parent company which has acted as de jure or de facto manager of a subsidiary in difficulty may render it liable if the subsidiary is wound up ⁽¹⁵⁸⁾: the parent company may be held liable as a shareholder of the subsidiary ⁽¹⁵⁹⁾ if faults that originated the controlled company's difficulties can be imputed to it ⁽¹⁶⁰⁾.

- (162) Ordinary law therefore provides for the liability of managers in relation to their company, its shareholders or its creditors ⁽¹⁶¹⁾. In the case of a group, the creditors of a subsidiary which has suspended payments will try to demonstrate that the parent company has assumed the role of manager of the subsidiary, de jure or de facto ⁽¹⁶²⁾. Liability of a parent for its subsidiary on the basis of a fault committed by the parent is therefore provided for in particular by the law governing collective proceedings ⁽¹⁶³⁾, and more specifically in the context of actions for liability for insufficient assets ⁽¹⁶⁴⁾, on condition that the parent has acted as the manager ⁽¹⁶⁵⁾ of its subsidiary. However, for the parent company to be held liable for fault, it is necessary to provide proof of

such fault, and above all of a causal link between this and the damage suffered by reason of the conduct of the subsidiary ⁽¹⁶⁶⁾.

- (163) In any event, it is clear from the above that legal actions of this case are never actions seeking the enforcement of a guarantee, since they are always based on a fault committed by the parent company. Therefore such actions do not demonstrate the existence of a general principle of vicarious liability of a parent company for its subsidiaries, a principle which would be contrary to the principle of the limitation of a shareholder's liability to the initial contribution made to the company, apart from cases where the company is a fictitious entity or where its assets are inseparable from those of its parent company, which can be ruled out here.

- (164) To sum up, it is clear from the case-law of the Court of Cassation that the principle of liability of a parent company for mismanagement of a subsidiary does not in any way provide a mechanism equivalent to a guarantee.

ii) Recent plans for reform of vicarious liability

- (165) According to the findings of a recent parliamentary information report ⁽¹⁶⁷⁾, in the present state of the law it appears, therefore, that 'the approaches taken in the case-law throw into relief the obstacle which legal personality places in the way of the assignment of liability' (emphasis added) ⁽¹⁶⁸⁾.

⁽¹⁶⁶⁾ In the specific case of environmental damage, in view of the crucial nature for the community of environmental claims, and the risk of their non-enforcement, Article L. 512-17 of the Environmental Code concerning the rehabilitation of sites being taken out of operation was recently amended in order to allow action to be taken against the parent company for fault resulting in an insufficiency of assets preventing the subsidiary from meeting its environmental rehabilitation obligations. As amended by Law No 2010-788 of 12 July 2010 on national commitment to the environment (Article 277), Article 512-17 of the Environmental Code provides: 'Where the operator is a subsidiary within the meaning of Article L. 233-1 of the Commercial Code and compulsory winding up has been initiated or ordered against it, the liquidator, the prosecution service or the representative of the State in the *département* may ask the court which has initiated or ordered the compulsory winding up to find that the parent company has committed a serious fault which has contributed to the subsidiary having insufficient assets and, if it is shown that such a fault has been committed, to make the parent company liable for all or part of the financing of the rehabilitation measures of the site or sites to be taken out of operation' (emphasis added). As regards the causal relationship, see: Paris, 15 January 1999, *Bull. Joly* 1999. 626, § 137, note B. Saintourens.

⁽¹⁶⁷⁾ Information report No 558 (2008-2009) on civil liability, by Mr Alain Anziani and Mr Laurent Bêteille, drawn up on behalf of the Legal Affairs Committee, submitted to the Senate on 15 July 2009 (available at the Senate Internet site: <http://www.senat.fr/rap/r08-558/r08-5581.pdf>).

⁽¹⁶⁸⁾ Parliamentary report cited above, p. 62.

⁽¹⁵⁷⁾ Parliamentary report cited above, p. 63.

⁽¹⁵⁸⁾ B. Grimonprez, 'Pour une responsabilité des sociétés mères du fait de leurs filiales', cited above, point 10.

⁽¹⁵⁹⁾ *Ibid.*, point 11.

⁽¹⁶⁰⁾ D. Schmidt, 'La responsabilité civile dans les relations de groupes de sociétés', *Rev. sociétés* 1981, p. 725.

⁽¹⁶¹⁾ Liability in relation to third parties can in theory be incurred on the basis of Articles L. 223-22 and L. 225-251 of the Commercial Code.

⁽¹⁶²⁾ As regards de facto management, it should be pointed out that a parent company will not systematically be considered a de facto manager, and the court considering the particular case will require precise actions which can be imputed to the parent company and which show that, without legal entitlement, it has directly or indirectly carried out a positive and independent activity in the administration of the subsidiary; see in particular *Com.* 9 May 1978, D. 1979. 419, note M. Vasseur. See also J.-L. Rives-Langes, 'La notion de dirigeant de fait', D. 1975. chron. 41; D. Tricot, 'Les critères de la gestion de fait', *Dr. et patr.* January 1996, p. 24, cited by B. Grimonprez, cited above, point 13.

⁽¹⁶³⁾ Apart from the law on collective procedures, the Court of Cassation, Commercial Division, 26 March 2008, No 07-11.619, *Ademe v. Elf Aquitaine*, recently found that while a parent company that acted alongside its subsidiary might incur fault-based liability, a parent was not obliged, by the mere fact of its participation in its subsidiary, to finance the subsidiary in order to enable it to meet its obligations (even supposing the subsidiary was responsible for a public service, so that there might be a threat to the public interest).

⁽¹⁶⁴⁾ Cf. Article L. 651-2 of the Commercial Code.

⁽¹⁶⁵⁾ The authors of the parliamentary report cited above state, for example, that at the time of the *Metaleurop* judgment, handed down by the Court of Cassation on 19 April 2005, the Court's Documentation and Study Service indicated that 'certain conduct ... on the part of a parent company in relation to its subsidiary could as a matter of fact constitute mismanagement such as to result in insufficient assets at the subsidiary'.

(166) This obstacle seems to be so critical that three has recently been debate in France on the advisability of a reform of the Civil Code which would extend vicarious liability to situations of economic dependence⁽¹⁶⁹⁾ (with special reference to the relationships of the subsidiaries of a group with their parent company). Certain consumer associations⁽¹⁷⁰⁾ mentioned in the parliamentary report cited above seem in particular to deplore the fact that the technique of converting units into subsidiaries allows certain entities, in the event of later litigation involving the liability of a subsidiary, to rely on the legal partitioning of the companies of the group even though in their commercial dealings they have presented the image of a group of perfectly integrated companies offering a range of services.

(167) Article 1355 of the Catala preliminary draft⁽¹⁷¹⁾ recently proposed the introduction of a new basis for vicarious liability which would call into question the principle of the legal autonomy of subsidiaries:

'Article 1355

A person shall be liable automatically for the damage caused by those whose way of life he regulates, or whose activity he organises, directs or controls in his own interest ...'

(168) The comments made by the authors of this preliminary draft clarify the innovations proposed with regard to non-contractual vicarious liability. The legislation would add as a possible basis 'the act of directing and organising the activity of others in the personal interest of the person exercising such control'⁽¹⁷²⁾, which would make quite a profound change to the present legal position, especially as the liability would henceforth be strict: it would not be 'subject to proof of a fault on the part

of the person responsible, but rather to proof of an act that might have rendered the direct author personally liable if he had not acted under the control of others'⁽¹⁷³⁾.

(169) The second paragraph of Article 1360 of the preliminary draft defines this principle in the case of the liability of the parent company of a group of companies in relation to its subsidiaries:

'Article 1360

... Likewise, a person shall also be liable where he controls the economic activity or assets of a professional person who is in a situation of dependence even though acting for his own account, if the victim shows that the act giving rise to the damage is related to the exercise of control. This shall apply in particular to parent companies in respect of damage caused by their subsidiaries, and to licensors for damage caused by their licensees' (emphasis added.)

(170) It is clear from the above, *a contrario*, that in the present state of French law, vicarious liability of the parent company for its subsidiary requires proof that the parent committed a fault affecting the subsidiary.

(171) As regards foreseeable developments in French positive law, the Commission notes that the reform contemplated on this point seems to have been abandoned: in the context of the parliamentary report cited above, the working party of the Senate Legal Affairs Committee declared itself against any legislative provision 'establishing the existence of strict liability by reason of a state of economic dependence' (Recommendation No 19). Moreover, a reform along these lines no longer seems to be on the agenda: in particular, it does not appear in Bill No 657 on the reform of civil liability⁽¹⁷⁴⁾ presented during the ordinary session 2009-2010 (registered at the office of the President of the Senate on 9 July 2010).

(172) In conclusion, whereas the State is liable in the event of default of a publicly owned establishment, by a mechanism which, especially in view of its automatic character, has all the features of a guarantee, there is in the current state of French law no implicit and automatic liability of parent companies for the actions of subsidiaries governed by private law under compulsory winding up.

⁽¹⁶⁹⁾ According to the first paragraph of Article 1384 of the Civil Code: 'A person is liable not only for the damage he causes by his own act, but also for that which is caused by the acts of persons for whom he is responsible, or by things which are in his custody.' The authors of the parliamentary report cited above note that the courts have been creative in introducing systems of liability which are not provided for by any legislation, covering liability arising from things, vicarious liability, or liability for abnormal neighbourhood disturbance. So far, however, case-law has not established a vicarious liability of a parent company for the actions of its subsidiaries.

⁽¹⁷⁰⁾ The associations Consommation, Logement et Cadre de Vie (CLCV) and UFC-Que choisir, see parliamentary report cited above, p. 62 and p. 65.

⁽¹⁷¹⁾ Report to the Minister for Justice, presented on 22 September 2005: 'Preliminary draft reform of the law of obligations (Articles 1101 to 1386 of the Civil Code) and the statute of limitations (Articles 2234 to 2281 of the Civil Code)'.

⁽¹⁷²⁾ Catala preliminary draft cited above, p. 166.

⁽¹⁷³⁾ Catala preliminary draft cited above, p. 177.

⁽¹⁷⁴⁾ Available online from the Senate Internet site: <http://www.senat.fr/leg/ppl09-657.pdf>.

B. Creditors of IFP's subsidiaries have no guarantee of the continued existence of the subsidiaries and/or their obligations

- (173) On the basis of the above, the Commission concludes that if, as public limited companies, the IFP subsidiaries were to be wound up and their existence terminated, their rights and obligations would disappear at the same time. Admittedly their controlling shareholder, the publicly owned establishment IFP, would have the option of a prior capital injection ⁽¹⁷⁵⁾ to avoid their winding up. Such a capital contribution could then ensure the continuation the claims against the subsidiaries held by third parties.
- (174) However, that would be a strategic choice on the part of the publicly owned establishment and not a legal obligation automatically imposed on it. Moreover, such a choice would be subject to the strict framework of State aid law: if the capital injection was not the behaviour of a private investor operating under normal market economy conditions, it would have to be notified to the Commission by the French authorities and await the Commission's prior vetting (and approval).
- (175) The Commission therefore concludes that in the event of winding up, the creditors of IFP's subsidiaries have no certainty regarding the settlement of their claims.

C. Conclusion regarding the lack of a State guarantee covering the private-law subsidiaries of the publicly owned establishment IFP

- (176) On the basis of the above, the Commission concludes that, in contrast to the creditors of the publicly owned establishment IFP, the creditors of the private-law subsidiaries of the IFP group do not have a guarantee either of the payment of their individual claims or of the continued existence of these companies in the event of winding up. These private-law subsidiaries are not covered by the unlimited guarantee enjoyed by IFP by virtue of its legal form as a publicly owned establishment. The Commission bases its analysis on the fact that the creditors of the IFP subsidiaries governed by private law:

- remain subject to the ordinary-law procedures regarding the administration and winding up of undertakings;
- are unable, in the current state of French law, to rely on an automatic liability of the controlling shareholder of the subsidiaries, the publicly owned establishment IFP, and hence of the French State, for the

actions of IFP's subsidiaries: they must first show that there has been a fault on the part of the publicly owned establishment, which means that any liability is not automatic and cannot be likened to a guarantee mechanism.

- (177) The Commission emphasises that it has already come to similar conclusions in other cases in which it took the view that a public limited company wholly owned by a publicly owned establishment, or by the State itself, was not covered by the unlimited public guarantee enjoyed by its shareholder. As regards companies owned directly by the State, the Commission considered, as early as 2003, in the *EDF* case ⁽¹⁷⁶⁾, that the conversion of an EPIC into a public limited company under ordinary law, which made it subject to the ordinary law on bankruptcy, had the effect of withdrawing the guarantee enjoyed by the undertaking up to that time. This approach was recently confirmed when *La Poste* was transformed into a public limited company wholly owned by the State ⁽¹⁷⁷⁾. As regards companies held by publicly owned establishments, the Commission acknowledged, in the decision cited above relating to the setting up of *La Banque Postale*, that the fact that the subsidiary had the legal form of a public limited company wholly owned by a publicly owned establishment (namely *La Poste*, which at that time was a publicly owned establishment with a form equivalent to that of an EPIC) was by itself sufficient to rule out the possibility of an unlimited guarantee to the subsidiary ⁽¹⁷⁸⁾.

