

II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

DECISIONS

COMMISSION

COMMISSION DECISION

of 11 December 2007

on the aid No C 7/06 (ex NN 83/05) implemented by Finland for *Tieliikelaitos/Destia*

(notified under document number C(2007) 6073)

(Only the Finnish and the Swedish version is authentic)

(Text with EEA relevance)

(2008/765/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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

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

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

Whereas:

1. **PROCEDURE**

(1) On 22 February 2006, the Commission took a decision to open the formal investigation procedure (C(2006) 461 final) following several complaints by two Finnish industry associations, alleging that the Finnish authorities, during the process of divesting *Tieliikelaitos* from the Finnish national administration as a State enterprise, had violated a number of EC Treaty provisions, including those on State aids.

(2) In a letter dated 23 February 2006, the Commission informed Finland of its decision to initiate the procedure, giving the Finnish authorities the opportunity to present their observations within a period of one month.

(3) In a letter dated 3 May 2006, the Commission transmitted a copy of the decision to initiate the procedure to the complainants, giving them the opportunity to provide comments on the decision within a period of one month.

(4) The Commission received Finland's response to the Commission's decision to initiate the procedure with letter of 31 May 2006, after having twice prolonged the time period for submitting the reply.

(5) In a letter dated 22 June 2006, the complainants transmitted their comments on the Commission's decision to initiate the procedure.

(6) The Commission transmitted these comments by letter of 6 July 2006 to the Finnish authorities, giving them an opportunity to respond within a period of one month.

(7) The Commission received Finland's response to the complainants' comments by letter of 27 September 2006.

(8) Following the meeting of 7 September 2006 between the Finnish authorities and the Commission, additional information was submitted by the Finnish authorities on 6 February 2007.

(9) On 20 April 2007 the Commission sent to the Finnish authorities a letter requesting further clarifications. The response of the Finnish authorities was received on 22 May 2007.

⁽¹⁾ OJ C 274, 10.11.2006, p. 2.

- (10) In its letters dating from 4 July and 27 July 2007 the Commission asked the Finnish authorities to provide the outstanding information that was necessary for the adoption of the final decision. The replies were received on 10 August and 29 August 2007, respectively.

2. FACTS

2.1. The beneficiary

- (11) *Tieliikelaitos* is a Finnish State Enterprise, which is active in, on the one hand, road design, road construction and road maintenance, and, on the other hand, ferry services. Although since 14 February 2007 the undertaking's name has been changed to *Destia*, for reasons of continuity the Commission will use throughout the text of the present decision the entity's initial name, i.e. *Tieliikelaitos*.
- (12) Under Finnish administrative law, a State Enterprise is a State-owned entity that is not incorporated and that carries out business activities. State Enterprises are governed by the provisions of the State Enterprise Act ⁽²⁾. The status of a State Enterprise is a hybrid status between an administrative agency and a State-owned company. A State Enterprise operates in accordance with business principles, however, Parliament, the Government and the relevant Ministries have decision-making and steering powers over it.
- (13) Although its annual turnover figure has been decreasing over the last 6 years (15 % decrease), with the annual turnover of EUR 474,1 million in 2006, *Tieliikelaitos* remains an important market player in the infrastructure sector of the Finnish civil engineering market.
- (14) The most important components of its turnover are construction services (47 %), maintenance services (31 %), surfacing and mineral aggregates services (asphalt works, road marking services, mineral aggregates production — 11 %). *Tieliikelaitos* provides services to the Finnish Road Administration (68 % of *Tieliikelaitos*' turnover), commercial enterprises (15 %), municipalities and cities (13 %), other government agencies (2 %), etc.
- (15) *Tieliikelaitos*' 2006 operating profit amounted to EUR 10,6 million. Its average number of employees stood at 2 469 in 2006.
- (17) The Road Service was a State agency, which was responsible for managing and maintaining public roads and developing road traffic conditions and related service activities. Under Finnish administrative law, a State agency is a department of the national administration, which does not have legal personality on its own, but which is part of the State.
- (18) In the pre-liberalisation period, the services of private consultants, developers and maintenance companies were used only to the extent that the 'road production' part ⁽³⁾ of the Road Service could not provide the service. In particular, in the sector of regular road maintenance ⁽⁴⁾, which mostly consists of keeping roads free from ice, there were practically no private contractors before the start of the liberalisation process: they had got only two tiny projects when preliminary/test tendering took place in late 1990's.
- (19) In March 2000, the Finnish authorities decided that the Road Service's production activities would be divested as a State Enterprise and change its name to *Tieliikelaitos* while the Road Administration would function as the customer agency in road maintenance. This was done in order to split the roles of the customer for buying maintenance and construction services and of the provider of these services.
- (20) Finland opted for a gradual opening of the market. In this context, the task of the Road Administration was to create opportunities for the emergence of active markets, for example, by bringing in new competitive tendering procedures.
- (21) As a result of the reform, the design, the construction and the maintenance of State roads were fully opened up to competition by the end of 2004. As to municipal roads, in line with the principle of subsidiarity, the choice is left to individual municipalities as to whether they use their in-house production capacities or not. However if they choose to outsource respective services, they should do so using open tender procedures.
- (22) As far as ferry services are concerned, the opening of the market for competition will take place in 2010.

2.3. Rules governing *Tieliikelaitos*, including special arrangements for the transitional period 2001 to 2004

- (23) During a transition period from 2001 to 2004, pursuant to the Act governing *Tieliikelaitos* ⁽⁵⁾ and the Government decree on *Tieliikelaitos* ⁽⁶⁾, *Tieliikelaitos*:
- could not operate as a provider of mineral aggregates and could use such aggregates only to cover roads;
- (16) Until the end of 2000, the maintenance of the Finnish network of State roads was carried out mainly by the Finnish Road Service. The Road Service also partially carried out the design and the construction of new State roads. In this context it has to be mentioned that in Finland there are 78 000 km of State roads, 26 000 km of municipal streets and 350 000 km of private (low grade) 'forest' roads.

⁽²⁾ Act 1185/2002 adopted on 20 December 2002.

⁽³⁾ The Road Service was divided internally into two parts: the Road administration and the Road Production, the latter one taking care of road design, construction and maintenance.

⁽⁴⁾ The service which today is tendered out through 84 regional contracts covering the whole of Finland

⁽⁵⁾ Act 569/2000 adopted on 16 June 2000 (amended by Act 1081/2003 adopted on 15 December 2003).

⁽⁶⁾ Decree 660/2000 adopted on 29 June 2000.

had to abstain from inland water work, rock cavern construction, energy network construction, ground-work, area work in building construction, and work which is not related to traffic lanes and the traffic environment, including demolition work;

- was under obligation not to create overcapacity in its own sector; did not have the right to buy excavating machines, crushing plants or to increase the number of other equipment.,

- (24) Furthermore, during the transition period, the personnel transferred to *Tieliikelaitos* were given job security: the Parliament's decision on the Road Service reform ⁽⁷⁾ stipulated that *Tieliikelaitos* would not give notice to its staff, lay staff off or impose forced job transfers during the transition period.
- (25) A number of other restrictions were imposed on *Tieliikelaitos* which apply to it on a permanent basis.
- (26) Firstly, in accordance with the Act governing *Tieliikelaitos*, the undertaking is under permanent obligation to make offers for all road maintenance contracts and provision of ferry traffic throughout the country.
- (27) Secondly, the company must be prepared to provide its services in emergency situations. The Road Administration and *Tieliikelaitos* are under the obligation to make preparations for emergency situations in accordance with a separate act on the matter, the Emergency Powers Act ⁽⁸⁾. The preparations would be made by means of prior planning, prior preparations for activities in emergency conditions, and other measures. Based on a government's bill ⁽⁹⁾, the Ministry of Transport and Communications decides separately about the level of preparedness necessary, and the division of responsibilities between the Road Administration and *Tieliikelaitos*. Furthermore, during the transitional period *Tieliikelaitos* was obliged to maintain emergency stockpiles of liquid fuels.
- (28) Finally, as any other State Enterprise, *Tieliikelaitos* is required to concentrate on its key functions. In particular, it is subject to restrictions as to the activities that can be carried out by its subsidiaries and as to its ability to operate abroad, as well as a ban on certain intra-group financial transactions.

2.4. Description of the relevant measures

2.4.1. State loan

- (29) At its general session of 21 December 2000, the Finnish Government decided on the asset structure of the balance sheet of *Tieliikelaitos*, which started up activities at the beginning of 2001. Part of the assets transferred to

Tieliikelaitos' control was entered as a long-term loan and part as equity capital.

- (30) *Tieliikelaitos* was thus granted by the State long-term borrowed capital in the amount of EUR 41,44 million. The repayment period of the loan is 15 years (1 January 2001 to 1 January 2015), of which the first three years were free from principal payments. It was also decided that the interest rate would gradually rise to 5 %, so that in 2001 it would be 1 %, in 2002 1,5 %, in 2003 2,5 %, in 2004 3,5 %, and from 2005 onwards, 5 %.

2.4.2. Non-financial assets put at the disposal of *Tieliikelaitos*, including land and gravel sites

- (31) When the split-up of the Road Services into the Road Administration and *Tieliikelaitos* was decided, the principle for the division of the Road Service's property was that assets covered by road legislation, i.e. mainly the roads themselves, remained in the control of the Road Administration, whereas assets used in the course of road maintenance and ferries were entered into the books of *Tieliikelaitos*.
- (32) The transfer of equipment took place at book value, which was based on the acquisition cost less any accumulated depreciation. Also extracted gravel resources were entered into *Tieliikelaitos*' balance sheet at book value.
- (33) The book value of land and gravel sites was raised, because the Finnish government considered that it was below the real value of the sites. For this purpose the Finnish Ministry of Transport and Communications established a working group ⁽¹⁰⁾ which had to make proposals about the resources sites remaining with the Road Administration and those being transferred to *Tieliikelaitos* and about the fair market value of these sites. It did not, however, reach consensus on the value of land sites.
- (34) The Ministry of Transport and Communications decided on the valuation of the land and gravel sites itself after having asked for advice of an independent consultant, Catella Real Estate Consulting Ltd (hereinafter referred to as 'Catella').

2.4.3. Negotiated contracts for road services

- (35) The transition arrangements for the Road Service reform foresaw that for the years 2001 to 2004, only a part of the contracts for road planning, road construction and road maintenance on State roads would be contracted out through a call for tenders by the Road Administration, but that this part would gradually increase. The remaining contracts would be concluded between *Tieliikelaitos* and the Road Administration as negotiated contracts without tendering procedure.

⁽⁷⁾ EV 84/2000 vp.

⁽⁸⁾ Act 1080/1991 adopted on 22 July 1991.

⁽⁹⁾ Government bill 25/2000 whereby proposals for the Act governing *Tieliikelaitos* and the Act governing the Road administration were submitted to the Parliament.

⁽¹⁰⁾ The Working Group included representatives of the Road Administration, private earthworks contractors, the Competition Authority and the Competition council.

(36) The starting point of pricing applied to negotiated contracts was the price level of contracts which had been awarded in a call for tenders. The Road Administration accordingly examined the price bids of *Tieliikelaitos* for the negotiated contracts and compared them with the competitive tender prices. During the following negotiation between *Tieliikelaitos* and the Road Administration, account was taken of the fact that *Tieliikelaitos* had excess staff, which had the effect of increasing its costs. The cost differential that was factored into other staff adjustment measures (notably special services projects) was however not compensated through negotiated contracts.

(37) During the transitional period, the Road Administration and *Tieliikelaitos* agreed each year on the expenditure adjustment procedure, by which the differences in margin generated in contract pricing between negotiated contracts and contracts put out to tender were subsequently levelled out to a certain extent. The extent to which it was done is analysed in the subsequent Chapters — Chapters 4, 5 and 6 (even after the adjustments there were still certain differences in margins of negotiated and tendered contracts). These arrangements helped to bring the project margins of negotiated contracts and contracts put out to tender closer together during the transition period.

2.4.4. Negotiated contracts for ferry services

(38) In Finland, ferry services are provided as part of the public road service at 43 ferry berths. The ferry berths are concentrated in the Turku archipelago and inland water areas in Eastern Finland.

(39) In conjunction with the road administration reform, it was decided that ferry traffic provided as part of public road service would be gradually opened to competition starting in 2005, and that as of 2010 all new contracts for ferry services would be attributed through calls for tenders.

(40) The 2005 call for expression of interest concerning 3 of a total of 10 contracts for ferry traffic did not bring about satisfactory results in that it would result in higher expenses for the Road Administration on the one hand⁽¹¹⁾ and reinforcement of *Tieliikelaitos'* market position on the other hand. Therefore, for the time being, the Road Administration continues with the negotiated contracts with *Tieliikelaitos* while looking for another procurement model to be used for future rounds of competitive bidding.

2.4.5. Special provisions for the reduction of overstaffing

(41) When *Tieliikelaitos* was created, all road maintenance staff of the Road Service were transferred into *Tieliikelaitos*. This led

⁽¹¹⁾ Given the way the formation of a negotiated price takes place, for the time being it is lower than the market price would have been (the agreement price for the previous year is taken as a starting point for determining negotiated price; thereafter it is adjusted taking into account changes in the cost level and the content and quality of the service).

to significant overstaffing at *Tieliikelaitos*. This fact is not contested by the complainants, who recognise in their June 2006 submission that '*Tieliikelaitos* had a structural disadvantage because it was obliged to employ its entire staff and could not lay off anyone'. Three types of measures were taken during the transition period in order to deal with this issue.

(42) Firstly, 116 employees were offered and used a possibility to fill vacant positions in other government agencies (9 thereof were positions in the Road administration).

(43) Secondly, EUR 20,1 million were allocated to support *Tieliikelaitos'* personnel adjustments, namely, to help employees with finding new jobs, to finance supplementary education and retraining measures and to support pensions for early retirement.

(44) Thirdly, individuals for whom there was no work available on the basis of either contracts awarded to *Tieliikelaitos* in a call for tenders, or on negotiated contracts between *Tieliikelaitos* and the Road Administration, and who could not yet benefit from early retirement or similar arrangements, were employed in service projects commissioned by the Road Administration. These projects related, for example, to the cleaning of roadsides, or to the restoration of buildings and outdoor areas. In total, the Road administration paid EUR 68 million for financing these service projects. On average, the service projects have been used to purchase 600-700 man-years of annual work over 2001-2004.

(45) During the transitional period, the staff of *Tieliikelaitos* decreased, from 4 235 employees in 2001 to 3 037 employees in 2004.

2.4.6. Inapplicability of bankruptcy legislation

(46) State Enterprises are not independent legal persons and the State is therefore ultimately responsible for a State Enterprise's commitments, as provided for in Article 6 of the State Enterprise Act.

(47) In view of the State's responsibility, pursuant to Article 3 of Chapter 1 of the Bankruptcy Act, State Enterprises cannot be declared bankrupt.

(48) To counter-balance the advantages related to the inapplicability of bankruptcy legislation, the Finnish legislation foresees that a fee shall be payable to the State with respect to the loans raised and guarantees granted by a State Enterprise after 1 January 2003⁽¹²⁾.

⁽¹²⁾ Section 5 of the State Enterprise Act — Act 1185/2002 adopted on 20 December 2002.

(49) According to section 15 of the Act governing State lending and the provision of State guarantees ⁽¹³⁾ in determining the size of such a guarantee fee, it is necessary to take into account the size of possible obligatory payments by the State caused by the guarantee, the nature and extent of the operations of the risk subject and its economy, the risk subject's creditworthiness, the creditworthiness of the national economy of the risk subject, and other matters and competitive conditions which affect the risk covered.

(50) With respect to long-term credits, the Government decree on fees collected from state guarantees ⁽¹⁴⁾ stipulates the lump sum to be collected at the level of 0,25 % of the credit (a handling fee). If the risk of loss related to the guarantee is exceptionally high, the lump sum collected is increased by 1,50 percentage points. Besides, the annual fee is levied at the level of 0,35 % of the credit. Upon occurrence of significant changes in market conditions, the level of the annual fee is to be adjusted within 12 months at the latest.

(51) With respect to short-term credits, the annual fee is set at half the annual fee for a long-term credit by the above-mentioned Act governing State lending and the provision of State guarantees.

2.4.7. Particularities of treatment for corporate income tax purposes

(52) The treatment of State Enterprises with regard to corporate income tax is laid down in the Income Tax Act ⁽¹⁵⁾. In line with the principles laid down in section 21(3) of the Act, State Enterprises which mainly operate to satisfy the needs of other State institutions are not liable to pay the tax.

(53) During the transitional period, most of *Tieliikelaitos'* turnover was generated from contracts to another State institution (the Road Administration), and due to this, no taxes have been levied on the income received from this activity.

(54) Furthermore, until July 2004, whenever *Tieliikelaitos* purchased land sites, the sellers were largely relieved of tax on the respective capital gains according to Section 49 of the Income Tax Act ⁽¹⁶⁾. In July 2004, this measure was removed from the Income Tax Act.

3. THE COMMISSION'S DOUBTS

(55) In its decision to initiate the procedure, the Commission raised doubts:

- as to the question of whether the special provisions for staff transfer between *Tieliikelaitos* and government agencies and the special projects for redundant, but

not laid-off workers conferred an advantage to *Tieliikelaitos*,

- as to the question whether the transfer of land and gravel sites from the Finnish State to *Tieliikelaitos* took place at market value,

- as to the exact monetary value of the advantages the Finnish government has granted *Tieliikelaitos*,

- as to the compatibility of the interest-reduced loan, the negotiated contracts and (potentially) the special projects for redundant, but not laid-off workers and the transfer of land and gravel sites with the Common market based on Article 86(2) of EC Treaty, and here especially as to the presence of a public service obligation and as to the absence of over-compensation,

- as to the compatibility of the interest-reduced loan, the negotiated contracts and (potentially) the special projects for redundant, but not laid-off workers and the transfer of land and gravel sites with the Common market based on Article 87(3)(c) of EC Treaty, and here especially as to the proportionality of the measures and as to the question whether the positive effects of the aid outweigh the negative effects on competition,

- as to the compatibility of the special tax provisions and the absence of the application of the bankruptcy law with the Common market based on Article 87(3)(c) of EC Treaty.

4. COMMENTS FROM INTERESTED PARTIES — COMMENTS JOINTLY SUBMITTED BY THE CONFEDERATION OF FINNISH CONSTRUCTION INDUSTRIES RT AND THE CENTRAL ASSOCIATION OF EARTH MOVING CONTRACTORS IN FINLAND

4.1. State loan

(56) The complainants consider that the interest rate set for the State loan granted to *Tieliikelaitos* is clearly below the market rate, and that the corresponding monetary advantage received by *Tieliikelaitos* was of approximately EUR 3,2 million during 2001-2004.

(57) The complainants consider that the higher interest payments fixed for the period 2005-2015 does not really mitigate this advantage. As interest rates have been increasing since 2005 the 5 % interest rate determined for the period 2005-2015 may soon cease to be a higher interest rate than those currently prevailing on the market.

⁽¹³⁾ Act 1988/449 adopted on 20 May 1988 (last amended by Act 2001/1110 adopted on 30 November 2001).

⁽¹⁴⁾ Decree 20/2003 as amended by Decree 25/2005.

⁽¹⁵⁾ Act 1992/1535 adopted on 30 December 1992.

⁽¹⁶⁾ Act 1535/1992.

4.2. Land and gravel sites put at the disposal of *Tieliikelaitos*

- (58) The complainants note that the value at which the land resources were entered into *Tieliikelaitos*' opening balance sheet by the Finnish State is FIM 15 million ⁽¹⁷⁾ lower than the estimate by an independent expert (Catella). On the basis of the estimate by private earth-work sector the difference would be even bigger. Besides, in complainants view, it would be more appropriate if *Tieliikelaitos* was buying land resources needed for carrying out its contracts from external suppliers at market price.
- (59) The complainants also consider that non-marketability deductions with respect to the value of land and gravel sites that were done in *Tieliikelaitos*' financial statements during years 2002-2004 and accepted by *Tieliikelaitos*' auditors cannot be considered as a proof of absence of aid in the transfer of land and gravel sites. The complainants believe that the auditors of *Tieliikelaitos* did not possess sufficient expertise regarding land resources to carry out this kind of appraisal. According to the complainants, the auditors based their view on the estimate made by *Tieliikelaitos*' management.