7.1.2 ECONOMIC NATURE OF THE ACTIVITIES OF THE PUBLICLY OWNED ESTABLISHMENT IFP THAT ARE COVERED BY THE UNLIMITED GUARANTEE

- (178) As the Commission already pointed out in its previous decisions relating to the publicly owned establishment IFP ⁽¹⁷⁹⁾, under its constitution, IFP performs three tasks:
- research and development in the fields of oil and gas prospecting and refining and petrochemicals technologies,

⁽¹⁷⁵⁾ In this respect, the Commission points out that the recapitalisation of the subsidiary Prosernat, mentioned by the French authorities in the observations referred to in recital 46, took place in March 2006, i.e. before the change in IFP's legal form on 7 July 2006, and therefore occurred at a time when IFP was not yet covered by an unlimited State guarantee.

⁽¹⁷⁶⁾ Commission Decision 2005/145/EC of 16 December 2003 on the State aid granted by France to EDF and the electricity and gas industries (OJ L 49, 22.2.2005, p. 9). See in particular recital 135 of the decision: 'The Commission considers that making *EDF* subject to the ordinary law on bankruptcy will have the effect of withdrawing the unlimited State guarantee which it enjoyed' (emphasis added.)

⁽¹⁷⁷⁾ See Article 2 of decision C 56/2007: 'the effective conversion of *La Poste* into a public limited company will result in the unlimited guarantee which *La Poste* enjoys being withdrawn' (emphasis added.)

⁽¹⁷⁸⁾ The Commission refers to footnote 3 to decision N 531/2005 cited above, where it said that as a public limited company, *Banque Postale* would be subject to the provisions of ordinary law, and especially Law No 85-98 on the compulsory administration and winding-up of undertakings, and consequently would not enjoy an unlimited State guarantee.

⁽¹⁷⁹⁾ See recital 18 of decision C 51/2005, and recital 6 of the opening decision.

— the training of engineers and technicians,

— the provision of sector information and documentation.

(179) As explained in recital 31, the French authorities consider that the publicly owned establishment IFP is a research organisation assigned a three-fold task in the general interest (research, training and documentation).

(180) The Commission likewise takes the view that in the light of the tasks assigned to it IFP can be termed a 'research organisation' within the meaning of point 2.2.(d) of the Community framework for State aid for research and development and innovation⁽¹⁸⁰⁾ ('the R&D&I Framework'): its primary goal is to conduct fundamental research⁽¹⁸¹⁾, industrial research⁽¹⁸²⁾ or experimental development⁽¹⁸³⁾ and to disseminate their results by way of teaching, publication or technology transfer.

(181) In accordance with the Court of Justice case-law⁽¹⁸⁴⁾, the public financing of the activities carried out by a research organisation (including their cover by an unlimited public guarantee) may⁽¹⁸⁵⁾ lead to the granting of State aid provided that the organisation in question is engaged in an economic activity, i.e. an activity consisting of offering goods and services on a given market⁽¹⁸⁶⁾, regardless of its legal status and the way in which it is financed.

(182) In its decision-making practice the Commission has clarified what it considers to be economic and non-economic activities engaged in by research organisations⁽¹⁸⁷⁾.

(183) The Commission takes the view that the primary activities of research organisations are normally of a non-economic character, notably:

— education for more and better skilled human resources;

— the conduct of independent R&D for more knowledge and better understanding, including collaborative R&D;

— the dissemination of research results.

(184) It furthermore considers that technology transfer activities (licensing, spin-off creation or other forms of management of knowledge created by the research organisation) are of a non-economic character if these activities are of an 'internal nature'⁽¹⁸⁸⁾ and all income from these activities is reinvested in the primary activities of the research organisations.

(185) On the other hand, the Commission considers that research carried out under contract with industry, the renting out of research infrastructure and consultancy work constitute economic activities⁽¹⁸⁹⁾.

(186) In the case under examination, the unlimited guarantee conferred on IFP by virtue of its EPIC status covers both its non-economic activities (which in itself does not give rise to any problem under the law governing State aid) and its economic activities, which are of two types.

(187) Regarding the first type of economic activity, although, as indicated in recital 31, the majority of IFP's activities are non-economic, the French authorities acknowledged in their letters dated 13 January and 16 July 2010 that outside the exclusive field of activity of its subsidiaries IFP provided services consisting essentially in renting out infrastructures and premises, providing staff and supplying legal services to its the subsidiaries, and contract research services for third parties and its subsidiaries. As pointed out in recital 185, such activities are economic activities as generally defined by the Commission.

(188) Regarding the second type of economic activity, technology transfers such as licensing, spin-off creation or other forms of management of knowledge created by the research organisation are in principle non-economic, as recalled in recital 184, if they are of an internal nature and if the profits they generate are entirely reinvested in public research. In the present case, however, as the Commission found in decision C 51/2005, the very specific relationships between the publicly owned establishment IFP and certain of its subsidiaries governed by private law are such that 'certain of IFP's activities fall outside the scope of its non-economic activities insofar as they give rise to commercial exploitation by its subsidiaries'⁽¹⁹⁰⁾. The Commission came to the conclusion that the subsidiaries concerned could not be considered autonomous from their parent in so far as their activities formed part of

⁽¹⁸⁰⁾ OJ C 323, 30.12.2006, p. 1.

⁽¹⁸¹⁾ As defined in point 2.2(e) of the R&D&I Framework.

⁽¹⁸²⁾ As defined in point 2.2(f) of the R&D&I Framework.

⁽¹⁸³⁾ As defined in point 2.2(g) of the R&D&I Framework.

⁽¹⁸⁴⁾ Court of Justice in Case C-41/90 *Hoefner & Elser* [1991] ECR I-1979, paragraph 21, and Case C-309/99 *Wouters* [2002] ECR I-157, paragraphs 46 *et seq.*

⁽¹⁸⁵⁾ Provided the other conditions laid down in Article 107(1) TFEU are also met.

⁽¹⁸⁶⁾ Case 118/85 *Commission v Italy* [1987] ECR 2599, paragraph 7; Case C-35/96 *Commission v Italy (CNSD)* [1998] ECR I-3851, paragraph 36; and Case C-309/99 *Wouters* [2002] ECR I-1577, paragraph 46.

⁽¹⁸⁷⁾ This practice is summarised in particular in point 3.1.1 of the R&D&I Framework.

⁽¹⁸⁸⁾ See footnote 25 to the R&D&I Framework: 'By internal nature, the Commission means a situation where the management of the knowledge of the research organisation(s) is conducted either by a department or a subsidiary of the research organisation or jointly with other research organisations'.

⁽¹⁸⁹⁾ See footnote 24 to the R&D&I Framework.

⁽¹⁹⁰⁾ See recital 151 of decision C 51/2005.

IFP's development strategy, IFP exercised not only de jure but also de facto control, exclusive agreements bore witness to strong economic integration, and IFP and the subsidiaries concerned had a common image in the eyes of operators in the relevant sectors. The technology transfers between IFP and its subsidiaries Axens, Beicip-Franlab and Prosernat, and especially those resulting from industrial research work⁽¹⁹¹⁾, must consequently be categorised as economic activities for purposes of competition law.

7.1.3 SCOPE OF THE PRESENT DECISION

(189) It is clear from section 7.1.1 that only the activities carried out directly by the publicly owned establishment IFP are covered by the State guarantee; the activities carried out by its subsidiaries, which are governed by private law, are not covered by the guarantee.

(190) Moreover, among the activities carried out directly by IFP, there can be a State aid element only in the guarantee cover given to activities of an economic character, and always provided the other conditions laid down in Article 107(1) TFEU are also met.

(191) Finally, it is clear from section 7.1.2 that these economic activities are confined on the one hand to contract research activities carried out by the publicly owned establishment IFP, and on the other hand to the transfer of technologies in the exclusive fields of activity of the subsidiaries Axens, Prosernat and Beicip-Franlab and the renting out of infrastructure, provision of staff and provision of legal services.

7.1.4 EXISTENCE OF A SELECTIVE ADVANTAGE TO THE IFP GROUP

(192) To analyse any advantages that the IFP group may derive from the unlimited guarantee conferred on the parent, IFP, by virtue of its EPIC status, the Commission will proceed in two stages: it will first examine any advantages to the parent (7.1.4.1), and then examine those potentially transferred to its subsidiaries (7.1.4.2).

7.1.4.1 *Advantages to the publicly owned establishment IFP*

(193) In the opening decision, in accordance with point 2.1.3 of the Guarantees Notice, the Commission said that it took the view that IFP could derive benefit from its EPIC

status mainly through more favourable funding terms on the capital markets⁽¹⁹²⁾, which is an advantage resulting from the non-applicability of the ordinary legal procedure for compulsory administration and winding up to legal entities governed by public law. Moreover, in the event of default of the publicly owned establishment, the Commission noted that the State guarantee would cover all of IFP's debts, which, as specified in recital 71 of the opening decision, might be not only financial but also commercial or of another nature again, in particular claims held by suppliers (whose invoices had not been paid) or by customers (to whom services had not been supplied).

(194) At the end of the detailed examination of the measure, therefore, the Commission considers that it is appropriate to analyse the existence of any advantage to the publicly owned establishment IFP in its relations with (A) banks and financial institutions, (B) its suppliers and (C) its customers.

A. **No advantage in dealings with banks and financial institutions**

(195) In the opening decision, although the Commission acknowledged that the publicly owned establishment IFP was not the subject of a financial rating by an external rating agency⁽¹⁹³⁾, it pointed out that the funding granted to IFP necessarily entailed an assessment by creditors of the risk of default⁽¹⁹⁴⁾. Given that IFP had recourse to the credit market to finance its debt, the Commission could not at the preliminary examination stage rule out the possibility that IFP might enjoy an economic advantage as a result of the weight given by the financial markets in their assessments to the State's role of last-resort guarantor of IFP's debts.

(196) At the end of the detailed examination, the Commission takes note of the information sent by France which is referred to in recital 64 above, and which is summarised in Table 1 in the present recital.

⁽¹⁹²⁾ See recitals 90 and 98 of the opening decision.

⁽¹⁹³⁾ In the case of undertakings such as La Poste, which are the subject of a financial rating by independent agencies, the Commission showed, in point 4.1.2(a) of decision C 56/2007, that the guarantee conferred by the status of publicly owned establishment allowed the beneficiary establishment to obtain more favourable borrowing terms than those that it would have obtained on its own merits.

⁽¹⁹⁴⁾ See recital 101 of the opening decision, and also recital 102, where the Commission cites in particular a report to the French Senate in which the Finance Committee declared on the subject of Réseau Ferré National (national rail network): 'This [financial] mechanism, combined with the unlimited and unconditional implied State guarantee resulting from its EPIC status, may give Réseau Ferré National significant borrowing capacity, at interest rates very close to those of the SNCF'.

⁽¹⁹¹⁾ See recital 182 of decision C 51/2005: 'the public financing concerns only the industrial research stages'.

Table 1

Debt of the publicly owned establishment IFP over the period 2005-2010

Entity:	IFP	2005	2006	2007	2008	2009	2010
		EUR thousand	EUR thousand	EUR thousand	EUR thousand	EUR thousand	EUR thousand
Loans and debts with credit institutions (*)	Amounts payable within one year (1)	[...] (*)	[...] (*)	[...] (*)	[...] (*)	[...] (*)	[...] (*)
	Amounts payable at over one year	[...] (*)	[...] (*)	[...] (*)	[...] (*)	[...] (*)	[...] (*)
(1) of which bank loans and overdrafts and bank credit balances		[...] (*)	[...] (*)	[...] (*)	[...] (*)	[...] (*)	[...] (*)
Interest rate on loans and debts contracted with credit institutions:		2005	2006	2007	2008	2009	2010
		Interest rate + margin	Interest rate + margin	Interest rate + margin	Interest rate + margin	Interest rate + margin	Interest rate + margin
Medium and long-term loans	[...] (*)	[...] (*)	[...] (*)	[...] (*)	[...] (*)	[...] (*)	[...] (*)
Bank loans and overdrafts and short-term credit facilities	[Bank No 1] (**)	EONIA + [...] (*)	EONIA + [...] (*)				
	[Bank No 2] (**)			EONIA + [...] (*)	EONIA + [...] (*)		
	[Bank No 3] (**)					EONIA + [...] (*)	
	[Bank No 4] (**)						EONIA + [...] (*)

(*) net of consolidation adjustments of the leasing components

(**) since the data are presented as at 31/12 for each year, the figures for 2010 are not yet known.

(197) This information shows that as regards the amounts payable at more than one year, IFP has not had recourse to borrowing from credit institutions since its change of legal form, i.e. over the period between 2006 and 2009 for which the data are available. Over the same period, following the change of status, IFP has had recourse to borrowing at less than one year only once, in 2009, for a negligible sum of EUR [...] (*). Moreover, the rate applied at the time by [Bank No 3] (**) (EONIA + [...] (*) %) was [...] (*) base points higher (all other things being equal) than the rate negotiated by IFP in 2005 with [Bank No 1] (**) (EONIA + [...] (*) %), when IFP it was still a legal person governed by private law, and therefore not yet covered by the State guarantee that it now derives from its status as a publicly owned establishment.

(198) As regards 2010 specifically, the French authorities specified that the publicly owned establishment IFP had received four proposals for credit facilities amounting to EUR [...] (*), at a one-year rate varying between EONIA + [...] (*) % with [Bank No 4] (**) (plus commitment fee of [...] (*) %, i.e. EUR [...] (*) or [Bank No 5] (**) (plus

commitment fee of [...] (*) %, i.e. EUR [...] (*) and EONIA + [...] (*) % with [Bank No 3] (**) (plus commitment fee of [...] (*) %, i.e. EUR [...] (*) or [Bank No 1] (**) (plus commitment fee of [...] (*) %, i.e. EUR [...] (*)). IFP also received another spot offer from [Bank No 3] (**) (depending on the term of drawdown chosen), for a rate equal to EURIBOR + [...] (*) %. The Commission notes the fact that these rates are equivalent to those negotiated by IFP before its change of status in 2006, when it was still a legal person governed by private law not covered by a State guarantee.

(199) In view of the above, the Commission acknowledges that, over the period between its change of legal form and 2010, IFP did not derive any actual economic advantage from its EPIC status in its relations with banks and financial institutions. In other words, it appears that the potential advantage that the undertaking might have derived from the unlimited guarantee, in the form of interest rates on borrowings more favourable than what was available on the market, did not materialise during the period under review.

(200) This conclusion naturally applies only for the past, since the Commission cannot make assumptions concerning future conduct by market operators or about their perception of the impact of the State guarantee on the risk of default of the publicly owned establishment IFP. Therefore, in the context of the annual reports that the French authorities will be called upon to send the Commission in the future, they should furnish information relating to the levels and terms of IFP's debt, providing proof that these loans are in line with market conditions, or adding the gross equivalent of the aid component to the estimate of the maximum impact of the guarantee using a methodology similar to that described in Table 6 appearing in recital 300.

(201) Finally, the Commission notes the proposal of the French authorities to include the following written statement in the financing contract for each transaction (for all instruments covered by a contract):

'The issue/programme/loan does not enjoy any form of direct or indirect State guarantee. In the event of insolvency, the State would not be obliged to act as financial substitute for IFP for payment of the claim.'

(202) While this commitment will not by itself suffice to resolve the question of the existence of the guarantee, in the particular context, combined with all the other obligations imposed on France, it will allow the plea of accepted risk to be relied upon where appropriate, and any negative repercussions of the guarantee to be limited considerably.

B. Advantage in dealings with suppliers

(203) As regards suppliers, contrary to the view expressed by the French authorities (see recital 65), in order to prevent IFP from drawing any advantage from its EPIC status it is not sufficient that it should be subject, under European Union law or national law, to a competitive procurement obligation: when IFP issues a public call for tenders, every potential supplier drawing up a tender can anticipate the impossibility of a bankruptcy of IFP. When considering public procurement, therefore, a distinction has to be drawn between the fall in price resulting from the efficiency gains secured by competition between bidders – which, as the Commission found in the report cited by the French authorities, represent a genuine 'social benefit' – and the fall in price resulting from the more favourable assessment by contractors of the risk of default on the part of an entity which they know is protected from the risk of compulsory winding up by its status as a publicly owned establishment. Both of these factors tend to cause the prices of public procurement to fall, but they are of an intrinsically different nature, which means that there can be no question for the Commission of imputing the effects of the second factor to the first.

(204) To estimate the fall in price resulting from the more favourable assessment of the risk of default made by suppliers in the case of an EPIC, the Commission will look at the cost of equivalent risk cover. In the absence of a State guarantee, a supplier to IFP wishing to benefit from a comparable guarantee (i.e. to cover itself in full against the risk of default of the other party) could have recourse to the services of a specialised credit institution or insurance undertaking. Such cover against the risk of default is commonly offered by specialised factoring companies⁽¹⁹⁵⁾.

(205) The remuneration for such a factoring service comprises two components:

(a) a financing fee (or debit interest) calculated in proportion to the time involved, to cover the funding of the advance granted to the supplier, which depends in particular on the interest rate in force at the time the claims are transferred;

(b) a factoring fee proper, varying between 0,7 % and 2,5 % of the turnover assigned, with an average rate of 1,5 %⁽¹⁹⁶⁾, calculated on the value of the claims transferred, to pay for the accounting management, collection and performance bond services.

(206) In their letter dated 26 November 2010, the French authorities said that, in their opinion, the Commission's arguments on the role of factoring were based on an inaccurate assessment of the reasons for which an undertaking might have recourse to this type of service. They acknowledged that factoring companies could provide three services, i.e. cash advance, collection and guarantee of claims, but said they could offer these services jointly or separately. On the basis of a Banque

⁽¹⁹⁵⁾ It may be worth recalling that factoring is a contract by which a factor (i.e. a specialised credit institution) purchases, for a fee, the claims held by a supplier on his customers. The service provided to the supplier is three-fold: the factor pays him a cash advance, frees him from need to recover the debts, and guarantees their payment (in the event of non-payment, notably if the customer defaults, the factor bears the risk). Regarding this final point, it should be pointed out that such a guarantee is a performance bond, in so far as the factor undertakes to pay the seller the invoices he has issued. The risk of insolvency of the purchaser and the risk of non-payment on the due date are borne by the factor.

⁽¹⁹⁶⁾ The Commission bases this estimate on publicly available information. See in particular the financial information sites <http://www.netpme.fr> and <http://www.banque-info.com>, and in particular the article on factoring by Mr Luc Bernet-Rollande, consultant and instructor in banking and finance, on the following Internet sites: <http://www.banque-info.com/fiches-pratiques-bancaires/l-affacturation> and <http://www.netpme.fr/banque-entreprise/2-affacturation.html> (consulted on 28 June 2011).

de France study carried out in 2009 ⁽¹⁹⁷⁾, they added that, among these different services, delegated management (i.e. a financial transaction without debt collection) was becoming predominant in the services offered by factors, so that recourse to factoring increasingly amounted to a mere cash transaction for the supplier. The Commission takes note of this observation.

- (207) The French authorities have communicated the volume of payments made by IFP to factors ⁽¹⁹⁸⁾ since 2004 (to pay for supplies needed for both types of activity, economic and non-economic):

Table 2

Recourse to factoring by IFP's suppliers over the period 2004-2010

Year	Number of suppliers concerned	Payments to factors (in euros)	Number of invoices concerned
2004	[...] (*)	[...] (*)	[...] (*)
2005	[...] (*)	[...] (*)	[...] (*)
2006	[...] (*)	[...] (*)	[...] (*)
2007	[...] (*)	[...] (*)	[...] (*)
2008	[...] (*)	[...] (*)	[...] (*)
2009	[...] (*)	[...] (*)	[...] (*)
2010 ⁽¹⁹⁹⁾	[...] (*)	[...] (*)	[...] (*)
Period as a whole (2004-2010)		[...] (*)	[...] (*)

⁽¹⁹⁹⁾ Over the first 10 months of the year.

⁽¹⁹⁷⁾ On the basis of information supplied by the Banque de France, the French authorities state that the proportion of transactions comprising a comprehensive offer covering all the above-mentioned services is still falling, from 45 % in 2008 to 35 % in 2009, in favour of delegated management, which has risen from 35 % to 49 %. According to the same study, the distribution of factoring by type of transaction in 2009 is as follows: collection, financing and guarantee (without delegated management): 35,5 %; collection and financing (without delegated management): 6,9 %; delegated management: 49,1 %; collection and guarantee: 0,3 %; reverse factoring: 3,8 % (this is a formula which allows a debtor to ask the factor to pay his main suppliers in his place; for the supplier, it provides a guarantee of being paid cash without recourse, while the purchaser has the same time for payment, secures the loyalty of his suppliers, supports their cash position, and obtains a discount for cash payment); syndication: 3,8 %; other: 2,5 %.

⁽¹⁹⁸⁾ The French authorities rightly point out that it is not possible, when suppliers are paid directly, to determine whether or not they have concluded a factoring agreement for delegated management, and that it is not possible, if a factor is paid in place of the supplier, to know the precise scope of the services subcontracted to the factor by the supplier, and in particular whether or not the supplier has contracted a factoring service with guarantee.

- (208) The French authorities observe that since its change of legal form in 2006, the payments made by IFP to factors have increased. They say that this trend invalidates the Commission's argument concerning the perception of third parties of the risk of default of EPICs. They consider that if IFP had benefited from cover of its risk of default by the State from 2006, recourse to the services of factors should have become less frequent from that date, if it did not stop altogether.

- (209) But as the French authorities themselves indicate (see recital 206), recourse to factoring is increasingly associated with a need for cash advances (increase in the delegated management service) and less and less with a need to transfer the risk of non-payment (decline in the collection, financing and guarantee service), and in IFP's accounts it is not possible to break down the use made of factoring by its suppliers by type of service; in the Commission's view, therefore, the trend established by IFP does not invalidate the Commission's arguments, still less does it show that IFP's suppliers have concluded that since IFP's change of legal form the risk of a default on its part has increased.

- (210) The Commission acknowledges that it is unable to provide a precise estimate of the amount of the premium which would be necessary to cover IFP's suppliers against the risk of default if IFP did not already enjoy a State guarantee. The Commission points out, however, that since the factoring fee referred to in recital 205.b in fact covers three separate services (collection, financing and guarantee against the risk of unpaid invoices), the maximum amount of 2,5 % of the guaranteed turnover which is mentioned there must in any event be an upper bound to the premium which would be required to cover the risk of default only.

- (211) In any event, the French authorities are still free to notify a more precise methodology for estimating the advantage conferred by the guarantee on IFP in its dealings with suppliers. Such a methodology could be based on an economic report by an expert, which would be debated by the two sides in the context of the appraisal, and if found appropriate could be the subject of a positive decision by the Commission and could be used by France to meet the information requirements laid down in the operative part of this decision.

- (212) As regards the amounts in question, the French authorities indicated in their letter dated 26 November 2010 that the cost of these goods and services was incorporated directly into the ratios for the use made of the staff allocated to the activities to which the acquisition of these goods and services related ⁽²⁰⁰⁾. Moreover, the

⁽²⁰⁰⁾ As explained in decision C 51/2005, the costs attached to the various acquisitions and staff expenses are then the subject of separate accounting, so that the two types of activities (economic and non-economic) and their costs and financing are clearly distinguished in IFP's accounts.

invoicing of seconded staff and of premises did not give rise to any significant specific expenditure, since all the relevant costs were already integrated into the structural costs of the establishment.

are particularly sensitive to the guarantees that their providers are able to give them in terms of cover of both contractual and non-contractual liability.

(213) Finally, with regard to the goods and services specifically acquired for the pursuit solely of economic activities, the French authorities submit that the average annual value of such supplies represents only a small fraction of IFP's annual average turnover⁽²⁰¹⁾. For contract research, on the basis of the information obtained by IFP via its analytical accounting system, the average value of supplies acquired by IFP to provide its services between 2006 and 2009 comes to EUR [...] (*) per year.

(214) The Commission considers that, for the performance of its economic activities, IFP has enjoyed a real economic advantage, consisting in a reduction in the prices charged by its suppliers, and resulting from a more favourable assessment by the latter of the risk of default of the establishment. The Commission cannot quantify this advantage precisely, but considers that, in any case, it would not have exceeded a sum in the order of EUR [...] (*) per year on average over the period under review (2006-2009)⁽²⁰²⁾.

(215) Finally, the Commission points out that such an advantage in dealings between IFP and its suppliers is selective, because its competitors, which remain subject to compulsory administration and winding-up procedures under ordinary law, do not enjoy a comparable guarantee conferred by the State, which is intrinsically linked to IFP's status as a publicly owned establishment.

C. Advantage in dealings with customers

(216) As regards the research services provided by the publicly owned establishment IFP, the Commission notes the comments made by UOP, which indicates that in technology transfer, a field which is risky by nature, acquirers

(217) As regards non-contractual liability, the French authorities stated in their letter dated 13 January 2010 that in France companies governed by private law and publicly owned establishments were both subject to ordinary law (Article 1382 of the Civil Code, relating in particular to tortious liability)⁽²⁰³⁾. They added that IFP's activities presented specific characteristics, in that they required the use of laboratory apparatus and inflammable, explosive or toxic products, which were potential sources of a significant 'industrial' risk⁽²⁰⁴⁾, within the meaning of the term customarily used by insurers. Consequently, IFP had entered into various insurance contracts to cover not only the traditional risks (civil liability), but also specific risks, such as those associated with sources of ionising radiation or with breakdown of machinery in the areas surrounding wells. As regards civil liability cover, IFP's insurance contract covered four risks: civil liability for its operations, civil liability after delivery, professional liability and environmental damage.

(218) It appears from the above that IFP has not shifted its non-contractual liability to the State by taking the risk that in the event of a claim it would be able to rely on the guarantee it derives from its EPIC status, but that, on the contrary, it has covered the risk by entering into the necessary insurance contracts on the market.

(219) As regards contractual liability, it is clear from the information supplied by the French authorities in response to UOP's comments, in particular those set out in recital 91, that with respect to the provision of services IFP's liability towards its customers (whether they are its own subsidiaries or third parties) 'is limited to [...] (*) % of the remuneration actually received, with a maximum which may reach up to [...] (*) % depending on the case', so that if the customer considers that the work carried out by IFP is defective, the latter cannot under any circumstances be obliged to repeat the work ad infinitum. Moreover, the Commission takes note of the French authorities' observation that, on account of the principle of non-combination of liabilities, a contracting party cannot invoke non-contractual liability to seek compensation for damage suffered under a contractual relationship⁽²⁰⁵⁾.

⁽²⁰¹⁾ This low level (in the order of [...] (*) %) is explained by the fact that the goods and services specifically allocated to the pursuit of economic activities relate essentially to fees, sub-contracting, travel and purchases of consumables directly linked to the corresponding research service (and are invoiced on to the customer).