4.3. Negotiated contracts for road services

- (60) The complainants consider that the aid related to negotiated contracts given to *Tieliikelaitos* by the Road Administration has been EUR 21,5 million which they calculated on the basis of difference in margins of negotiated and tendered contracts undertaken by *Tieliikelaitos*.
- (61) Furthermore, complainants suspect that the margins of negotiated contracts could have been artificially lowered by taking into account also the costs of personnel not involved in implementation of the negotiated contracts.
- (62) Besides, they believe that the so called expenditure adjustment procedure related to negotiated contracts ⁽¹⁸⁾ gave *Tieliikelaitos* access to extra funds each year during 2001-2004 that it could use for about one year without having to pay interest on it to the Road Administration.
- (63) Complainants consider that the aid received by *Tieliikelaitos* has, *inter alia*, allowed it to undertake plan-and-implement contracts ⁽¹⁹⁾ which had a lower margin.
- (64) The complainants believe that the fact that *Tieliikelaitos*' financial performance compared with its competitors were below industry average only shows that the operations of *Tieliikelaitos* were inefficient and it used anti-competitive pricing policy in liberalised sectors.

⁽¹⁷⁾ In their 22 June 2006 submission the complainants refer to EUR 15 million, but from their earlier submissions and the data provided by the Finnish authorities it appears that the right amount is FIM 15 million.

⁽¹⁸⁾ Cf. Section 2.4.3.

⁽¹⁹⁾ Plan-and-implement contracts are contracts where design services and construction works are procured as one package.

4.4. Negotiated contracts for ferry services

- (65) The complainants consider that negotiated contracts for ferry traffic services confer an advantage to *Tieliikelaitos*. They believe that *Tieliikelaitos* is able to provide ferry services at a comparatively low price only because it received ferry equipment from the Road Administration which either does not need to be renewed, or because the associated capital costs do not need to be taken into account in the value of the equipment.

4.5. Measures for the reduction of *Tieliikelaitos*' staff

- (66) In the complainants' view, *Tieliikelaitos* received about EUR 100 million in State aid during 2001-2004 for solving the issue of overstaffing.
- (67) *inter alia*, the complainants believe that *Tieliikelaitos* has benefited from an aid related to the fact that its employees have been in a privileged position in filling vacant positions in the government agencies, including the Road Administration. In total, this enabled *Tieliikelaitos* to reduce its problem of overstaffing by 116 persons.
- (68) The complainants believe that the respective employees' transfer procedure led to a loss of the freedom for involved government agencies to choose the best and most affordable applicant available on the labour market for a position, and caused additional expenses to the State. The State might have been able to hire personnel from outside more affordably and with more favourable employment conditions. Individuals from *Tieliikelaitos* were transferred with their old employment conditions into new positions and treated as veteran staff.
- (69) Besides, the complainants point out that *Tieliikelaitos* received EUR 20,1 million as State aid from the Road Administration's budget for the purposes of helping *Tieliikelaitos* employees to find new jobs, financing supplementary education and retraining and for supporting pensions for early retirement.
- (70) The complainants also believe that the personnel involved in special service projects constituted *Tieliikelaitos*' own labour reserve whereas its expenses were paid by the Finnish State. The complainants assert that opportunities for this kind of arrangement do not exist in the private sector; rather, when a project or contract ends, a private employer is still obliged to pay the employee his or her salary or alternatively give a layoff notice and pay his or her salary during the notice period.

- (71) Finally, the complainants doubt that *Tieliikelaitos* contributed sufficiently from its own resources for financing staff reduction measures. According to them, the financial statements of *Tieliikelaitos* do not give any evidence in this respect.

4.6. Indirect fiscal aid related to land purchase

- (72) The complainants note that to the extent that *Tieliikelaitos* purchased land sites during the transitional period, the sellers were largely relieved of tax on capital gains that also constitutes indirect State aid for the benefit of *Tieliikelaitos*.

4.7. Advantages conferred to *Tieliikelaitos* on a permanent basis: the inapplicability of bankruptcy law and deviations from normal tax law

4.7.1. Bankruptcy legislation

- (73) The complainants consider that the fact that *Tieliikelaitos* is not included within the scope of bankruptcy legislation constitutes prohibited State aid. They point out that although the current Bankruptcy Act ⁽²⁰⁾ entered into force only on 1 September 2004, the possibility to declare *Tieliikelaitos* bankrupt did not exist before either.
- (74) The complainants believe that it is sufficient that the possibility for this sort of aid exists, even if the threat of bankruptcy never arose.
- (75) They stress that *Tieliikelaitos* had a possibility to receive financing on more favourable conditions thanks to the respective legal provision. In addition, *Tieliikelaitos* continually orders services and materials from external suppliers, which constitutes debt by *Tieliikelaitos* to these external actors. *Tieliikelaitos* can thereby obtain a competitive advantage as it cannot be declared bankrupt.
- (76) Furthermore, they draw the Commission's attention to the fact that the guarantee fee on the loans raised and guarantees granted by a State Enterprise, the purpose of which is to compensate for the fact that an organisation operating as a part of the State may receive external financing on more favourable terms, was introduced only in 2003 (Article 5 of the State Enterprise Act). This implies that *Tieliikelaitos* has not paid such a fee so far (it is not applicable retroactively to pre-2003 loans raised by *Tieliikelaitos*).
- (77) In any case, the complainants note that private undertakings, which can be declared bankrupt under Finnish law, must also give the loan provider guarantees which match the cost of the State guarantee fee. Expenses of this kind are incurred due to, for example, the mortgaging of immovable

property and permanent leases, as well as guarantees provided by financial institutions and other parties.

4.7.2. Tax treatment

- (78) In the complainants' view, the fact that *Tieliikelaitos* does not pay corporate income tax to the State, because State contracts make up more than half of its turnover, constitutes prohibited aid.
- (79) The complainants consider that *Tieliikelaitos* obtained an advantage of EUR 14,5 million through this tax exemption for the years 2001 to 2004 alone, as it would have had to pay EUR 14,5 million more taxes, had it been subject to the 29 % tax rate applicable to private undertakings in the years 2001 to 2004 (in 2005 the rate was lowered to 26 %).
- (80) The fact that *Tieliikelaitos* has disbursed part of its earnings to the State corresponds to the payment of a dividend by a private limited company, the size of which is always decided by the shareholders at the Annual General Meeting. The dividend is only paid from earnings that are left over after the payment of corporate income tax.

4.8. Burdens ensuing from the specific status of *Tieliikelaitos*

- (81) With respect to *Tieliikelaitos* being legally obliged to submit offers to every call for tenders for the maintenance of the road network, both during the transition period and after its expiry, the complainants do not see any additional financial burden on *Tieliikelaitos*. In any case, complainants consider that *Tieliikelaitos*' financial statements do not show such additional expenditure.
- (82) As *Tieliikelaitos* has offices throughout Finland, complainants believe it has an excellent opportunity to provide maintenance services in the whole country. In addition, the Road Administration has introduced, in order to support participation to tenders, a EUR 5,000 fee that it pays to all bidders whose bids corresponded to tender documentation. On average, 4-4,7 contractors submitted their bids for each maintenance contract put for tender in 2001-2004. This demonstrates companies' interest in making bids.
- (83) Similarly the complainants contest that *Tieliikelaitos*' had additional expenses compared to other companies active in the sector due to its obligation to be prepared for providing its services in emergency situations. First, they stress that no such extra expense could be identified in *Tieliikelaitos*' financial statements. Second, the complainants believe that all companies must prepare for emergency conditions, and that it is a part of a private company's risk management system.

⁽²⁰⁾ Act 120/2004 adopted on 20 February 2004 (last amended by Act 709/2007 adopted on 15 June 2007).

- (84) Furthermore, the complainants believe that in *Tieliikelaitos*' financial accounts there is no separation between costs and receipts associated with clearly identified service of general economic interest and those associated with other services, and that no parameter has been defined for allocating costs and revenue between two such categories of services.
- (85) Therefore the complainants stress that the measures in favour of *Tieliikelaitos* cannot be qualified as compensation for public service obligation.
- (86) As to restrictions imposed on operations of *Tieliikelaitos*, the complainants emphasize that the follow-up group established by the Ministry of Transport and Communications has noted that *Tieliikelaitos* has repeatedly violated respective restrictions, for example by building energy networks and municipal engineering. Hence, they have not caused significant costs and loss of income, nor have such items been presented in *Tieliikelaitos*' financial statements.

4.9. Overall conclusions by the complainants

- (87) All in all, the complainants believe that the *Tieliikelaitos* has received at least EUR 164-171 million in prohibited aid:

(EUR)	
Measures	Resulting aid
Interest rate subsidies from the loan 2001-2004,	3 182 978
Equipment,	13 800 000-20 700 000
Extractable land resources,	7 230 000
Extracted land resources,	3 750 000
Negotiated contracts 2001-2004,	21 500 000
Adjustment of personnel 2001-2004,	100 000 000
Tax benefits 2001-2004,	14 454 620

- (88) According to the complainants, respective sums must be increased by the amount of aid received through negotiated contracts in ferry traffic and interest income on funds returned annually from negotiated contracts through the expenditure adjustment procedure.
- (89) The complainants believe that *Tieliikelaitos* has received advantages which have reduced its expenses and which it could not have received under normal market conditions.
- (90) While the complainants do not contest that there were the cost savings achieved through the opening up of the market to competition, they stress that during the transitional period *Tieliikelaitos* received aid that was almost equal to the savings for the State for the same period.
- (91) The complainants consider the aid granted to *Tieliikelaitos* has distorted competition in the infrastructure sector and

allowed *Tieliikelaitos* to carry out contracts at a lower margin than private actors in a competitive market. In the complainants' view *Tieliikelaitos* has enjoyed a dominant market position in road maintenance contracts throughout the transitional period, and in 2005 it got 88 % of new maintenance contracts awarded by the Road administration. This would show that the opening up of the market has failed.

- (92) Thus, the complainants dispute that the State aid measures have been necessary and proportionate to the results, in other words the liberalisation of Finland's road maintenance and ferry traffic markets. Therefore, in the complainants' view, the State aid received by *Tieliikelaitos* has not been justified and is thus incompatible with the common market.

5. COMMENTS SUBMITTED BY THE FINNISH AUTHORITIES

- (93) First, the Finnish authorities explain the reasons underlying the approach which was chosen for liberalising road services market in Finland.

- (94) In their view, the gradual opening of the market together with granting a job security to the employees of *Tieliikelaitos* was necessary to achieve a political compromise on the market opening.