⁽²⁰²⁾ This figure is arrived at by multiplying the turnover recorded each year (EUR [...] (*) %) by the maximum rate adopted to cover the risk of default of IFP (2,5 %). For each year, using the same calculation method, and taking account of the variations in turnover, the figures are as follows: EUR [...] (*) in 2007, EUR [...] (*) in 2008, and EUR [...] (*) in 2009. For 2006, it would also be appropriate in theory to apply a rate of 48,5 % (= (365-188)/365) in proportion to the time involved, since the guarantee started only from 7 July 2006, the 188th day of the year 2006, which was the date of conversion of IFP's legal form, i.e. a maximum of EUR [...] (*) %.

⁽²⁰³⁾ Moreover, the conditions for tortious liability are strictly regulated: there must be (i) fault, (ii) damage and (iii) a causal link between fault and damage.

⁽²⁰⁴⁾ On account of the significance of this risk, IFP has concluded a contract with a lead insurer which has taken a co-insurer to share the benefits and risks associated with the contract.

⁽²⁰⁵⁾ Judgment Cass. civ. 2^o, 9 June 1993: 'this provision [Article 1382 of the Civil Code] is not applicable to compensation for damage relating to the performance of a contractual commitment'.

- (220) The fact remains that, in view of the State guarantee granted to IFP, its customers are assured that IFP will never be subjected to compulsory winding up and therefore will always be able to fulfil its contractual obligations, or failing that that they will be compensated for any such breach.
- (221) By analogy with the arguments it set out in recitals 204 *et seq.* with regard to dealings with suppliers, the Commission considers that in the absence of a State guarantee, a customer wishing to enjoy the same level of protection would take out a performance bond from a financial intermediary (a bank or insurance company, for example) to ensure the completion of the contract between it and IFP. The purpose of such protection would be to guarantee financial compensation for the customer for loss caused by (total or partial) breach of contract.
- (222) France acknowledges, not without certain reservations, as set out in recital 66, that 'the only supposed effect on IFP that might be identified would be a reduction in charges as a result of the absence of subscription to performance bonds'. The French authorities conclude, without elaborating further, that, on the basis of 'the sums usually charged by banks and insurance companies to provide this type of service, it is clear that the sum involved in such a reduction would be negligible'.
- (223) The Commission points out, firstly, that a large number of factors enter into the calculation of the cost of a performance bond, notably the type of contract and the sum covered, the staff employed, the financial situation, the risk of default and the claims history of the undertaking whose service the contract concerns, as well as other purely financial factors, such as the fees or commissions of intermediaries. On the basis of publicly available information ⁽²⁰⁶⁾, the Commission estimates that the rate applied generally speaking varies between 1 % and 5 % of the turnover covered.
- (224) The calculation of premiums by specialised intermediaries uses statistical techniques, which may be refined by type of risk, and it is not possible to establish *a priori* a standard rate for a performance bond. The final price of the guarantee depends ultimately on the estimated value of potential losses and the probability that they may occur. Consequently, whereas a guarantee of full performance without defects is proposed in certain sectors (for example in civil engineering and building and public works or in international trade), it does not seem feasible in the case of contract research services to cover more than best efforts, since R&D is by nature a high-risk field in which the purchaser of research work has no certainty that it will lead to results that can be exploited. In this respect, the Commission notes that the amount contractually guaranteed to IFP's customers, including its subsidiaries, is limited to 100 % of the price of the research work carried out.
- (225) The Commission acknowledges that it is unable to provide an exact estimate of the premium which would be required to guarantee to customers (including subsidiaries) that IFP will use its best efforts in carrying out the research work. Questioned on this point, the French authorities indicated in their letter dated 26 November 2010 that they did not have any information on the premiums charged on the market to cover the specific risks in the field of R&D. The Commission considers, however, that the premium which would be required by the market to cover such a risk (limited to best efforts in research, and therefore less than the risk attached to full performance without defects) should logically be lower than the maximum estimates mentioned in recital 223. Therefore the Commission considers that a maximum rate of 5 % of the turnover generated by the service covered is in any case an upper bound to the premium which would be necessary to cover such a risk.
- (226) As regards the volume of the economic activities which might be covered by such a guarantee, the Commission recalls that these activities are of two types: on the one hand, renting out infrastructure, providing research staff and legal services, and the contract research activities carried out by IFP on behalf of both third parties and its own subsidiaries, and on the other hand, the transfer of technology from IFP to its subsidiaries in the exclusive fields of activity of Axens and Prosernat. As regards the activities carried out by IFP in the exclusive field of activity of its subsidiary Beicip-Franlab ⁽²⁰⁷⁾, the Commission has already found that they are financed entirely from income earned in the market for oilfield operation consultancy services and the contract development of oilfield software. In decision C 51/2005, the Commission established the absence of intra-group transfers of public funding from the publicly owned establishment IFP to its subsidiary Beicip-Franlab, since the business relations between the two entities were based on normal market conditions. The remuneration paid by Beicip-Franlab to IFP 'broadly' ⁽²⁰⁸⁾ covers the cost of work done by IFP in its subsidiary's exclusive domain, so that the Commission can conclude that the prices charged are such that in any event Beicip-Franlab already bears a cost equivalent to any additional impact of the State guarantee on the research costs borne by IFP.

⁽²⁰⁶⁾ According to the site specialising in performance bonds <http://www.performancesuretybonds.com>, consulted on 28 June 2011.

⁽²⁰⁷⁾ See recitals 149 to 151 of decision C 51/2005.

⁽²⁰⁸⁾ See recital 149 of decision C 51/2005.

In these conditions, the cover provided by the State guarantee for the business relations between the subsidiary and its parent is not of a nature to confer a competitive advantage on the activities conducted by IFP in the exclusive research fields of its subsidiary Beicip-Franlab. Consequently, the fact that they may be covered by the State guarantee does not constitute State aid within the meaning of Article 107(1) TFEU.

(227) Regarding activities of the first type carried out by IFP for third parties and its own subsidiaries, the French authorities in their letter dated 26 November 2010 provided figures for the volume of economic activities carried by IFP between 2006 and 2009. It emerges from this information that the average annual value of research services during this period is in the order of EUR [...] (*) , including EUR [...] (*) on behalf of third parties and EUR [...] (*) on behalf of the subsidiaries.

(228) The French authorities also provided information concerning the administrative services supplied by IFP to its subsidiaries during the same period. This information shows that, since 2006, the average annual amount invoiced by IFP to its subsidiaries is in the order of EUR [...] (*) for the staff provided and EUR [...] (*) for the costs of premises and ancillary services (*frais de domiciliation*). ⁽²⁰⁹⁾

(229) Regarding the activities of the second type, i.e. the transfer of technology from IFP to its subsidiaries in the exclusive fields of activity of Axens and Prosernat, it should first be pointed out that decision C 51/2005 already contained the figures for 2006:

(a) in the exclusive field of Axens, IFP carried out economic activities comprising technical feasibility studies prior to industrial research amounting to EUR [...] (*) and industrial research work amounting to EUR [...] (*), i.e. in total EUR [...] (*).

(b) in the exclusive field of Prosernat, IFP carried out economic activities comprising technical feasibility studies amounting to EUR [...] (*) and industrial research work amounting to EUR [...] (*), i.e. in total EUR [...] (*).

(c) In total, IFP carried out research work in the exclusive fields of its subsidiaries amounting to EUR 56,4 million (EUR 7,4 million for technical feasibility studies and EUR 49,0 million for industrial research work), whereas the volume of its own resources was only EUR [...] (*), and the Commission accordingly considered that these research activities had been subsidised by public funds to the amount of EUR 11,3 million (an aid intensity of 20 %) ⁽²¹⁰⁾.

⁽²⁰⁹⁾ These are the financial flows generated by renting out equipment or premises (laboratories) and by ancillary services (legal services).

⁽²¹⁰⁾ Aid intensity is the ratio between public funds used and the total cost of the research project, i.e. here $11,3/56,4 = 20\%$.

(230) As regards the following years, in accordance with Article 5(1) of decision C 51/2005, until the expiry date of the exclusive agreements, France is required to 'submit to the Commission a detailed annual report on the projects carried out by IFP in the exclusive fields of activity of Axens and Prosernat'. The information contained in these annual reports allows a precise calculation to be made of the annual volume of the research services carried out by IFP on behalf of and in the exclusive fields of its subsidiaries.

(231) So far, France has sent the Commission the annual reports for 2007, 2008 and 2009. In view of the time needed to process the accounting data, the 2010 report is to be forwarded in the course of 2011.

(232) In the exclusive fields of Axens, these economic activities are summarised for the years 2007 to 2009 in Table 3 shown in this recital (EUR thousand).

Table 3

Activities of IFP in the exclusive fields of Axens between 2007 and 2009

(EUR thousand)

Total	Total charges	Total own resources	Public resources (+) or benefit (-)
2007	[...] (*)	[...] (*)	[...] (*)
2008	[...] (*)	[...] (*)	[...] (*)
2009	[...] (*)	[...] (*)	[...] (*)

(233) The research services provided by IFP in the exclusive field of Axens therefore generated economic activity amounting to EUR [...] (*) in 2007, EUR [...] (*) in 2008, and EUR [...] (*) in 2009, which is comparable to that established by the Commission for 2006 in decision C 51/2005 (EUR [...] (*)).

(234) In the exclusive fields of Prosernat, these economic activities are summarised for the years 2007 to 2009 in Table 4 shown in this recital (EUR thousand).

Table 4

Activities of IFP in the exclusive fields of Prosernat between 2007 and 2009

(EUR thousand)

Total	Total charges	Total own resources	Public resources (+) or benefit (-)
2007	[...] (*)	[...] (*)	[...] (*)
2008	[...] (*)	[...] (*)	[...] (*)
2009	[...] (*)	[...] (*)	[...] (*)

- (235) The research services provided by IFP in the exclusive field of Prosernat therefore generated economic activity amounting to EUR [...] (*) in 2007, EUR [...] (*) in 2008, and EUR [...] (*) in 2009, comparable to that established by the Commission for 2006 in decision C 51/2005 (EUR [...] (*)).
- (236) On the basis of the above, the Commission considers that in the pursuit of its economic activities IFP has

benefited from a real economic advantage, consisting in the absence of payment of a premium for a performance bond, at the very least for best efforts, which it was able to offer in respect of its research activities to its customers, including to its subsidiaries Axens and Prosernat in their exclusive fields. The Commission cannot quantify this advantage precisely, but in view of the specific nature of the risk covered, the Commission considers that in any case it would not exceed, service by service, year by year, the sums shown in Table 5 in this recital:

Table 5

**Upper bounds to economic advantage derived by IFP from the unlimited guarantee in its customer relations
between 2006 and 2009**

	2006		2007		2008		2009	
Research services (outside the exclusive fields of the subsidiaries)	Turnover (EUR million)	Upper bound ⁽¹⁾ (insurance premium)	Turnover (EUR million)	Upper bound (insurance premium)	Turnover (EUR million)	Upper bound (insurance premium)	Turnover (EUR million)	Upper bound (insurance premium)
On behalf of subsidiaries	[...] (*)	EUR [...] (*)	[...] (*)	EUR [...] (*)	[...] (*)	EUR [...] (*)	[...] (*)	EUR [...] (*)
On behalf of third parties	[...] (*)	EUR [...] (*)	[...] (*)	EUR [...] (*)	[...] (*)	EUR [...] (*)	[...] (*)	EUR [...] (*)
Administrative services provided								
Invoicing of staff provided	[...] (*)	EUR [...] (*)	[...] (*)	EUR [...] (*)	[...] (*)	EUR [...] (*)	[...] (*)	EUR [...] (*)
Invoicing of premises and ancillary services	[...] (*)	EUR [...] (*)	[...] (*)	EUR [...] (*)	[...] (*)	EUR [...] (*)	[...] (*)	EUR [...] (*)
Services in the exclusive field of Axens	[...] (*)	EUR [...] (*) million	[...] (*)	EUR [...] (*) million	[...] (*)	EUR [...] (*) million	[...] (*)	EUR [...] (*) million
Services in the exclusive field of Prosernat	[...] (*)	EUR [...] (*)	[...] (*)	EUR [...] (*)	[...] (*)	EUR [...] (*)	[...] (*)	EUR [...] (*)
Total for the subsidiaries	[...] (*)	EUR [...] (*) million	[...] (*)	EUR [...] (*) million	[...] (*)	EUR [...] (*) million	[...] (*)	EUR [...] (*) million
Total for third parties	[...] (*)	EUR [...] (*)	[...] (*)	EUR [...] (*)	[...] (*)	EUR [...] (*)	[...] (*)	EUR [...] (*)

⁽¹⁾ These figures are arrived at by multiplying the turnover recorded each year by the maximum rate applied to cover the performance bond (5 %). For 2006, it would be appropriate in theory to apply a rate of 48,5 % (= (365-188)/365) to this product in proportion to the time involved, since the guarantee started only from 7 July 2006, the 188th day of the year 2006, which was the date of conversion of IFP's legal form.

- (237) In any event, the French authorities are still free to notify a more precise methodology for estimating the advantage conferred by the guarantee on IFP in its dealings with customers. Such a methodology could be based on an economic report by an expert, which would be debated by the two sides in the context of the appraisal, and if found appropriate could be the subject of a positive decision by the Commission and could be used by France to meet the information requirements laid down in the operative part of this decision.

to compulsory administration and winding-up procedures under ordinary law, do not enjoy a comparable guarantee conferred by the State, which is intrinsically linked to IFP's status as a publicly owned establishment.

7.1.4.2 Advantages transferred to the private-law subsidiaries of the IFP group

- (238) Finally, the Commission points out that such an advantage in dealings between IFP and its suppliers is selective, because its competitors, which remain subject

- (239) As regards the subsidiaries of the publicly owned establishment IFP, in its opening decision the Commission pointed out that it could not at the preliminary investigation stage rule out the possibility that any advantage

arising from the EPIC status of the publicly owned establishment IFP, such as in particular more advantageous borrowing terms, might also benefit the three subsidiaries ⁽²¹¹⁾.

relations between IFP and its subsidiary Beicip-Prosernat ^(***) were conducted on normal market terms.

(240) At the end of the present detailed examination, for the reasons listed in section 7.1.1.2, given that in French law a shareholder in a group of companies does not bear general vicarious liability for its subsidiaries, there is no reason to take the view that the publicly owned establishment IFP, and consequently the French State, can be liable for the payment of claims held by third parties in respect of the economic activities of Axens and Prosernat, in particular if those subsidiaries were to be subjected to compulsory winding up.

(241) However, it should be noted that in decision N 531/2005 cited above, although it took the view, as recalled in recital 177, that as a public limited company La Banque Postale remained subject to ordinary law with regard to compulsory administration and winding-up and did not therefore itself enjoy an unlimited State guarantee, the Commission nevertheless examined the question of a possible transfer to the subsidiary of the effects of the public guarantee conferred on its sole shareholder ⁽²¹²⁾.

(242) More precisely, the Commission took the view ⁽²¹³⁾ that the operating structure of the group resulted in permeability between the shareholder (La Poste) and the subsidiary (La Banque Postale), owing to the combined effect of (i) the use by the subsidiary of human and material resources made available by the parent and (ii) the remuneration of these resources on the basis of the costs borne by the parent, in such a way that in the event of an economic advantage of a nature to cause the costs of La Poste to fall, the remuneration paid by La Banque Postale to its parent would have been reduced accordingly, resulting in an (at least partial) transfer of this economic advantage to the subsidiary.

(243) In the same way, in decision C 51/2005, the Commission considered that there was a measure of porosity, in particular in the prices applied by IFP for the services supplied to Axens and Prosernat in their exclusive fields, such that the intra-group business relations did not follow a market-driven logic, but on the contrary offered the possibility of cross-subsidisation of the economic activities of the subsidiaries via public funds made available by the parent. As recalled in recital 226, the Commission concluded moreover that the

(244) In the case cited above relating to La Banque Postale, the Commission considered it necessary for the French authorities to enter into commitments permitting a mechanism to be put in place which neutralised at the level of the subsidiary any advantages that might be enjoyed by the parent. As regards the funding terms, this obligation was to state in writing in the financing contract, for each instrument covered by a contract, that under French law (in particular the need for express statutory authorisation by law for each guarantee) this financing transaction would not benefit from any guarantee of any kind, direct or indirect, on the part of the State. The issuing prospectus of each transaction was to publicise this contractual provision ⁽²¹⁴⁾.

(245) In the present case, the French authorities have given a commitment, with regard to the borrowing terms of the IFP subsidiaries (Axens, Beicip-Franlab and Prosernat), to state in writing in the financing contract for each transaction (for any instrument covered by a contract) that 'Pursuant to French law (in particular the need for express statutory authority for each guarantee), the present financing transaction shall not enjoy any form of direct or indirect State guarantee'.

(246) As regards the use by the subsidiaries of human and material resources made available by their parent, as noted by the Commission in decision C 51/2005, 'if there is any subsidisation of economic activities, it results from the level of the remunerations paid by the subsidiaries concerned to the parent company and is reflected in IFP's accounts' ⁽²¹⁵⁾. In the examination of IFP's accounts, the only cost components not taken into account by the Commission for the year 2006 in decision C 51/2005, and for the following years in the annual reports sent by the French authorities, are those relating to the cover provided by the unlimited guarantee for the services provided by IFP to its subsidiaries. Since the premium corresponding to a performance bond, at the very best efforts, was not paid to the State, it was not possible for it to be priced into the services supplied to the subsidiaries either.

(247) Consequently, it must be held that the economic advantage conferred on the publicly owned establishment by the guarantee it enjoys by virtue of its legal form was transferred in this way to its private-law subsidiaries Axens and Prosernat.

⁽²¹¹⁾ See recital 104 of the opening decision.

⁽²¹²⁾ See recital 8 of decision N 531/2005 cited above, according to which the unlimited State guarantee to La Poste was to be the subject of separate proceedings, while that decision would deal with the effects of the guarantee on Banque Postale.

⁽²¹³⁾ See recitals 88 to 91 of decision N 531/2005 cited above.

^(***) Clerical error: for 'Beicip-Prosernat' read 'Beicip-Franlab'.

⁽²¹⁴⁾ See recital 96 of decision N 531/2005 cited above.

⁽²¹⁵⁾ See recital 132 of the decision.

(248) The French authorities have confirmed the existence of the contracts jointly concluded by IFP and its subsidiaries Axens, Prosernat and Beicip-Franlab with common suppliers, which the Commission mentioned in its opening decision and which UOP also referred to in its comments, as indicated in recital 73; but the French authorities have pointed out that that essentially they concerned the transport sector (air and rail) for business travel of the staff of the various entities. The Commission considers that if the subsidiaries were able to benefit from more favourable purchasing conditions granted to the IFP group — which has not necessarily been established with regard to the supplies in question — this was the result of a volume discount policy applied by these suppliers for bulk purchasing, rather than for any impact of the guarantee. In any case, even supposing that the analysis presented in section 7.1.4.1 B with regard to the publicly owned establishment can be transposed to the subsidiaries for the supplies obtained jointly with it, and that by such a mechanism these subsidiaries benefit from a transfer of the advantage enjoyed by the publicly owned establishment IFP on account of the guarantee, thus enabling them to obtain these services more cheaply, the sums in question would be so negligible that the Commission doubts whether they can be described as a real economic advantage.

(249) Consequently, in line with the conclusions of decision C 51/2005, the only activities that may benefit from an advantage deriving from the cover provided by the parent's State guarantee for the research activities conducted in the subsidiaries' exclusive fields are confined to the 'contribution [by the publicly owned establishment IFP] to activities in the fields of activity of Axens and Prosernat' ⁽²¹⁶⁾. The Commission cannot quantify the advantage transferred to Axens and Prosernat precisely, but in view of the specific nature of the risk covered, the Commission considers that it would not in any case exceed, service by service, year by year, the sums shown in Table 5 in recital 236.

(250) In the Commission's view, such an economic advantage transferred by the publicly owned establishment IFP to its private-law subsidiaries Axens and Prosernat is selective, because the subsidiaries' competitors do not have access to the technologies and human and material resources of IFP on such favourable terms.

7.1.5 DISTORTION OF COMPETITION AND EFFECT ON TRADE

(251) The measure examined may lead to a reduction in the operating costs of IFP for the services it supplies to third parties (contract research) and in those of Axens and Prosernat for the services they obtain from their parent (research in their exclusive field, contract research, provision of staff and infrastructures, and provision of

administrative services), which has the effect of favouring the IFP group and therefore of distorting competition within the meaning of Article 107(1) TFEU.

(252) The markets on which the IFP group operates, in particular that of contract research in the case of the publicly owned establishment IFP itself, those of catalysts and technologies for the refining and petrochemicals industries in the case of its subsidiary Axens, and consultancy, other services, and infrastructures in the field of gas treatment and sulphur recovery in the case of its subsidiary Prosernat, are wide open to trade within the European Union, so that the measure is liable to have an unfavourable impact on competing undertakings which have, or wish to develop, similar economic activities in the markets concerned.

(253) The existence of an unlimited State guarantee for the publicly owned establishment IFP is consequently liable to distort competition and to affect trade within the meaning of Article 107(1) TFEU.

7.1.6 CONCLUSION REGARDING THE NATURE OF THE AID MEASURE

(254) The guarantee given by the State to IFP by virtue of its legal form therefore results in a transfer of State resources imputable to the State, and distorts or threatens to distort competition and trade between Member States by favouring the IFP group.

(255) The Commission concludes that this guarantee constitutes State aid within the meaning of Article 107(1) TFEU.

7.2 UNLAWFULNESS OF THE AID MEASURE

(256) Before its change of legal form, IFP was a legal person governed by private law, in the form of a trade body within the meaning of Law No 43-612 of 17 November 1943 on the management of trade interests. In this capacity, IFP was subject to the compulsory administration and winding-up procedures provided for under ordinary law and did not benefit from the State guarantee conferred by EPIC status.

(257) IFP became an EPIC on 7 July 2006, by Decree of 6 July 2006, adopted under Law No 2005-781 of 13 July 2005. This change of legal form is the basis of an unlimited State guarantee granted to the publicly owned establishment IFP. The measure in question must therefore be categorised as new aid within the meaning of Article 1(c) of the Procedural Regulation.

⁽²¹⁶⁾ See recital 154 of decision C 51/2005.

- (258) In accordance with Article 2(1) of the Procedural Regulation, Member States are required to notify in sufficient time 'any plans to grant new aid'. The change of IFP's legal form was not formally notified by France, but only pointed out incidentally in the context of other proceedings, and the measure was implemented without the prior approval of the Commission, so that the State aid in question was put into effect by the French Government in breach of Article 108(3) TFEU.
- (259) Consequently, the Commission considers that this measure constitutes unlawful aid within the meaning of Article 1(f) of the Procedural Regulation.

7.3 COMPATIBILITY OF THE AID MEASURE

7.3.1 AID IN THE FIELD OF CONTRACT RESEARCH AND SERVICES PROVIDED BY THE PUBLICLY OWNED ESTABLISHMENT IFP

- (260) The services provided consist in the renting out of research infrastructure, providing staff or providing legal services (to the subsidiaries).
- (261) IFP's contract research services generally consist in providing support to a customer (a third party or subsidiary) ⁽²¹⁷⁾ wishing to conduct research activities with a view to better understanding or mastery of a scientific or technical phenomenon ⁽²¹⁸⁾. The request may be more or less precise and leave IFP greater or lesser scope, ranging from simple compliance with specifications strictly defined by the customer to the supply of full research including recommendations. [...] (*) In response to a request IFP draws up a technical and commercial proposal, accompanied by contractual conditions for implementation, which is then the subject of negotiation with the customer. The French authorities have explained the contract research and provision of services provided by IFP in its three fields of competence, handled by its operating centres (*'centres de résultat'*) for exploration and production, refining and petrochemicals, and engines and energy.
- (262) The services provided by the operating centre for exploration and production are aimed in particular at validating and/or improving the methodologies, technologies and software developed by the research centre. Moreover, to carry out some of these services, the centre makes available to its industrial partners infrastructures and calculation algorithms specific to IFP or rare expertise

which is not available under a commercial service supplied by a private operator. These services can be classified into the following categories:

- (a) services linked to specific infrastructures with very few if any equivalents in the world ⁽²¹⁹⁾;
- (b) interpretation of cases using software developed by IFP which is not yet marketed or which in the particular context can be used only with specific expertise and IFP skills ⁽²²⁰⁾;
- (c) use of special IFP expertise ⁽²²¹⁾;
- (d) use of expertise under development to validate the competency, technologies and methodologies developed ⁽²²²⁾.

- (263) The contract research services provided by the operating centre for refining and petrochemicals have consisted, for example, in assistance in the establishment, by a foreign university ⁽²²³⁾, of activities within the specific competence of IFP in the field of catalysts, work relating to '[...]' (*) ⁽²²⁴⁾ to gain insight into the phenomena of [...] (*) ⁽²²⁵⁾, or a study on [...] (*) ⁽²²⁵⁾.

⁽²¹⁹⁾ The French authorities cite the following examples of uses in particular:

- research equipment [...] (*) for an evaluation [...] (*) or to carry out tests [...] (*);
- research equipment [...] (*) to carry out a testing programme of [...] (*) or to test a [...] (*);
- a [...] (*) specifically adapted by IFP for its research work in [...] (*) and [...] (*) for [...] (*);
- methodology for [...] (*) developed by IFP to carry out a study of [...] (*);
- test cells adapted for [...] (*) or [...] (*);

⁽²²⁰⁾ The French authorities cite in particular the example of use of a [...] (*) for [...] (*).

⁽²²¹⁾ The French authorities cite the following examples of uses in particular:

- expertise [...] (*);
- feasibility study concerning [...] (*);

⁽²²²⁾ The French authorities cite the following examples of uses in particular:

- feasibility study [...] (*), feasibility study [...] (*): expertise in [...] (*) developed with [...] (*);
- study [...] (*) on the site of [...] (*), project [...] (*): expertise in the field of [...] (*) – validation and improvement of [...] (*);
- [...] (*) under the project [...] (*) (validation of the concept of [...] (*) on behalf of [...] (*)).

⁽²²³⁾ This involved [...] (*), a university recently set up in [...] (*), for which the contract research services were invoiced in the context of a research consortium involving IFP, [...] (*) acting on behalf of [...] (*).

⁽²²⁴⁾ The research work was carried out on behalf of [...] (*). The [...] (*) in particular enable [...] (*) on the basis of [...] (*).

⁽²²⁵⁾ The study was carried out on behalf of [...] (*): IFP in particular checked [...] (*) and made recommendations on [...] (*), used for [...] (*).

⁽²¹⁷⁾ It may be worth recalling that when contract research is carried out on behalf of subsidiaries, it relates to topics outside the exclusive fields of Axens and Prosernat.