- (95) In fact, the Finnish government started to work on the design of the road services reform already in 1994. Nevertheless, given the vested interests involved, for a long time it was not possible to reach an agreement on the market liberalisation and on 20 May 1997 the Government's Committee on Economic policy decided to keep the existing system largely unchanged except for introducing certain 'border-lines' between administrative and 'production' functions of the Road Service. It is only at the beginning of 2000 that the Government could reach a political agreement on the gradual liberalisation of the road services' market. This agreement was reflected in the package of legislative proposals submitted to the Parliament, namely the proposals for the Act on the Road Administration and the Act governing *Tieliikelaitos*, as well as the preliminary proposal for the annual budget law (the latter containing the foreseen financing necessary to measures accompanying the reform). When approving the respective acts, the Parliament not only endorsed the package of support measures for the benefit of *Tieliikelaitos* proposed by the Government, but decided that additional safeguards for the benefit of the undertaking's employees would be introduced.

- (96) On top of the political and social considerations, there was also a competition-related aspect underpinning the market liberalisation model chosen by the Finnish Government. In

view of the Finnish authorities, market opening without transition may have led to an oligopoly or even monopoly on the market, as *Tieliikelaitos* would have disappeared from the market, with its share being picked up by the biggest private competitors.

- (97) Finland believes that the actions it has carried out do not constitute State aid. Even if the Commission were to hold that the actions include State aid, the Finnish authorities believe that the aid should be declared compatible with the common market.
- (98) To substantiate its position, Finland submitted, *inter alia*, an expert economic statement from brokerage company Icecapital Securities Ltd related to the alleged economic advantages conferred to *Tieliikelaitos* (hereinafter referred to as 'the Expert statement').
- (99) While the complainants doubt the validity of this Expert statement, on the grounds that Icecapital would be economically dependent on *Tieliikelaitos*, the Finnish authorities argue that *Tieliikelaitos* is only one of Icecapital's clients among many others. IceCapital's work for *Tieliikelaitos* was occasional during the two years they had business relation (In 2005 IceCapital's work for *Tieliikelaitos* brought 4,7 % from its annual revenues; in 2006 — 3,1 %). The Finnish government has subjected the provision of the Expert statement to tender, and Icecapital was chosen to provide the statement. The Finnish authorities also observe that the fact that *Tieliikelaitos* has used Icecapital's services in the past has deepened Icecapital's understanding of the earth-moving sector, which has been of benefit in the preparation of the Expert statement.

5.1. State loan

- (100) The Finnish authorities assert that it was not a case of a normal granting of a loan, where a company is granted a loan of a certain size, which is repaid with interest within a certain time. Rather, it was a transfer of assets to *Tieliikelaitos* with a repayment obligation.
- (101) Finland believes that if the entire stock of assets had been disbursed to *Tieliikelaitos* as equity, a distortion of competition might have been created. When examining the balance sheets of private undertakings in this sector, the undertakings have fixed assets in their balance sheets acquired both as equity and as loans. Therefore, it was important that *Tieliikelaitos'* balance sheet included assets acquired as loans. If this had not been done, Finland claims that *Tieliikelaitos* would have gained a competitive advantage financially equal to the capital repayment of the loan. The Finnish authorities believe that the structure of *Tieliikelaitos'* opening balance sheet was created in line with the balance sheets of private undertakings in the sector.

- (102) If the measure is examined as a normal long-term loan, Finland believes that the cost of the loan should be compared with the financing available on the market during the whole term of the loan. A comparison which only compares some years of the loan with market alternatives does not give a total picture of the cost of the loan. Therefore, Finland believes that the period 2005-2015 must be considered alongside the transitional period 2001-2004.
- (103) The Finnish authorities state that *Tieliikelaitos* has not the possibility of terminating the loan agreement during the term of the loan without the consent of the lender. Therefore, in calculating the possible advantage conferred by the long-term loan, due account must be taken of the entire time period during which *Tieliikelaitos* has to pay interest. Such a calculation results in a significantly different result from the calculations of the complainants.
- (104) With respect to the relevant rate of interest, the Finnish authorities observe that 12-month Euribor is generally used as the reference rate of interest in corporate loans. Finland notes that a forward curve exists that predicts what the level of market interest rates will be till 2015. The curve is based on the expectations of the development of interest rates by various market participants. The reference rates of interest used in the calculations of the Expert statement are based on information available from the forward market, and thus describe the market's understanding of what the future rate of interest will be.
- (105) Based on this, it is evident from the Expert statement that from the end of the transitional period until the end of the term of the loan, *Tieliikelaitos* must pay about EUR 2,0 million more than for financing at the market rate of interest, as they were forecast by market analysts as of 8 May 2006 ⁽²¹⁾.

- (106) Thus, Finland concludes that, in any event, this amount of EUR 2 million should be deducted from the EUR 3,2 million evaluated by the complainants, with the result that *Tieliikelaitos'* maximum possible advantage from the State loan is EUR 1,2 million.

5.2. Land and gravel sites put at the disposal of *Tieliikelaitos*

- (107) To start with, the Finnish authorities explain that one of the main principles underlying the split-up of the Road Services into the Road Administration and *Tieliikelaitos* was that assets covered by road legislation, i.e. mainly the roads themselves, had to be kept by the Road Administration, whereas assets formerly used by the 'production part' of the Road Service (*Tieliikelaitos'* predecessor) in the course of road maintenance had to be kept for road maintenance purposes by *Tieliikelaitos*.

⁽²¹⁾ Source: Bloomberg.

- (108) As to the valuation of land and gravel sites at the disposal of *Tieliikelaitos*, Finnish authorities believe that the appraisal of land sites and gravel sites was carried out in accordance with the principles described in the Commission's communication on State aid elements in sales of land and buildings by public authorities ⁽²²⁾.
- (109) Finland asserts that Catella's valuation which was taken as the basis for establishing the value of the gravel and land sites can be considered to be the result of estimate by an impartial valuator.
- (110) The adjustment of Catella's estimate (downwards revision from FIM 128 million to FIM 113 million ⁽²³⁾) was made because the Finnish Ministry of Transport and Communication considered that the price of concrete gravel would decrease when *Tieliikelaitos* would enter on the respective market as a seller, that value added in the extraction process was lower on the basis of the National Land Survey of Finland and that after-treatment costs would be higher based on new requirements concerning the after-treatment of land resource areas.
- (111) In view of the downwards revision of the value of the land assets done in *Tieliikelaitos* financial reports during the transitional period and accepted by *Tieliikelaitos* auditors (Ernst and Young) the Finnish authorities estimate, that land and gravel sites were still entered into *Tieliikelaitos*' balance sheet at an excessive value compared with the audited book values. This conclusion was confirmed by IceCapital which carried out the overall evaluation of the arrangements for the benefit of *Tieliikelaitos*. Therefore, *Tieliikelaitos* did not gain an economic advantage, but rather incurred an economic disadvantage of EUR 4,3 million.
- (112) Finland notes that the auditors are experts in the evaluation of the bases of expected income and therefore had necessary qualification to verify the validity of the non-marketability deductions made by the company.
- (113) With respect to the complainants' preference for no land being entered in *Tieliikelaitos*' books and for *Tieliikelaitos* buying all land resources it needed externally at market prices (Cf. Section 4.2), Finland notes that during the transitional period *Tieliikelaitos* bought significant amounts of land resources from external parties at market prices: 47 % in 2001, 39 % in 2002, 41 % in 2003 and 34 % in 2004.

5.3. Negotiated contracts for road services

- (114) First, the Finnish authorities recall that the annual expenditure rectifying procedure, which existed during the transitional period (cf. Section 2.4.3), ensured that differences in margins between negotiated contracts and contracts put out to tender were levelled out to a large extent. Expenditure adjustments during the transitional period totalled EUR 16,8 million.
- (115) As to the remaining differences in margins, according to Finland, it is not appropriate to compare the margin of *Tieliikelaitos*' negotiated contracts with the average margin *Tieliikelaitos* received on tendered contracts during the whole transitional period as it was done by the complainants.
- (116) In the Finnish authorities' view, one should calculate differences in margins for contracts which are mutually comparable.
- (117) In this respect, the specificity of years 2001 and 2002 was that many of the tendered contracts during these years were new kind of plan-and-implement contracts (ST contracts). Initially *Tieliikelaitos* was not prepared for the significantly higher level of risk compared with traditional contracts. For this reason the margin level of plan-and-implement contracts turned out to be much lower than the expected margin. Negotiated contracts, in turn, did not include plan and implement contracts. Therefore it is appropriate to exclude plan-and-implement contracts from the calculation.
- (118) The specificity of years 2003 and 2004, in turn, was that the negotiated contracts received from the Road Administration in 2003 and 2004 were exclusively road maintenance and design contracts. Therefore, the margin level has to be compared with the margin level of similar tendered contracts.
- (119) Besides, the Finnish authorities point out that part of the contracts implemented as negotiated contracts could have been — even without the transitional provision contained in section 9 of the Act governing *Tieliikelaitos* — implemented in another way using direct negotiation in accordance with the procurement legislation in force.
- (120) In accordance with the Expert statement, *Tieliikelaitos* has gained an advantage of at most EUR 8,5 million from the negotiated contracts, when the difference in margins between comparable negotiated and tendered contracts is calculated:

⁽²²⁾ Commission Communication on State aid elements in sales of land and buildings by public authorities, OJ C 209, 10 July 1997, paragraph 2.

⁽²³⁾ Downwards revision from EUR 21,5 million to EUR 19 million.

	Year	2001	2002	2003	2004	Total
Negotiated contracts	MEUR	451,4	346,3	207,1	85,9	1 090,7
	margin	12 %	9,3 %	8,9 %	11,9 %	
Comparable tendered contracts	MEUR	88,4	183,8	231,7	280,5	784,4
	margin	10,1 %	8,5 %	10,2 %	12,1 %	
Difference in margins ⁽¹⁾	MEUR	8,6	2,8	- 2,7	- 0,2	8,5

⁽¹⁾ Difference in margins remaining after the annual expenditure adjustment procedure.

(121) Even if *Tieliikelaitos* received an economic advantage of EUR 8,5 million, this advantage was justified compensation for the obligation to perform public services, and expenses caused by structural disadvantages (Cf. Section 2.3).

(122) During the transitional period, the additional expenses resulting in particular from the excessive personnel costs had to be considered in the pricing of negotiated contracts to the extent that they had not been taken into account via other staff adjustment measures. Although a big part of excess staff was engaged in special service projects, there were still on average 100 employees more in *Tieliikelaitos* than would have been the optimum number during the transitional period.

(123) The Finnish authorities reject allegations that the aid received by *Tieliikelaitos* has allowed the State Enterprise to accept a lower margin level on plan-and-implement contracts. As explained above, the margin level of plan and implement contracts was low because *Tieliikelaitos* was unprepared for the level of risk they involve.