⁽²¹⁸⁾ The French authorities explain that this might, for example, take the form of a geological study based on information supplied by the customer, laboratory testing for [...] (*), or a performance calculation for a material provided by the customer.

- (264) Contract research services provided to car manufacturers by the operating centre for engines and energy consisted, for example, in [...] (*) on the basis of [...] (*), of a [...] (*) and an IFP methodology ⁽²²⁶⁾, a study [...] (*) based on research by IFP [...] (*) ⁽²²⁷⁾, or tests of [...] (*) on [...] (*) developed by IFP ⁽²²⁸⁾.
- (265) This description shows that the contract research activities conducted by IFP on behalf of third parties concern technical feasibility studies prior to research activities, or aim at the acquisition of new knowledge and skills in IFP's fields of competence or at the application of knowledge and technologies developed by IFP to develop new products, processes or services.
- (266) The French authorities have supplied costings of the contract research activities and the provision of services on behalf of third parties by IFP for the period 2004-2009. The information sent shows that these research services represent annually about [0-5] (**) % of IFP's total budget (i.e. EUR [...] (*) in services for about EUR 300 million in budget), which means that this economic activity can be regarded as only residual within the activities of the publicly owned establishment.

7.3.1.1 *Possible transfer of State aid to third parties or subsidiaries*

- (267) In accordance with point 3.1.2 of the R&D&I Framework, where a not-for-profit research organisation performs economic activities, such as renting out infrastructures, supplying services to business undertakings or performing contract research, any public funding of these economic activities will generally entail State aid. However, if it is possible to prove that the totality of the State funding has been passed on to the final recipient, and that there is no advantage granted to the intermediary, the intermediary organisation may not be a recipient of State aid.
- (268) In the present case the research organisation, which is the publicly owned establishment IFP, performs contract research activities whilst being covered by an unlimited public guarantee, and it must be held that it receives State aid unless it can be proved that the selling price of these services has allowed the totality of the State aid to be transferred to its customers.
- (269) The pricing of IFP's contract research services is established on the basis of their total production cost ⁽²²⁹⁾, to which a margin is applied, the rate of which varies according to the outcome of the negotiations with the customer mentioned in recital 261. The only cost

component which IFP does not seem to have taken into account is an insurance premium to be paid by IFP for the performance bond (or best efforts guarantee).

- (270) As regards the contract research carried out by the publicly owned establishment IFP on behalf of its subsidiaries Axens and Prosernat, the Commission considers that the economic advantage resulting from the guarantee may either remain with IFP and where appropriate be put to other uses or, in view of the specific nature of the links binding them to their parent, be transferred to the subsidiaries through the pricing mechanism:
- (a) in the former case, the compatibility of the aid is examined in this section;
- (b) in the latter case, the Commission refers to the analysis of compatibility presented in section 7.3.2, which, as a precaution, will include the amounts at stake in the estimate of the advantage potentially transferred to the subsidiaries.

- (271) As regards third-party customers, likewise, if it could be established that an amount corresponding to this additional cost component was systematically transferred to the third parties via the pricing mechanism, detailed examination of the aid transferred would very likely reveal *de minimis* sums ⁽²³⁰⁾. The information sent by the French authorities shows that the majority of the services invoiced generate less than EUR [...] (*) in turnover (i.e. a maximum amount of cover of the risk of default of EUR [...] (*)), the largest contract amounting to only EUR [...] (*) (i.e. a maximum amount of cover of the risk of default of EUR [...] (*)).

- (272) However, it cannot be concluded that the margin applied by IFP has always allowed the totality of the State aid to be passed on to the customer for contract research services. In such a case, the absence of a guarantee premium paid to the State to cover contract research contracts performed for third parties would constitute additional public funding made available to the publicly owned establishment by the State.

- (273) The public funds involved could then be put to three uses:

- (a) to finance non-economic activities of the publicly owned establishment, which would not entail State aid;

⁽²²⁶⁾ [...] (*), who was aware of this tool, asked IFP to apply it to [...] (*).

⁽²²⁷⁾ [...] (*) asked IFP to adapt [...] (*) allowing testing [...] (*).

⁽²²⁸⁾ [...] (*) asked IFP to apply its knowhow concerning [...] (*) to validate [...] (*).

⁽²²⁹⁾ [...] (*).

⁽²³⁰⁾ Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid (OJ L 379, 28.12.2006, p. 5).

(b) or to finance other contract research activities on behalf of third parties or subsidiaries: this case is analysed in detail in section 7.3.1.2;

(c) or to finance research carried out by the publicly owned establishment in the exclusive field of activity of its subsidiaries, which could consequently be added to the amounts of State aid already transferred to the subsidiaries: this hypothesis is analysed in detail in section 7.3.2.

7.3.1.2 Compatibility of a State guarantee conferred on a research organisation for the performance of contract research services and services ancillary to its principal objective of independent public research

(274) Before examining the specific features of the present case, the Commission wishes to reassert the general approach that it has adopted in its decision-making practice, according to which an unlimited State guarantee covering economic activities in principle constitutes incompatible State aid⁽²³¹⁾. Generally, the Commission considers unlimited guarantees in a sector open to competition to be incompatible with the TFEU, in particular because such a guarantee causes the State to shoulder the liability for all the risks attaching to an economic activity without the beneficiary undertaking paying the cost of such cover, and gives rise to a situation of moral hazard which incites the beneficiary undertaking, protected from any threat of bankruptcy, to increase its risk-taking by comparison with a situation in which it would have to bear all the negative consequences of its actions. Under the principle of proportionality, such unlimited guarantees cannot usually be justified by the need to perform an economic task of general interest, because with an unlimited guarantee it is impossible to check whether the amount of aid exceeds the net costs of providing the public service⁽²³²⁾.

(275) In the present case, it should be pointed out that French legislation has assigned public service obligations to the publicly owned establishment IFP, consisting of a three-fold task of research, training and documentation; unlike services of general economic interest⁽²³³⁾, these obligations fall outside the scope of economic activities

within the meaning of Union law. The fact that non-economic activities may be covered by a public guarantee by reason of IFP's legal form, therefore, does not entail any granting of State aid. But the bulk of IFP's activity is of a non-economic nature. Consequently, the impact of the guarantee it enjoys by virtue of its legal form falls mainly on these non-economic activities, and affects the ancillary contract research and provision of services only in the second place.

(276) On the other hand, where the guarantee covers the economic activities of a research organisation, for example contract research or provision of services, without being priced on market terms, it confers State aid on the research organisation, which, as explained above, can be added to the public funding of its non-economic activities in the general interest (independent public research), or to the funding of its other economic activities of contract research and provision of services, or finally to the funding of technological transfer to Axens and Prosernat⁽²³⁴⁾.

(277) In the first two cases, however, although in the present case the State guarantee is a priori unlimited, it is possible, exceptionally, to make an a posteriori estimate, for the years 2006 to 2009, of an upper bound to the gross grant equivalent of the effects of the guarantee (the risk premium not paid to the State), which (provided that it has been retained by IFP) comes in addition to the public funds already paid by the State to IFP to cover the net costs of its independent public research and contract research activity or provision of services.

(278) In this respect, however, the Commission wishes to emphasise that the contract research and the provision of services covered by the State guarantee are confined to activities which are ancillary to the principal activity of independent public research, i.e. economic activities which:

(a) do not prejudice the normal operation, the independence or the neutrality of the research organisation;

(b) are performed on normal market terms, and in particular at a market price or, in the absence of a market price, at a price that reflects all the organisation's costs (net of the impact of the guarantee) plus a reasonable margin;

⁽²³¹⁾ The Commission refers in particular to point 4.1.b of the Guarantees Notice and to points 118 to 123 of the Community guidelines on State aid for railway undertakings (OJ C 184, 22.7.2008, p. 13) ('the Railway Guidelines').

⁽²³²⁾ See in particular point 120 of the Railway Guidelines, recital 127 of the EDF decision cited above, and recital 311 of decision C 56/2007.

⁽²³³⁾ Although the expression 'services of general economic interest' is not defined in the Treaty, 'there is broad agreement that the term refers to services of an economic nature which the Member States or the Community subject to specific public service obligations by virtue of a general interest criterion' (Commission, *Green Paper on Services of General Interest*, 21 May 2003, point 17, emphasis added).

⁽²³⁴⁾ The compatibility of such a use of the aid is analysed in section 7.3.2.

- (c) are the subject of accounting separate from that of the independent public research activities, especially as regards their respective costs and funding;
- (d) are intrinsically linked to the principal activity of independent public research, so that it is not technically possible to separate them, by reason in particular of the use of the same infrastructures, equipment, materials or technologies, or the use of the same researchers, scientists, engineers, designers or technicians.
- (279) These ancillary activities may consist in research, expert reports or technical or scientific consultancy, entailing where appropriate the provision of infrastructures, equipment, materials or technologies with high innovative content which are funded or introduced in the context of, and are necessary to, the independent public research work, which have few if any equivalents in the world ⁽²³⁵⁾ outside the services offered by one or more comparable research organisations, and the use of which requires the expertise and competency of researchers, scientists, engineers, designers or technicians who are employed mainly by the research organisation to contribute to its independent public research work.
- (280) These services also permit the dissemination of scientific knowledge between public research and the industrial sector, offering customer undertakings the possibility to access IFP's experimental resources, technologies and staff knowhow, and allowing IFP to accumulate feedback on the use made of its original work, which is a source of future improvements in its independent public research activities. These reciprocal impacts in the field of scientific knowledge are mutually beneficial for the various operators involved and for the European Union as a whole.
- (281) As indicated in recital 266, contract research and services activities represented only [0-5] (**) % of IFP's total budget over the period between 2004 and 2009, which is an extremely small proportion.
- (282) Moreover, for any one customer, the services invoiced are usually for an amount below EUR [...] (*) in turnover, which means that the estimated maximum amount of aid usually remains negligible, in the order of EUR [...] (*) per contract. Consequently, in the Commission's view, the aid at issue is proportionate to the objective in the general interest which is the dissemination of scientific knowledge in the European Union.
- (283) Provided that these ancillary activities continue to represent a very limited fraction of the budgets devoted by IFP to its principal task of independent public research, and taking account of the positive impact of these ancillary activities in terms of objectives in the common interest, the Commission is of the opinion that the fact that they are covered by the State guarantee cannot under any circumstances adversely affect trading conditions to an extent contrary to the interest of the Union within the meaning of Article 107(3)(c) TFEU.
- (284) In the annual reports relating to the measure at issue, it will be for the French authorities to provide proof that this condition is still being met. In case of doubt about the ancillary nature of contract research activities or provision of services, they should of course notify the Commission accordingly without delay, and where appropriate notify any State aid taking account of the impact of the State guarantee.
- (285) The Commission also takes note of the proposal of the French authorities to include a clause stating that the State bears no liability in any contract specifically falling within IFP's economic activity, and therefore its contract research activities and its provision of services, so as to allow a plea of accepted risk to be relied upon where appropriate, thus strictly limiting any negative repercussions of the guarantee.
- 7.3.2 AID TO THE IFP GROUP IN THE EXCLUSIVE FIELDS OF ACTIVITY OF AXENS AND PROSERNAT**
- 7.3.2.1 *Basis for the examination of the compatibility of the aid***
- (286) Since this is a State aid measure designed to support the R&D work carried out by IFP, the rules applicable to the examination of compatibility are those relating to State aid for research and development.
- (287) Because IFP's change of legal form took place on 7 July 2006, the date on which the State granted the unlimited guarantee in question is prior to 1 January 2007, when the R&D&I Framework entered into force. In accordance with the notice on the determination of the applicable rules for the assessment of unlawful State aid ⁽²³⁶⁾, therefore, the Commission will consider the compatibility of this non-notified measure on the basis of the 1996 R&D Framework, which was in force at the time the aid was granted.

⁽²³⁵⁾ In particular on account of their nature as 'prototypes' or 'pilot projects' within the meaning of point 2.2(g) of the R&D&I Framework, production of which would be too expensive to allow them to be used only for demonstration and validation by IFP's customers.

⁽²³⁶⁾ OJ C 119, 22.5.2002, p. 22.

(288) However, in view of the fact that IFP's economic activities are to be covered by the unlimited guarantee conferred by its EPIC status over an unlimited period of time, and in view of the fact that, as explained in recital 277, it is possible, exceptionally, to make a quantified estimate of the maximum impact of the guarantee in this particular case, the Commission will also make an assessment of whether the cover provided by the unlimited guarantee for IFP's activities in the exclusive fields of activity of Axens and Prosernat is compatible with the internal market on the basis of the R&D&I Framework, from 1 January 2007, the date on which the Framework entered into force. In any event, the conclusions of the analysis of compatibility remain the same whichever framework is applied.

7.3.2.2 *Research stages*

(289) In decision C 51/2005 ⁽²³⁷⁾, the Commission considered that the activities carried on by IFP in collaboration with its subsidiaries Axens and Prosernat in their exclusive fields of activity did fall under the heading of R&D, because in each project sticking points were identified in the component parts, their relationships or the characteristics of the target processes or products; the work was carried out prior to certification, by staff consisting mainly of research workers and technicians, using methods based on experimentation, interpretation and modelling; and the results were wide in scope and patented. The Commission also observed that activities of the same type carried on by other operators in the sector were usually classified as research activities ⁽²³⁸⁾. The analysis of the innovative aspects of the research activities carried out was performed on the basis of the internationally recognised standards of the Frascati Manual ⁽²³⁹⁾.