(124) As to the complainants' claim that expenses caused by additional personnel were considered to be a cost that artificially reduced the margin of *Tieliikelaitos* in the negotiated contracts, the Finnish authorities note that excess personnel were not included in the calculation of the margin level of negotiated contracts. Excess personnel were placed into service projects.

(125) Finally, Finland rejects the allegation that the comparatively poor financial performance of *Tieliikelaitos* points to inefficiencies on the part of *Tieliikelaitos* operations and the use of uncompetitive pricing policy in liberalised markets. In Finland's view, the poor result can be accounted for by the additional costs due to the adjustment of *Tieliikelaitos'* personnel, and the fact that the special arrangements made for personnel could not cover all the costs of additional personnel.

5.4. Negotiated contracts for ferry services

(126) According to the Finnish authorities, for the time being it is cheaper for the Road Administration to continue with negotiated contracts. The first attempt to tender out part of ferry services was unsuccessful for the following reasons.

(127) Firstly, the prices offered by the bidders were 17-25 % higher than the prices of the negotiated contracts in force between the Road Administration and *Tieliikelaitos*, about which the parties have held separate annual price negotiations. Therefore, having accepted the results of the tender, the Road Administration would have had to pay more for the respective services.

(128) Secondly, *Tieliikelaitos'* market position would have been strengthened (as the prices quoted by *Tieliikelaitos* were the lowest prices offered, although still being higher than the prices in the negotiated contracts, the Road administration would have to accept *Tieliikelaitos* as the winning bidder).

(129) Therefore the Finnish authorities reject the allegation that the negotiated contracts between the Road administration and *Tieliikelaitos* would involve any competitive advantage for *Tieliikelaitos*. On the contrary, they may constitute a disadvantage since the conditions of negotiated contracts do not reflect adequately the need for renewal of equipment (capital costs are not included in their entirety in the price of ferry services).

(130) Finland is developing a new procurement model for future rounds of competitive bidding, by revising the conditions of the liberalisation associated with capital costs and refurbishing of ferries. An opportunity to do this can be obtained by reducing the risks associated with investments through redemption conditions for ferry equipment attached to the agreement. Another option is to require that all tenderers have new vessels. In the meantime, the existing ferry contracts have been extended until the end of 2009.

5.5. Special provisions for the reduction of overstaffing

- (131) The Finnish authorities argue that the special arrangements and special projects cannot be considered to constitute an advantage.
- (132) When *Tieliikelaitos* started operations on 1 January 2001, it had 4 235 employees, although in reality it needed significantly fewer personnel. It is clear that the former Road Service, as an official institution based on hierarchy, had a significant number of positions and tasks which were not needed in *Tieliikelaitos*, which thus led to significant overstaffing at *Tieliikelaitos*.
- (133) In Finland's view, the fact that *Tieliikelaitos* was required to employ its entire staff and was prohibited from any lay-offs has been a structural disadvantage to *Tieliikelaitos*. The expenses the company incurred due to that structural disadvantage have exceeded any, even theoretical, economic advantages gained by *Tieliikelaitos*. The personnel transfer procedures available to *Tieliikelaitos* have been more expensive and slower than the personnel policies available to *Tieliikelaitos'* competitors.
- (134) According to Finland, the Finnish State could have opted not to transfer the excess employees to *Tieliikelaitos* at the time it was established.
- (135) Finland also refers to the *Combust* judgment of the Court of First Instance ⁽²⁴⁾ in which the Court dealt with a similar situation concerning transfers of personnel. It was concluded in this case that a one-off payment by the Danish State to officials who were employed by *Combust* and who agreed to give up their status as officials and become employed on a contract basis by that undertaking did not constitute State aid. The CFI considered that the measure did not result in lightening the burden normally assumed in an undertaking's budget.
- (136) The reform of road administration and maintenance sector in Finland was carried out in a situation similar to the one in *Combust*. The fact that *Tieliikelaitos* did not pay any compensation to personnel who was transferred to government agencies, including the Road Administration, cannot be considered to constitute State aid.
- (137) In Finland's view, the applicability of the *Combust* judgment is in no way reduced by the Court judgements cited by the Commission in its decision to initiate the procedure (*Altmark Trans* ⁽²⁵⁾ and *France v. Commission* ⁽²⁶⁾). These judgments indeed predate the *Combust* judgment and were thus necessarily taken into account by the Court of First Instance.
- (138) Furthermore, Finland argues that if a measure is not intended to confer an advantage which has an effect on the budget, it is not a case of a transfer of State funds and therefore does not constitute State aid ⁽²⁷⁾. Finland considers that administrative measures which have no effect on State finances do not constitute State aid.
- (139) Thus, Finland believes that the State has not lost income because it agreed to employ 116 former personnel of *Tieliikelaitos* and pay their salaries. No one of these employees was appointed without an assessment of his/her suitability for the position. Transfers of personnel between *Tieliikelaitos* and civil service departments were only possible when a post became open and it was published. If a suitable applicant could not be found within *Tieliikelaitos* other applicants were considered.
- (140) With respect to financial transfers by the State for solving *Tieliikelaitos'* overstaffing problem, Finland stresses that *Tieliikelaitos* did not receive EUR 100 million in State aid as is claimed by the complainants. *Tieliikelaitos* received EUR 68 million from the Road Administration to fund service projects (from 68 million approximately 56 million went to cover personnel costs and the rest was spent on materials and other 'non-personnel' items). In addition, the Road Administration paid EUR 20,1 million to support the adjustment of staff. The total compensation of EUR 88,1 million did not cover all the expenses incurred from the excess staff. According to the Expert statement the excess staff caused structural disadvantages amounting to EUR 157 million over the period 2001-2004.
- (141) Finland notes that sound accounting procedures were followed in the preparation of *Tieliikelaitos'* financial statements, and that the financial statements have been audited. The financial statement does not include notes at the level of detail referred to by the complainants. Nevertheless, the Expert statement provides the following justifications for uncovered structural disadvantage related to the excess staff (EUR 69 million in total, i.e. EUR 157 million — EUR 88 million):
- (142) Firstly, the Road Administration did not cover all costs related to the special service projects. For example it did not cover the respective supervision costs which were estimated at EUR 2,8 million over four years. Furthermore, the service projects recorded a total loss of EUR 1,4 million during the transitional period in addition to the respective supervision costs (the deficit was calculated by subtracting the expenditure for wages and materials for service projects from revenues related to those projects). Therefore, the service projects caused to *Tieliikelaitos* a net disadvantage of EUR 4,2 million.

⁽²⁴⁾ Judgment of the Court of First Instance of 16 March 2004 in the case T-157/01, *Danske Busvognmaend v. Commission*.

⁽²⁵⁾ Judgment of the Court of Justice of the European Communities in the case C-280/00, *Altmark Trans*, judgment of 24 July 2003.

⁽²⁶⁾ Judgment of the Court of Justice of the European Communities in the case C-251/97, *France v Commission*, judgment of 5 October 1999.

⁽²⁷⁾ *inter alia* Finland refers to Joined Cases C-72/91 and C-73/91, *Sloman Neptun Schiffarts AG v. Seebetriebsrat Bodo Ziesemer*, judgment of 17 March 1993.

(143) Secondly, the funds provided by the Road Administration to finance measures related to looking for new jobs, supplementary training and re-training and support for anticipatory early retirement were not sufficient. As a result, *Tieliikelaitos* had to earmark over EUR 20 million in personnel adjustment costs out of its own funds (EUR 12,8 million thereof were paid out in 2004 and 2005).

(144) Thirdly, *Tieliikelaitos* had to bear additional administrative expenditures related to personnel adjustments, which were estimated at the level of EUR 2,8 million for the transitional period.

(145) Fourthly, *Tieliikelaitos* had to face additional expenses also due to more favourable holiday conditions for those *Tieliikelaitos* employees which fell in the category of long-term State employees (50 % longer holiday). These additional expenses were estimated at the level of EUR 42 million during the four years of the transitional period.

(146) In any case, pension schemes have left *Tieliikelaitos* with a heavy burden. Even after its conversion into a State Enterprise the staff of *Tieliikelaitos* remained governed by the State Pension Act No 280 of 20 May 1966, which implies that the State Enterprise had to pay the state employer's pension contribution, which is higher than the employer's pension contribution in the private sector. The Amendment to the State Pension Act (No 679 of 30 July 2004) will lead to the approximation of the pension contributions and employees' pension benefits between the private and the public sector, but only in the long run. In 2005, the general pension contribution for private sector employers was 16,8 %. By contrast, the *Tieliikelaitos*' pension contribution was determined individually and stood at 21,13 % in 2005.

(147) Moreover, it is only on 16 February 2005 that the provisions of the collective agreements of *Tieliikelaitos* concerning wages paid on sick leave were adapted to correspond to the equivalent conditions of private sector agreements. Prior to that, these provisions were more expensive for *Tieliikelaitos* than those applicable to private sector employers.

(148) Considered as a whole, Finland states that the staff's employment conditions are still better than those of staff in private companies. This is true regardless of the fact that the 2005 amendments to the collective agreements brought the conditions of employment closer to those existing in the private sector. The right to annual leave, for example, which is based on contract provisions equivalent to those in state contracts, is still better than that enjoyed by staff in the private sector. So employment conditions as a whole, including pension benefits, can still be clearly considered a burden in comparison with those prevailing for private sector operators.

5.6. Fiscal measure related to land purchases by *Tieliikelaitos*

(149) According to Section 49(1)(4) of the Income Tax Act, the taxable amount of the capital gains received by a taxable person other than a corporation, partnership or limited partnership used to be calculated by deducting either 80 % of the sales price or the real acquisition cost, whichever is more, provided that the real property is sold to the state, province, municipality or joint municipal authority. Therefore, the amount of taxable capital gains would be at most 20 % of the sales price. Thus, for the purposes of determination of the amount of taxable capital gains, the respective sellers could deduct from the sales price 30 % or 60 % more than they could deduct under the normal taxation rules, depending on whether they sold their land before or after having owned it for 10 years.

(150) Land transfers to *Tieliikelaitos*/its predecessor were included in the scope of the concession scheme from the very outset ⁽²⁸⁾. That is, also *Tieliikelaitos*' predecessor, the Road Service, indirectly benefited from the same measure. Therefore the Finnish authorities stress that even if this measure constituted an indirect State aid for the benefit of *Tieliikelaitos* it complies with the definition of 'existing aid' pursuant to Article 1(b) of the Council Regulation (EC) No 659/1999.

(151) Section 49 of the Act was amended in such a way in July 2004 ⁽²⁹⁾ that it is no longer applicable when property is sold to a State Enterprise for purposes other than nature protection, use by the armed forces, and research or other similar social purposes. As a result, the income from sales of land sites to *Tieliikelaitos* is now subject to the standard tax on capital gains.

5.7. Advantages conferred to *Tieliikelaitos* on a permanent basis: the inapplicability of bankruptcy law and corporate income tax law to *Tieliikelaitos*

(152) With respect to the advantages conferred to *Tieliikelaitos* on a permanent basis, the Finnish authorities stress that even if these measures constitute State aid they comply with the definition of 'existing aid' pursuant to Article 1(b) of the Council Regulation (EC) No 659/1999.

(153) *Tieliikelaitos* and the predecessors of the respective economic entity (until 31 December 1997 — the Road Service as such, from 1 January 1998 until 31 December 2000 — the Production part of the Road Service) have never been subject either to bankruptcy or to normal corporate income tax rules.

(154) This situation pre-dates not only the start of the liberalisation of the road services' sector in Finland (point v of Article 1(b) of Regulation 659/1999), but also Finland's accession to the EU (point i of Article 1(b) of Regulation 659/1999).

⁽²⁸⁾ The Act was adopted on 30 December 1992.

⁽²⁹⁾ Act 728/2004

- (155) The Finnish authorities undertakes a commitment to transform *Tieliikelaitos* into a State-owned limited company which will be subject to normal bankruptcy and corporate income taxation rules by 1 March 2008 at the latest.

5.7.1. Bankruptcy law

- (156) This stems from *Tieliikelaitos*' status as State Enterprise and from the Road Service's status as government agency that they could not go bankrupt.
- (157) The Finnish authorities observe that according to the Commission's notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees more favourable funding terms obtained by enterprises whose legal form rules out bankruptcy are considered to constitute State aid. The Finnish authorities consider however that *Tieliikelaitos* has not received such more favourable funding terms as *Tieliikelaitos* has not had to borrow funds.
- (158) There has never been a threat of *Tieliikelaitos*' bankruptcy and the ensuing realisation of the State's responsibility.
- (159) Therefore, according to the Finnish authorities, it has not been possible for *Tieliikelaitos* to gain a competitive advantage in comparison with private competitors.
- (160) With respect to the use of external financing in the foreseeable future, a guarantee fee prescribed by the Act on State Enterprises puts State Enterprises financially on equal footing on the loan market with other companies which operate without state guarantees (Cf. Section 2.4.6).

- (161) The reference used by the Finnish Government for periodical revision of the annual fee is the yield spread on the market between State serial bonds and investment-grade corporate bonds in the JP Morgan business loan index. The new fee is applicable to loans disbursed after the adjustment in question.
- (162) The Finnish authorities disagree with the complainants' view that the guarantee fee is comparable to private companies' expenses arising from a mortgage. Mortgages are one-off expenses, while the guarantee fee is annual. Mortgage fees are relatively small in the case of large loans, and in a corresponding loan the collateral would have been handled through a corporate mortgage. In practice, the guarantee fee corresponds rather to a margin calculated on top of Euribor.

5.7.2. Tax law

- (163) The income tax liability of undertakings operating within the State administration, is determined in the same way as

the tax liability of State enterprises i.e. in accordance with Section 21 of the Income Tax Act. Thus, the predecessor of *Tieliikelaitos* ('production part' of the former Road Service) was not subject to income tax. Section 21 of the Income Tax Act was already included in the initial version of Income Tax Act, which entered into force on 1 January 1993. The Income and Wealth Tax Acts⁽³⁰⁾, which were previously in force, contained similar provisions on the income tax liability of the State and its undertakings.

- (164) Although *Tieliikelaitos* does not pay corporate income tax to the State on its profits, the Finnish authorities argue that this factor is taken into account when taking annual decisions on profit-crediting to the State by *Tieliikelaitos*.
- (165) *Tieliikelaitos*' total profit during the transitional period was EUR 62 million, and during the first four years, *Tieliikelaitos* disbursed to the State total profit-crediting of 59 % (EUR 37,3 million). The profit-crediting percentage has varied between 47 % and 71 %. *Tieliikelaitos*' theoretical taxes during the transitional period at a tax rate of 29 % would have been less than EUR 18 million.
- (166) In the view of the Finnish authorities, companies such as YIT Group and Lemminkäinen Group (the former — a group with annual sales exceeding EUR 3 billion and the latter — a group with annual sales close to EUR 2 billion), which are the main private competitors of *Tieliikelaitos*, can be considered as benchmark companies for comparative analysis of the respective information. Based on information by Bloomberg, in 2001-04 the combined share of dividends and corporate income tax amounted to 68 % of the pre-tax profit for YIT group and to 63 % for Lemminkäinen Group. The annual indexes for these period varied between 58 % and 85 % of pre-tax profits for YIT and between 37 % and 98 % for Lemminkäinen Group.
- (167) In 2005, the first year following the transitional period, profit-crediting was 69 % of profit (EUR 4,6 million). In 2006, it was 50 % (EUR 4,8 million). Based on information from the annual reports of the competitor-companies, the percent of profits YIT group and Lemminkäinen group gave away as dividends and corporate income tax amounted, respectively, to 52 % and 59 % in 2005, and to 50 % and 61 % in 2006, respectively.
- (168) Finland considers that, by exercising its rights as owner, the State has received significantly more from *Tieliikelaitos* during its entire period of operations than would have been the corporate income tax on profits of the same size.

- (169) Finland further notes that the value-added tax rate, capital transfer tax rate, and real estate tax rate applied to State Enterprises are the same as for limited companies.

⁽³⁰⁾ Acts 1240/1988 and 1043/1974.

5.8. Burdens ensuing from the specific status of *Tieliikelaitos*

5.8.1. Public service obligations

(170) Finland considers that, even if the Commission were to conclude that *Tieliikelaitos* was granted State aid, such aid should be deemed necessary to compensate for expenses *Tieliikelaitos* is facing due to special tasks imposed on it by the Act governing *Tieliikelaitos*. (Cf. Chapter 2.3).

(171) By imposing on *Tieliikelaitos* the obligation to bid for all road maintenance contracts, in addition to ensuring that the quality requirements and monitoring included in ordering procedures and contract agreements are achieved, this special task would also further the implementation of functioning competition in maintenance contracts, because, in addition to private undertakings, *Tieliikelaitos* should also bid for the tendered contracts.

(172) As to the undertaking's obligation to be prepared to provide its services during emergency situations, this arrangement was considered by Finland to be necessary because during such emergency situations there may be a need to handle various road maintenance activities on a very tight schedule and in a way that diverges from the ordinary.

(173) Finland believes that these special tasks can be considered public service obligations referred to in Article 86(2) of the EC Treaty. It believes that the obligations in question result in substantial costs for *Tieliikelaitos*.

(174) As regards the obligation to make offers on the maintenance of public roads and the provision of ferry traffic throughout the country, Finnish authorities observe that it is difficult to estimate exactly the corresponding expenses.

(175) As to the preparation for emergency conditions, according to the Expert statement, it has resulted in approximately EUR 4,6 million in additional costs for *Tieliikelaitos* during the transitional period (2001 to 2004). These costs have resulted in particular from *Tieliikelaitos'* obligation to maintain emergency stockpiles of liquid fuels until the end of 2004 (the respective cost amounted to EUR 2,2 million). Other cost items included:

- storage, maintenance and repair of emergency bridge for free in 2001 (EUR 0,4 million),
- handling of preparation matters at the service group and head office level (EUR 0,6 million), and
- obligation to make preparations and arrange training included within the service agreements (EUR 1,4 million).

(176) In any event, the Finnish authorities consider that the amount of these expenses is manifestly greater than the resources made available to *Tieliikelaitos*.

(177) The Finnish authorities note that costs like these do not have to be borne by private sector actors in the earth work and the building trades.

(178) With respect to the complainants' claim that the Road Administration pays a EUR 5,000 fee for contract offers, the Finnish authorities note that the Road Administration has paid the fee referred to by the complainants to all offers for maintenance contracts that meet the quality criteria of the offers. This sort of compensation paid to all bidders must be distinguished from compensation paid for public service obligations. The compensation paid to all bidders does not remove the fact that *Tieliikelaitos* has accrued expenses from its obligation to make an offer in all competitive bidding.

5.8.2. Other conditions imposed on *Tieliikelaitos'* operations

(179) During the transitional period, *Tieliikelaitos* had to abide by quite significant restrictions which were not imposed on private actors, e.g. the regulation of the sector, restrictions on subsidiaries, the prohibition of group contributions, and restrictions on foreign operations.

(180) As is evident from the Expert statement the restrictions related to foreign operations have caused difficulties for *Tieliikelaitos* in making offers on road maintenance contracts abroad (in Estonia, for example). *Tieliikelaitos* has not been able to bid directly on foreign projects.

(181) Furthermore, *Tieliikelaitos* has incurred expenses due to the broader reporting obligations imposed upon State Enterprises in comparison with private undertakings, and the administrative bureaucracy of State enterprises.

(182) The requirement that *Tieliikelaitos* focuses on its core operations, for example, has led to delays in the diversification of *Tieliikelaitos'* operations into e.g. electric power network contracts, which led to a loss of income.

(183) Finland, however, recognises that the estimation of the expenses due to the structural disadvantages listed above has been very difficult.

(184) Finland estimates that, as a result of the restriction to sell mineral aggregates to outside parties, *Tieliikelaitos* lost profits of approximately EUR 1,6 million during the transitional period. This estimate is based on average annual potential sales of mineral aggregates of EUR 3 million (this corresponded to the 2006 sales forecast) had the restriction not been present, and on the 2006 cost structure ⁽³¹⁾.

⁽³¹⁾ With this cost structure, annual sales of EUR 3 million yield EUR 0,4 million operating margin.

- (185) With respect to the complainants' claim that *Tieliikelaitos* continually violated all the restrictions on its operations that were in place during the transitional period, the Finnish authorities observe that the alleged violations were investigated and found to be insignificant. Insignificant violations do not change the fact that the restrictions caused disadvantages to *Tieliikelaitos*.

5.9. Global evaluation of *Tieliikelaitos* advantages and disadvantages

- (186) In the Expert statement submitted by the Finnish authorities *Tieliikelaitos*' possible advantages and disadvantages during the transitional period have been summarised in the following graphic manner:

(EUR)	
Source of advantage/disadvantage	Effect
State loan	+ 1,2 million
Negotiated contracts	+ 8,5 million
Transfer of land and gravel sites	- 4,3 million
Public service obligations	- 4,6 million
Structural disadvantages ⁽¹⁾	- 70,6 million

⁽¹⁾ Includes an estimate of uncompensated costs of personnel arrangements to reduce the overstaffing problem and the size of the burden due to extra personnel as well as the foregone income (EUR 1,6 million) due to the restrictions imposed on trading in mineral aggregates.