(290) With respect to the year 2006, in decision C 51/2005 the Commission examined the work carried out under the research agreements concluded between IFP and Axens, on the one hand, and IFP and Prosernat, on the other ⁽²⁴⁰⁾. The Commission came to the conclusion that within the meaning of the 1996 R&D Framework this work consisted in industrial research activities and technical feasibility studies preparatory to industrial research activities. Each research activity carried out by IFP and Axens on the one hand, and by IFP and Prosernat on the other, was classified on the basis of the specific examples and explanations provided by the Frascati Manual.

(291) Moreover, in the reports forwarded in accordance with decision C 51/2005, the French authorities have classified

the projects carried out in the exclusive fields of activity of Axens and Prosernat for the years 2007, 2008 and 2009 into the two abovementioned categories defined in the 1996 R&D Framework, or alternatively into industrial research activities within the meaning of point 2.2(f) of the 2006 R&D&I Framework and technical feasibility studies preparatory to industrial research within the meaning of point 5.2 of that Framework. The work consisted in studying new synthesis routes or the improvement of synthesis routes, on a scale far from the industrial level. It was aimed at validating concepts, and constituted industrial research within the meaning of the 1996 R&D framework and the R&D&I Framework. Annual summaries of each project were forwarded to the Commission with the annual reports communicated under decision C 51/2005.

(292) For the following years, the Commission points out that decision C 51/2005 requires France to submit a report to the Commission each year setting out the details of the projects carried out by IFP classified by category of research.

7.3.2.3 *Eligible costs*

(293) The costs of projects in the exclusive fields of Axens and Prosernat set out in decision C 51/2005 ⁽²⁴¹⁾ (for 2006) and in the annual reports (for the years 2007, 2008 and 2009) are in line with the eligible costs defined in Annex II to the 1996 R&D Framework and point 5.1.4 of the R&D&I Framework.

(294) The costs of research activities carried out by IFP invoiced to Axens and Prosernat include the costs directly chargeable to projects relating to sub-contracting, travel, insurance and documentation, and supplies and small equipment. They also include the other costs chargeable to projects such as expenditure on research personnel, the amortisation of fixed tangible and intangible assets and other overheads. These costs are incurred directly as a result of the research activities and are broken down between the different research projects in proportion to the time spent by the research personnel on each project. The costs of cross-cutting R&D projects relating to the methods and equipment used in other R&D projects are allocated in proportion to the costs of each R&D project.

(295) These costs fall into the following categories: costs of consultancy and equivalent services, personnel costs, costs of instruments, equipment, and land and premises, and additional overheads and other operating expenses, which are in line with the categories of eligible costs in the 1996 Framework and the R&D&I Framework.

⁽²³⁷⁾ See recitals 168 to 171 of the decision.

⁽²³⁸⁾ See in this connection SINTEF's website <http://www.sintef.no/default.aspx?id=490> (site consulted on 28 June 2011).

⁽²³⁹⁾ Organisation for Economic Cooperation and Development, *The Measurement of Scientific and Technological Activities: Proposed standard practice for surveys on research and experimental development*, 2002.

⁽²⁴⁰⁾ See recitals 168 to 171 of the decision.

⁽²⁴¹⁾ See recitals 168 to 171 of the decision.

- (296) In succeeding years this information too should be included in the annual reports submitted by the French authorities.

7.3.2.4 Intensity of the aid

- (297) According to the 1996 R&D Framework, the maximum permissible aid intensity is 75 % for technical feasibility studies preparatory to industrial research projects (point 5.4) and 50 % for industrial research projects (point 5.3).
- (298) According to the R&D&I Framework, the aid intensity, as calculated on the basis of the eligible costs of the project, may not exceed 50 % for industrial research (point 5.1.2(b)) and 65 % for studies preparatory to industrial research activities carried out in large undertakings (point 5.2(b)). To recap, the activities covered by the State guarantee relate only to industrial research and technical feasibility studies carried out by IFP, since precompetitive development activity within the meaning of the 1996 R&D Framework (or experimental development within the meaning of the R&D&I Framework) is financed entirely by Axens and Prosernat from their own resources out of income obtained on the markets.
- (299) The Commission has drawn up Table 6 appearing in recital 300 on the basis of the lists of projects detailing the annual costs by project and by research stage and on the basis of the statement of IFP's resources.
- (300) In performing this exercise, the Commission has followed a conservative approach by including all costs falling under the exclusive fields of activity of Axens and Prosernat, directly or indirectly, and excluding all proceeds other than those paid by Axens and Prosernat⁽²⁴²⁾. As a precaution, the Commission has also integrated into this table all the potential effects of the unlimited guarantee on the unlikely assumption that they would all be used by IFP to fund research activities in the exclusive fields of activity of Axens and Prosernat (effects of the guarantee in relations with suppliers and customers, whether subsidiaries or third parties).

Table 6

Maximum estimate of the total amount of public funding contributed by IFP to the activities carried out in the exclusive fields of activity of Axens and Prosernat between 2006 and 2009

(EUR million)

	2006	2007	2008	2009
Annual cost of technical feasibility studies (EUR million)				
Area of activity IFP/ Axens	[...] (*)	[...] (*)	[...] (*)	[...] (*)

⁽²⁴²⁾ Own resources consist of dividends, royalties and other proceeds such as the income from patents filed by IFP. In its examination the Commission has taken into account only remuneration paid by Axens and Prosernat.

(EUR million)

	2006	2007	2008	2009
Area of activity IFP/ Prosernat	[...] (*)	[...] (*)	[...] (*)	[...] (*)
Total	7,4	3,5	0,9	0,9

Annual cost of industrial research work (EUR million)

Area of activity IFP/ Axens	[...] (*)	[...] (*)	[...] (*)	[...] (*)
Area of activity IFP/ Prosernat	[...] (*)	[...] (*)	[...] (*)	[...] (*)
Total	49,0	45,5	52,8	55,2

Own resources (EUR million)

Amount	[...] (*)	[...] (*)	[...] (*)	[...] (*)
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Annual State aid (EUR million)

Amount of public funding ⁽¹⁾	11,3	6,4	7,7	11,1
Upper bound to the impact of the guarantee in dealings between IFP and its suppliers	[...] (*)	[...] (*)	[...] (*)	[...] (*)
Upper bound to the impact of the guarantee in dealings between IFP and its customers ⁽²⁾	[...] (*)	[...] (*)	[...] (*)	[...] (*)
— in the exclusive field of the subsidiaries	[...] (*)	[...] (*)	[...] (*)	[...] (*)
— outside the exclusive field of the subsidiaries	[...] (*)	[...] (*)	[...] (*)	[...] (*)
Maximum amount of public funding (including the upper bound to the impact of the guarantee)	13,1	9,8	11,3	14,7
Intensity of the aid (net of upper bound to the impact of the guarantee)	20,0 %	13,0 %	14,3 %	19,8 %
Upper bound to the intensity of the aid (including upper bound to the impact of the guarantee)	23,2 %	20,0 %	21,0 %	26,2 %
Maximum permissible intensity ⁽³⁾				
— 1996 R&D Framework	53 %	51,8 %	50,4 %	50,4 %
— R&D&I Framework	—	51,1 %	50,3 %	50,2 %

⁽¹⁾ Data from decision C 51/2005 for 2006 and the annual reports submitted by the French authorities for 2007 to 2009.

⁽²⁾ See the last two lines of Table 5 in recital 236.

⁽³⁾ Weighted average of the permissible aid intensities for industrial research and feasibility studies.

- (301) The Commission has checked on compliance with the permissible intensities by research stage on the basis of the annual lists of projects carried out between 2006 and 2009, taking account of the maximum possible impact of the unlimited guarantee deriving from IFP's status as a publicly owned establishment, and incorporating as an additional aid component the estimated upper bound to the insurance premiums for the various risks. In all cases, even incorporating all the possible effects of the guarantee in dealings with customers and suppliers, the upper bound to the intensity of the aid remains well within the maximum permissible. In conclusion, the Commission considers that the aid intensities permitted by the 1996 R&D Framework and the R&D&I Framework are complied with.
- (302) With regard to succeeding years, the Commission points out that decision C 51/2005 requires France to submit an annual report to the Commission so that the latter may satisfy itself that the aid intensities by research stage and by project are being complied with. From 2010, the report will have to cover all projects carried out in the fields of activity of Axens and Prosernat, classified according to research categories, stating not only their costs by research stage and the amounts of public financing and of own resources allocated by IFP and its subsidiaries, but also the upper bound to the amount of the guarantee premium, estimated according to the method described in this decision, including any effects on the terms of IFP's debt financing in line with the reasoning in recital 200.
- 7.3.2.5 Cumulation**
- (303) The rules on overlapping aid measures, whether in point 5.12 of the 1996 R&D Framework or in point 8 of the R&D&I Framework, are complied with. The Commission has considered the total amount of public funding, irrespective of its origin, including the maximum impact of the unlimited guarantee for the years 2006 to 2009.
- (304) From 2010, the French authorities are to apply the same method in the annual reports sent to the Commission.
- 7.3.2.6 Incentive effect**
- (305) The 1996 R&D Framework and the R&D&I Framework require that State aid have an incentive effect, i.e. result in the recipient changing its behaviour so that it increases its level of R&D (and innovation). The following criteria are generally sufficient to demonstrate the existence of an incentive effect for projects in receipt of aid below the thresholds for a detailed assessment: an increase in the size of the project, an increase in its scope, an increase in its speed and an increase in the total sum allocated to R&D&I. If a significant effect on at least one of these elements can be demonstrated, the Commission will normally conclude that the aid proposal has an incentive effect, taking account of the normal behaviour of an undertaking in the respective sector ⁽²⁴³⁾.
- (306) The Commission would refer to the analysis in recitals 196 to 198 of decision C 51/2005 concerning the strategic interest, monitored and validated by technical committees, of the research conducted by IFP and its subsidiaries in the field of the long-term security of energy supplies, with special reference to renewing and increasing production of oil and gas (increasing the success rate in exploration and deposit recovery rates, exploitation of unconventional resources, etc.), designing refining processes, developing conversion technologies, developing innovative fuels and efficient engine technologies, and diversifying the energy sources used in fuel production; a large number of these objectives are among the European Union's priorities for research, energy policy and environmental policy.
- (307) With regard to the year 2006, the Commission reiterates the analysis it presented in recital 199 of decision C 51/2005, according to which, thanks to State support, of which the unlimited guarantee forms an integral part, IFP and its subsidiaries were able to conduct additional research activities which would not have been pursued otherwise, owing to the technological risk or the highly uncertain return on investment.
- (308) On the basis of the annual reports submitted by the French authorities, the Commission finds that this approach continued in 2007, 2008 and 2009. In these reports, the French authorities indicate, for each project, the incentive effect obtained as a result of the aid, notably in terms of scope of the project, its speed and the increase in the total amount allocated to R&D.
- (309) For example, in 2007, in the exclusive field of Axens, the IFP group conducted flagship projects, [...] (*) ⁽²⁴⁴⁾. [...] (*). Without State aid, a lag of several years would have occurred before these products were placed on the market: the R&D projects would have been launched later, they would have developed more slowly, and [...] (*).
- (310) In the exclusive field of Prosernat, State aid enabled the launch of the project [...] (*) on [...] (*), the finalisation and patenting of original processes of [...] (*) ⁽²⁴⁵⁾. [...] (*). [Such a project] (**) entailed delicate, difficult operations requiring substantial human, technical and financial investments that a company like Prosernat could not achieve alone. Consequently, the State support provided by the publicly owned establishment IFP proved essential. In particular, only IFP had specialised teams available with the capacity to devise the models necessary to develop the process and laboratory equipment adapted to handling components which are harmful to health.

⁽²⁴³⁾ See point 6 of the R&D&I Framework.

⁽²⁴⁴⁾ [...] (*).

⁽²⁴⁵⁾ [...] (*).

- (311) In 2008, in the exclusive field of Axens, the State aid enabled removal of the scientific and technical barriers in [...] (*). Moreover, the project [...] (*)⁽²⁴⁶⁾ also underwent major developments. The State aid enabled the publicly owned establishment IFP to develop, in association with industrial partners, a process [...] (*), which will be accessible to the market via licensing. The development work for a process of this type involves both [...] (*), and [...] (*).
- (312) In the exclusive field of Prosernat, a project [...] (*) relating to the capture of CO₂ in fumes was implemented. The capture/storage of CO₂ (CSC) is one of the means identified to reduce global warming⁽²⁴⁷⁾. In view of the constituents of the fumes and their low pressure, IFP had to take up new technological challenges. Prosernat would not have been able to develop this process from its own resources, in view of the uncertainty surrounding the structure, magnitude, deployment and regulatory framework of the future market for capture of CO₂.
- (313) In 2009, in the exclusive field of Axens, the project [...] (*) on the processes [...] (*) can be mentioned as an example. Its aim was to develop [...] (*) and to improve certain processes [...] (*). Thanks to the public funding, [...] (*) could be studied, which allowed a significant improvement to the [...] (*). The project [...] (*) was able, thanks to the public financing, to explore solutions breaking with the existing technologies, [...] (*). Likewise, the project [...] (*) was continued on catalysts which, after extrapolation, allowed diversification of the supply on the growth market [...] (*). Without the State aid, the development of the catalysts would have been far more sequential and the improvement in performances slower. As regards [...] (*), the project [...] (*), which related to innovative catalysts [...] (*) allowed new pathways to be explored thanks to the State aid, whilst the project [...] (*), which aimed to explore the limits of the technology (variation in loads in particular) in order to [...] (*), succeeded in enlarging its spectrum beyond the existing performances.
- (314) In the exclusive field of Prosernat, the State aid permitted, for example, the relaunch and continuation of R&D work with respect to [...] (*) which had been undertaken but gradually sidelined. The State support also meant that it was possible to avoid losing the earlier technological achievements and to maintain a range of processes [...] (*) on the market. Likewise, the public aid allowed the continuation of the project [...] (*) on the capture of CO₂ [...] (*).
- (315) The Commission also takes note of the continuation between 2007 and 2009 of the positive trend in indicators of the R&D efforts of IFP and its subsidiaries Axens and Prosernat which it noted in recital 200 of decision C 51/2005.