- (187) Based on the above estimates, Finland concludes that the overall effect of the advantages and disadvantages incurred by *Tieliikelaitos* during the transitional period was a total loss of EUR 69,8 million for *Tieliikelaitos*.

5.10. Market developments

- (188) The Finnish authorities argue that competition has developed quickly in all the product groups of road maintenance, planning and construction. The reform of the Road Administration's procurement strategy has led to the development of a community of independent contractors and consultants.

- (189) Looking at all types of works and services provided by *Tieliikelaitos* in Finland, its share decreased from 31 % at the beginning of the reform process till 17 % in 2006.

5.10.1. Evolution of Road Administration's contracts during the transitional period

- (190) The value of tendered road services commissioned by the Road Administration increased from EUR 54,1 million in 2000 to EUR 549,1 million in 2004. During the same period, the value of negotiated contracts commissioned by

the Road administration decreased from EUR 451,4 million to EUR 85,9 million. In 2005 all of the contracts commissioned by the Road administration were awarded through a tender procedure. The value of road services carried out the contractors other than *Tieliikelaitos* increased, in turn, from EUR 20,2 million in 2000 to EUR 203,5 million in 2004. In addition to main contractors, the reform benefited private companies that function as subcontractors to *Tieliikelaitos*.

- (191) Enough offers were received for all types of tendered contracts (starting with planning contracts and ending with construction contracts) with an average of 4,0-4,7 offers per contract.

- (192) The price level of the contracts has decreased clearly in comparison with the period before the reform. According to an estimate by the Finnish Road Administration, the Road Service reform has thus resulted in total annual savings of EUR 60 million. This includes EUR 48 million annual savings in regional maintenance contracts (all the regular road maintenance work ⁽³²⁾ is contracted out through regional maintenance contracts); at the end of the transitional period the costs of the competitively tendered maintenance contracts concluded by the Road Administration were 21,7 % lower than the costs of the contracts concluded through the negotiated procedure at the beginning of the period. The remainder of the EUR 60 million savings are mostly made up of construction and planning services.

- (193) More specifically, for regional maintenance contracts, the largest source of cost savings was winter maintenance ⁽³³⁾ (EUR 15,2 million a year), followed by maintenance of gravel roads (EUR 8,6 million) and maintenance of traffic environment ⁽³⁴⁾ (EUR 8,3 million).

- (194) According to the Finnish authorities, today *Tieliikelaitos*' competitors include several large national and foreign competitors such as Skanska Oy (subsidiary of Swedish Skanska AB' and NCC Roads Oy (subsidiary of Swedish NCC Ab) ⁽³⁵⁾ and also an important number of small and medium-sized, dynamic and highly profitable regional and local competitors, which are limited companies.

5.10.2. Evolution of regional road maintenance contracts commissioned by the Road administration

- (195) The sector of the Road administration's regional road maintenance contracts is specifically looked at in view of the complainants' allegation that *Tieliikelaitos*' 88 % share of new maintenance contracts tendered out in 2005 in this sector would indicate that the market liberalisation has failed.

⁽³²⁾ Winter maintenance, maintenance of the traffic environment, maintenance of gravel roads, etc.

⁽³³⁾ Anti-skid measures, snowploughing, road levelling, snow bank removal and traffic sign cleaning.

⁽³⁴⁾ upkeep of traffic signs, road markings, etc.

⁽³⁵⁾ Companies with much higher turnover than the one of *Tieliikelaitos*.

- (196) The Finnish authorities consider it inappropriate to make judgements based on the results of a specific year's tender results. In this context it explains that the Finnish Road administration has divided Finland into 84 areas/contracts. One contract lasts between 3-7 years and the most of the work/costs consists of keeping the roads clear from ice. Each year just a relatively small percentage of those contracts is to be tendered. Therefore the results for one year are not necessarily representative.
- (197) As to the 2005 results, there were several 10 million EUR contracts that *Tieliikelaitos* won just by a very narrow margin (20 000-30 000 euro). Those contracts could have easily gone also to its competitors.
- (198) When it comes to the 2006 tendering results, they were radically different: *Tieliikelaitos* won just 5 of the 15 maintenance contracts the Finnish Road Administration put out for competitive bidding. The total value of the contracts awarded was EUR 48,2 million, and, based on contract values, the market share of *Tieliikelaitos* was 31 %.
- (199) In this context Finnish authorities find it necessary also to provide information on the development of overall package of the ongoing contracts held by *Tieliikelaitos*. In 2000 *Tieliikelaitos'* predecessor accounted for close to 100 % of the respective regional road maintenance work whereas at the end of 2006 *Tieliikelaitos'* share in the Road administration's portfolio of road maintenance contracts was 68 %. If one focuses on *Tieliikelaitos'* share of contracts that were attributed through open tender procedure, it decreased from 77 % in 2001 to 68 % at the end of 2006.
- (200) This still relatively high *Tieliikelaitos'* share of the road maintenance market was something to be expected in the sense that at the beginning of liberalisation process *Tieliikelaitos* had an advantage linked to its incumbent position and new entrants needed some time to establish a foothold in the Finnish market for road maintenance services.
- (201) Furthermore, a number of indicators suggest that effective competition has developed.
- (202) First, the number of bids has been increasing and in 2006 for each new contract put out to tender there were 5,7 bids received that met tender specifications. As a result of 2006 tendering, 9 of 15 contracts went to other operators than incumbents.
- (203) Second, prices have decreased. The prices that were the outcome of tenders undercut the ex-ante estimation by the Road Administration by 16 % in 2005, by 18 % in 2006 and by 14 % in 2007. Therefore, competition on the market was effective and intense.

- (204) Currently, there are six different contractors carrying out regional maintenance contracts. In addition to the Finnish Road Enterprise the following contractors are involved (market share in brackets): YIT Rakennus Oy belonging to YIT group (20 %), NCC Roads Oy (5 %), Koillistie Määttä Oy (3 %), Savon Kuljetus Oy (2 %) and an Estonian contractor, AS Teho (2 %).

5.11. Overall conclusions by the Finnish authorities

- (205) The Finnish authorities emphasise that the alleged aid measures mainly have been associated with the transitional period, which ended in 2004. *Tieliikelaitos'* activities in other Member States were insignificant during the transitional period.
- (206) The liberalisation of closed national markets is a central goal of EU competition policy. In this respect, Finland refers to several documents ⁽³⁶⁾.
- (207) The transitional market arrangement has been a necessary precondition of the liberalisation of Finland's road maintenance market. Therefore, the aid measures have been necessary to facilitate a project that is in accordance with the Community's overall interests.
- (208) Besides, the aid measures alleged by the complainants have been proportionate to the intended results, in other words the liberalisation of Finland's road maintenance and ferry traffic markets. The benefits from the aid have exceeded its possible adverse effects.
- (209) Finally, Finland refers to its commitment to transform *Tieliikelaitos* into a State-owned limited company subject to normal bankruptcy and corporate income tax rules by 1 March 2008 at the latest.

6. EXISTENCE OF AID WITHIN THE MEANING OF ARTICLE 87(1) EC

- (210) Article 87(1) of the EC Treaty prohibits in principle 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, in so far as it affects trade between Member States.
- (211) *Tieliikelaitos*, in spite of its specific legal status, is an entity engaged in an economic activity and, as such, is an undertaking within the meaning of Article 87 of the EC Treaty. This has not been contested by the Finnish authorities.

⁽³⁶⁾ XXXth Report on Competition Policy (2000), p. 128; Lisbon European Council, 23-24 March 2000, Presidency Conclusions, SN 100/00; Communication to the Spring European Council, COM(2005) 24, p. 21, Brussels, 2 February 2005; Green Paper on Services of General Interest, COM(2003) 270 final, paragraph 5, Brussels, 21 May 2003.

6.1. Applicability of the *Altmark* jurisprudence

(212) As has been outlined above, the Finnish authorities argue that the measures considered here constitute compensation for additional expenses that *Tieliikelaitos* had to bear due to special tasks imposed on it.

(213) In *Altmark* ⁽³⁷⁾, the Court of Justice held that public service compensation does not constitute State aid within the meaning of Article 87 of the EC Treaty provided that four cumulative criteria are met. Firstly, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner. Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit. Finally, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped, would have incurred. When these four criteria (hereinafter, 'the *Altmark* criteria') are met cumulatively, the State intervention does not entail conferring an advantage upon an undertaking.

(214) As to the first *Altmark* criterion, the Commission notes that the task imposed on the undertaking by Section 3 of the Act governing *Tieliikelaitos*, namely the obligation to make offers for all road maintenance contracts and provision of ferry traffic throughout the country, appears to constitute a public service obligation, i.e. the obligation to provide services of general economic interest. The same is true with respect to the obligation to take care of emergency stockpiles of liquid fuels during the transition period and the obligation to store, maintain and repair the Road administration's emergency bridge equipment for free (the latter obligation was limited to 2001) ⁽³⁸⁾.

(215) In fact, with the exception of the sectors in which there are Community rules governing the matter, Member States have a wide discretion in the definition of services that could be classified as being services of general economic interest, which is subject only to a control by the

Commission that no manifest error has been committed in such classification ⁽³⁹⁾.

(216) Thus, the Commission agreed that *Tieliikelaitos'* task to take care of emergency stockpiles of liquid fuels during the transition period, its continuous obligation to bid for all road maintenance and ferry services contracts tendered out by the Road administration as well as the obligation to store, maintain and repair of emergency bridge for free during 2001 are clearly burdens that *Tieliikelaitos* competitors are not subject to and can be classified as public service obligations.

(217) As regards other emergency preparation measures and staff training obligations imposed on *Tieliikelaitos* the Commission has not been provided with sufficient information to exclude that, as is claimed by the complainants, they are not more burdensome than the risk management measures its competitors are carrying out ⁽⁴⁰⁾ (all undertakings must prepare for emergency conditions, it being a part of all undertakings' risk management system). Furthermore, the Commission notes that the respective obligations only extended to roads whose maintenance was entrusted to *Tieliikelaitos* itself. However, there is no need to pursue further the examination of this point as it appears that there are problems with the fulfilment of other *Altmark* criteria.