Table 7

Progression of the indicators measuring the effort of IFP and its subsidiaries Axens and Prosernat in 2007, 2008 and 2009

Progression of the indicators	IFP/Axens			IFP/Prosernat		
	2007/2003	2008/2003	2009/2003	2007/2003	2008/2003	2009/2003
Expenditure allocated to R&D in the exclusive field	[...] (*)	[...] (*)	[...] (*)	[...] (*)	[...] (*)	[...] (*)
Staff allocated to R&D in the exclusive field	[...] (*)	[...] (*)	[...] (*)	[...] (*)	[...] (*)	[...] (*)

- (316) In addition, the Commission reiterates the findings it summarised in recitals 201 to 203 of decision C 51/2005: the proportion of the IFP groups' turnover accounted for by R&D expenditure is particularly high, even though it works in a context subject to a large number of constantly evolving national regulations, especially with regard to environmental standards and intellectual property protection regimes.

- (317) As in recital 204 of decision C 51/2005, the Commission notes the diversity and structure of supply

and the functioning of competition on the refining and petrochemicals market⁽²⁴⁸⁾. Certain competitors enjoy a far more comfortable competitive position than that of the IFP group: UOP, for example, possesses a world market share in the order of 57 % in terms of value, compared to only 7 % for the IFP group. The Commission therefore considers that the State aid granted to the R&D projects conducted by the IFP group is not, by its nature or proportions, such as to impair the dynamic incentives of the refining technologies market. Moreover, it is clear that trading

⁽²⁴⁶⁾ This process [...] (*) allows [...] (*). This is a key component of the chains [...] (*) which are intended to [...] (*). The chain [...] (*) also offers the advantage of [...] (*).

⁽²⁴⁷⁾ Post-combustion capture is one of the processes that can prevent the discharge of CO₂ into the atmosphere on combustion of a hydrocarbon or carbon.

⁽²⁴⁸⁾ The Commission notes in particular that price competition is not the main argument for differentiation between the offers available on the market, since customers select a technology on the basis of various criteria, some of which, such as the installation cost involved and the profitability of the investment, are considered to be critical, but are totally exogenous to the research projects.

partners of the European Union, and especially the United States, devote large budgets to financing research into energy which have allowed support to be given to the R&D projects carried out by the IFP group's competitors. For instance, certain competitors of the IFP group, and in particular UOP, enjoy substantial State support⁽²⁴⁹⁾ or have benefited from indirect State support through partnerships with research institutes and universities.

(318) In conclusion, the Commission considers that the State aid for the IFP group in the exclusive field of its subsidiaries Axens and Prosernat had an incentive effect in 2006, 2007, 2008 and 2009.

(319) From 2010, the annual reports that are to be submitted by France to the Commission, until the exclusive agreements between the publicly owned establishment IFP and its subsidiaries Axens and Prosernat expire, will have to show that the aid still has an incentive effect.

(320) In the light of all the above considerations, the Commission concludes that the State aid granted to the IFP group for activities in the exclusive fields of its subsidiaries Axens and Prosernat, including the aid component deriving from the effects of the unlimited guarantee enjoyed by the publicly owned establishment IFP, is in keeping with the provisions of the 1996 R&D Framework and those of the R&D&I Framework, subject to compliance with the conditions set forth therein.

7.3.3 CONCLUSION ON THE COMPATIBILITY OF THE MEASURE

(321) In conclusion, the Commission considers that the measure at issue is compatible with the internal market, subject to compliance with the conditions set forth in sections 7.3.1 and 7.3.2.

8 NEUTRALITY WITH REGARD TO THE RULES GOVERNING THE SYSTEM OF PROPERTY OWNERSHIP

(322) The Commission wishes to emphasise that it is in no way disputing the State's ownership of IFP, nor is it challenging its status as a legal entity governed by public law as such.

(323) Under Article 345 TFEU the Union is neutral with regard to the rules governing the system of property ownership in the Member States, and no provision of the Treaty prevents a State from owning enterprises (whether wholly or partly). That being so, the rules of competition

must be applied equally to private and public enterprises. Neither of these two types of enterprise may be placed at an advantage or disadvantage by the application of those rules.

(324) In the present case, the guarantee enjoyed by the publicly owned establishment IFP stems not from the ownership of the enterprise but from its legal form. The Member States are free to choose the legal form of enterprises, but they must, when making their choice, comply with the competition rules of the Treaty. In particular, the mere fact that a State guarantee automatically derives from a particular legal form does not prevent the guarantee from constituting State aid within the meaning of Article 107(1) TFEU if the necessary conditions are met⁽²⁵⁰⁾.

HAS ADOPTED THIS DECISION:

Article 1

1. The status of publicly owned industrial and commercial establishment granted by France to IFP conferred on IFP, from 7 July 2006 onward, an unlimited public guarantee ('the State guarantee') covering the totality of its activities.

2. The cover provided by the State guarantee for the non-economic activities of the publicly owned establishment IFP, in particular its training activities with a view to increased, better qualified human resources, its independent R&D activities with a view to more extensive knowledge and better understanding, and its activities for the dissemination of research results, does not constitute State aid within the meaning of Article 107(1) TFEU.

3. The cover provided by the State guarantee for the technology transfer activities carried out by the publicly owned establishment IFP in the fields provided for by the exclusive development, marketing and use agreement concluded with its subsidiary Beicip-Franlab does not constitute State aid within the meaning of Article 107(1) TFEU.

4. The cover provided by the State guarantee for the technology transfer activities carried out by the publicly owned establishment IFP in the fields provided for by the exclusive agreements concluded with its subsidiaries Axens and Prosernat referred to in Article 3(1) of the Commission decision of 16 July 2008 on the aid measure implemented by France for the IFP group ('decision C 51/2005') constitutes State aid within the meaning of Article 107(1) TFEU.

⁽²⁴⁹⁾ The Commission refers to recital 204 of decision C 51/2005.

⁽²⁵⁰⁾ See in particular point 1.5 of the Guarantees Notice, which confirms the principle of neutrality, and point 1.2, which explains that a State guarantee may result from the simple fact of the legal form (second and fourth indents of that point).

5. The cover provided by the State guarantee for the contract research and other services performed by the publicly owned establishment IFP, on behalf of both third parties and the subsidiaries, constitutes State aid within the meaning of Article 107(1) TFEU.

Article 2

In the event of any amendment of the agreement between the publicly owned establishment IFP and its subsidiary Beicip-Franlab referred to in Article 1(3), France shall notify the agreement to the Commission, taking account of any impact of the State guarantee in order to assess the total amount of any public funding, unless the new contractual terms allow the presence of State aid to be ruled out.

Article 3

In the period between 7 July 2006 and 31 December 2009, the cover provided by the State guarantee for the economic activities referred to in Article 1(4) and (5) constituted aid compatible with the internal market.

Article 4

From 1 January 2010 onward, and until the date of expiry of the exclusive agreements between the publicly owned establishment IFP and its subsidiaries Axens and Prosernat referred to in Article 3(1) of decision C 51/2005, the cover provided by the State guarantee for the economic activities referred to in Article 1(4) of this decision constitutes aid compatible with the internal market, subject to compliance with the conditions in Articles 5 and 6 of this decision.

Article 5

1. The annual financial report referred to in Article 4(2) of decision C 51/2005 shall include, in addition to the information already mentioned in Article 5(1) of that decision, the information listed in paragraphs 2, 3 and 4 of this Article.

2. The annual financial report shall include the value, interest rate and contractual terms of the loans subscribed to by the publicly owned establishment IFP during the year under review, and an estimate of the gross grant equivalent of any interest rate subsidy deriving from the State guarantee, unless proof is supplied that these loan contracts are in accordance with normal market conditions, either by comparing their terms with those obtained by the publicly owned establishment IFP before its change of legal form, or on the basis of a more precise methodology approved in advance by the Commission.

3. The annual financial report shall include the value of goods and services obtained by the publicly owned establishment IFP from suppliers to carry out the economic activities referred to in Article 1(4) and (5), during the year under review,

and a maximum estimate of the gross grant equivalent of the aid resulting from a more favourable assessment by suppliers of the risk of default of the establishment. This estimate shall be made either by applying a flat rate of 2,5 % to the value of acquisitions made, or on the basis of a more precise methodology approved in advance by the Commission.

4. The annual financial report shall include the value of the economic activities referred to in Article 1(4) and (5) carried out by the publicly owned establishment IFP during the year under review, and a maximum estimate of the gross grant equivalent of the aid resulting from the lack of payment of a premium corresponding to a performance bond or, at the very least a best efforts guarantee, offered to the beneficiaries of the above-mentioned economic services. This estimate shall be made either by applying a flat rate of 5 % to the value of the services provided or on the basis of a more precise methodology approved in advance by the Commission.

Article 6

1. The total amount of public funding allocated to the activities of the publicly owned establishment IFP in the exclusive fields of activity of Axens and Prosernat, including the maximum impact of the State guarantee as estimated in Article 5(2), (3) and (4), must be lower than the maximum intensity permitted by the Community framework for State aid for research and development and innovation.

2. If the threshold referred to in paragraph 1 is exceeded, the surplus aid shall, where appropriate, be refunded by the subsidiary concerned, Axens or Prosernat, to the publicly owned establishment IFP.

Article 7

From 1 January 2010, the cover provided by the State guarantee for the economic activities referred to in Article 1(5) constitutes State aid which is compatible with the internal market, subject to compliance with the conditions in Article 8.

Article 8

1. The contract research activities and the provision of services carried out by the publicly owned establishment IFP referred to in Article 1(5) shall remain ancillary to its principal activity of independent public research.

2. To be considered ancillary, the contract research activities and the provision of services by the publicly owned establishment IFP must:

— not prejudice the normal functioning, independence and neutrality of the publicly owned establishment IFP;

- be charged for at a market price, or in the absence of a market price, at a price which reflects the totality of the costs, plus a reasonable margin, net of the potential impact of the State guarantee;
- be the subject of accounting separate from that of the independent public research activities (accounting separation of their respective costs and funding), and the profits they generate must be reinvested in full in the principal activity of independent public research;
- be intrinsically linked to the principal activity of independent public research of the publicly owned establishment IFP by reason in particular of the use of the same infrastructures, equipment, materials or technologies, or the use of the same researchers, scientists, engineers, designers or technicians;
- be outside the scope of the exclusive agreements concluded between the publicly owned establishment IFP and its subsidiaries Axens and Prosernat referred to in Article 3(1) of decision C 51/2005, where appropriate extended or amended in accordance with Article 3(2) of decision C 51/2005 and Article 12(2) of the present decision;
- represent only a residual proportion of the budget devoted by the publicly owned establishment IFP to its independent public research activities.

3. France shall submit each year to the Commission a report on the contract research activities and provision of services carried out by the publicly owned establishment IFP which specifies the ratio of their value to the budget devoted by the publicly owned establishment IFP to its independent public research activities.

Article 9

1. The French authorities and the publicly owned establishment IFP shall include the following written statement in the financing contract for each transaction (for all instruments covered by a contract):

'The issue/programme/loan does not enjoy any form of direct or indirect State guarantee. In the event of insolvency, the State would not be obliged to act as financial substitute for the publicly owned establishment IFP for payment of the claim.'

2. The French authorities shall have a similar clause, ruling out State liability, included in any contract relating to contract research services or other services referred to in Article 1(5).

3. The French authorities shall have a similar clause, ruling out liability of the publicly owned establishment IFP and the State, included in any contract involving a claim concluded by the public limited companies Axens, Beicip-Franlab and Prosernat.

4. The publicly owned establishment IFP shall refrain from issuing any form of suretyship, endorsement, guarantee, or letter of intent or comfort in favour of the public limited companies Axens, Beicip-Franlab and Prosernat which does not comply with normal market terms.

Article 10

France shall notify individually to the Commission any aid of an amount in excess of the thresholds laid down in the Community framework for State aid for research and development and innovation, taking account of any impact of the State guarantee.

Article 11

France shall inform the Commission, within two months from the date of notification of this decision, of the measures it has taken to comply herewith.

Article 12

1. Articles 4, 5 and 6 of the present decision shall apply until the date of expiry of the exclusive agreements referred to in Article 3(1) of decision C 51/2005 between the publicly owned establishment IFP and its subsidiaries Axens and Prosernat.

2. Where they notify the Commission of an extension of, or amendment to, the above-mentioned exclusive agreements, in accordance with Article 3(2) of decision C 51/2005, the French authorities shall take account of the impact of the State guarantee in order to assess the total amount of public funding.

Article 13

This decision is addressed to the French Republic.

Done at Brussels, 29 June 2011.

For the Commission
Joaquín ALMUNIA
Vice-President

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