(218) None of the measures described in Section 2.4 was targeted at compensating the possible financial burden created by the respective tasks. This goes against points 90 and 91 of the *Altmark* judgement, which presuppose a link between the costs and the compensation (compensation to be set *ex ante* on the basis of objective parameters). There is nothing of that kind in the case of *Tieliikelaitos*. In fact, the various advantages have been granted and calculated on the basis of objectives that are wholly unrelated to the alleged public service obligations. Thus, the second *Altmark* criterion is not fulfilled.

(219) Furthermore, the data provided by the Finnish authorities do not make it possible for the Commission to conclude that the compensation does not exceed what is necessary to cover costs incurred in the discharge of the public service obligations (third *Altmark* criterion). The fact that there were no public service compensations budgeted after the end of the transitional period further supports the contention that the package of measures carried out for the benefit of *Tieliikelaitos* was not needed to help it to cope with the alleged public service obligations.

⁽³⁹⁾ See Commission's Decision of 28 November 2005 on the application of Article 86(2) of the EC treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest C(2005)2673, OJ L312, 29.11.2005, p. 67-73, at recital 7.

⁽⁴⁰⁾ From the information provided by the Finnish authorities, it appears that after the end of the transitional period emergency preparations at the service group and headquarters levels as well as training measures require the annual expense of EUR 0,5 million, including all incidental expenses. Given the value of *Tieliikelaitos* annual turnover, this sum does not appear excessive.

⁽³⁷⁾ Judgment of the Court of 24 July 2003 in Case C-280/00 (Reference for a preliminary ruling from the Bundesverwaltungsgericht): *Altmark Trans GmbH, Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747

⁽³⁸⁾ Obligations stemming from the Act governing *Tieliikelaitos* and the Emergency Powers Act.

- (220) Finally, *Tieliikelaitos* was not selected to provide the respective services through an open tender procedure. Nor were the costs involved determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped, would have incurred.
- (221) The set of measures taken together therefore cannot be considered to exclude the involvement of State aid on the basis of the *Altmark* criteria. Therefore, the Commission must analyse whether the measures concerned are selective (Chapter 6.2 below), confer an advantage upon *Tieliikelaitos* that is financed through State resources (Chapter 6.3 below), and whether they distort or threaten to distort competition and affect trade between Member States (Chapter 6.4 below). All these elements are cumulative conditions for the finding that a measure involves State aid within the meaning of Article 87(1) EC.

6.2. Selectivity of the measures

- (222) It is not contested that all the relevant measures were either specifically designed for *Tieliikelaitos* or are limited to undertakings benefiting from the Finnish State Enterprise status. It is equally clear that, in the markets where it is active, *Tieliikelaitos* is in competition with undertakings that are not State Enterprises. As such, the Commission considers that the measures at stake are selective.

6.3. Existence of a selective advantage granted through the use of State resources

- (223) Under this heading the Commission will verify whether or not the measures put in place by the Finnish government are financed through State resources and confer a selective advantage to *Tieliikelaitos*. The latter entails assessing whether the measures in question lighten for *Tieliikelaitos* the burdens normally assumed in an undertaking's budget and are therefore to be regarded as an economic advantage which it would not have obtained under normal market conditions ⁽⁴¹⁾.

6.3.1. Grant of a preferential State loan

- (224) The long-term borrowed capital in the amount of EUR 39,5 million (FIM 237 million) provided to *Tieliikelaitos* at the moment of its formation has been defined differently by the complainants and the Finnish authorities. While the former considered it to be a loan, the latter considered it to be the transfer of assets with a repayment obligation. In this respect the Commission considers that the definition of the measure is less important than its actual impact on the charges borne by the undertaking concerned, namely whether it relieves that undertaking of charges it would normally have to bear.

- (225) For the purposes of evaluating aid element of the measure, the situation should be viewed from the point of view of the private lender at the moment the loan was approved ⁽⁴²⁾. As the respective promissory note of the Finland's State Treasury was signed on 28 December 2000 (State Enterprise loan No 6030-14) ⁽⁴³⁾, for the purposes of calculation of State aid element of the preferential loan, the Commission has to use the reference rate that was in force at that date for Finland. In line with the relevant Commission notice ⁽⁴⁴⁾ the applicable rate to be applied throughout the duration of the credit agreement thus is 5,7 % — the interest rate calculated as five-year interbank swap rate plus a premium of 75 basis points.

- (226) Thus, in 2001 *Tieliikelaitos* benefited from 4,7 percentage point lower interest rate, in 2002, 2003 and 2004, respectively 4,2, 3,2 and 2,2, and in subsequent years — 0,7 percentage point lower interest rate. Multiplying the respective interest rate difference with the outstanding credit sum at the beginning of each year ⁽⁴⁵⁾, the Commission has arrived at the total aid element of EUR 7,2 million.

- (227) To the extent the loan has been granted at an interest rate lower than the market rate, the State has foregone resources that could have accrued to it, had it provided the loan in question at market rent. As such, *Tieliikelaitos* receives an advantage granted through State resources.

6.3.2. Land and gravel sites

- (228) With respect to the land and gravel sites put at the disposal of *Tieliikelaitos*, first of all the question arises as to whether this implies a State aid. In this respect, the Commission notes that the land and gravel sites in question had already been at the disposal of *Tieliikelaitos* prior to its incorporation. Indeed, the predecessor of *Tieliikelaitos*, the Road Service within the Finnish administration, already had at its disposal the very same land and gravel sites. The creation of *Tieliikelaitos* seems to have merely established the 'road production' section of the Road Service as a separate entity, without affecting the means at the disposal of this entity.

⁽⁴¹⁾ Case 173/73 *Italy v Commission* [1974] ECR 709, paragraph 26. Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraphs 12 and 13; and Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-000, paragraph 84 and the case-law cited therein.

⁽⁴²⁾ See e.g. point 42 of the Commission communication to the Member States — Application of Articles 92 and 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector, JO C 307 du 13. 11. 1993, p. 3). See also point 76 of Judgment of the Court of First Instance of 30 April 1998 in Case T-16/96 — *Cityflyer Express Ltd v Commission of the European Communities*.

⁽⁴³⁾ The data from the 31.05.2006 submission of the Finnish authorities

⁽⁴⁴⁾ Commission notice on current State aid recovery interest rates and reference/discount rates for 15 Member States applicable as from 1 January 2005 and historic recovery interest rates and reference/discount rates applicable from 1 August 1997 — Published in accordance with Article 10 of Commission Regulation (EC) No 794/2004 of 21 April 2004 (OJ L 140, 30.4.2004, p. 1) and the Commission notice on the method for setting the reference and discount rates (OJ C 273, 9.9.1997, p. 3) Official Journal C 088, 12/04/2005 P. 0005 — 0005

⁽⁴⁵⁾ The data obtained from the 31.05.2006 submission of the Finnish authorities

(229) Secondly, the decision to initiate formal proceedings has raised the issue of the adequate valuation of the land and gravel sites.

(230) In the present case, the value of the land and gravel sites has been assessed by an independent asset valuer namely Catella Real Estate Consulting Ltd. The Finnish authorities decided to revise the value established by the independent asset valuer from EUR 21,5 million to EUR 19 million because, in the opinion of the Finnish authorities, Catella's assessment did not take properly into account three factors explained in Chapter 5.2.

(231) Moreover, according to the auditor (Ernst and Young) of *Tieliikelaitos*' books during the transitional period, the value entered into *Tieliikelaitos*' books was still too high and it approved extraordinary depreciations of the value of land and gravel sites at the level EUR 4,3 million. The valuation by Ernst and Young was in addition verified by the brokerage company IceCapital Securities Ltd, which certified that the land and gravel sites were valued in *Tieliikelaitos*' balance sheet at a price above their market value.

(232) The complainants contest the valuations carried out.

(233) The Commission considers that it is not necessary to definitively decide whether a State aid has been granted in connection with the land and gravel sites, as any such aid would be compatible with the common market for the reasons set out in Section 7.2.

6.3.3. Attribution of negotiated contracts in road services

(234) The method of calculating the price for negotiated contracts in the road sector necessarily leads to a price that is higher than the market price, since it takes as point of departure the price of a comparable tendered contract, which is itself comparable to the market price, and then increases such price in order to take into consideration structural disadvantages of *Tieliikelaitos*, that are not otherwise compensated. This confers an economic advantage to *Tieliikelaitos*, which is financed through State resources: *Tieliikelaitos* obtains from the State more money than a normal market operator would obtain for an equivalent service.

(235) While the complainants believe that the total aid related to negotiated contracts amounted EUR 21,5 million, the Finnish authorities, based on the Expert Statement, consider that *Tieliikelaitos* has gained an advantage of at most EUR 8,5 million from negotiated contracts.

(236) The Commission notes that there is a considerable heterogeneity with respect to the degree of risk involved and the kind of work requested in the different contracts concluded between the Road administration and the different operators, including *Tieliikelaitos*. The two main

types of contracts were on the one hand maintenance and planning contracts, and on the other hand plan and implement contracts. In order to establish the advantage *Tieliikelaitos* has received through its negotiated contracts, the Commission considers that it is appropriate to compare the price paid by the Finnish government for these negotiated contracts to the price paid by the Finnish government for tendered contracts, which have a comparable degree of risk and involve a comparable kind of work.

(237) The negotiated contracts have been exclusively maintenance and planning contracts. Accordingly, for establishing the advantage received by *Tieliikelaitos*, the Commission has to compare the margins of *Tieliikelaitos* in negotiated maintenance and planning contracts to the margins of *Tieliikelaitos* in tendered maintenance and planning contracts ⁽⁴⁶⁾.

(238) IceCapital has carried out an analysis of the respective profit margins. Its report shows that the difference in profit margins has procured *Tieliikelaitos* an advantage of EUR 8,5 million.

(239) At the same time, the Commission considers that *Tieliikelaitos* total benefit related to negotiated contracts is slightly larger than EUR 8,5 million. The difference of EUR 8,5 million was calculated using the final margin of negotiated contracts (the margin after the annual expenditure adjustment procedure). As stressed by the complainants and not contested by the Finnish authorities, during the transitional period the undertaking could thus benefit every year from the value of annual downwards 'adjustment' without paying the corresponding interest. Therefore, in addition to EUR 8,5 million difference in margins, *Tieliikelaitos* benefited from short-term ⁽⁴⁷⁾ interest-free credits. Knowing that the amount of expenditure downwards adjustments during the transitional period amounted to EUR 16,8 million and that credit interest rates in this period did not exceed 5,7 %, the value of the benefit *Tieliikelaitos* kept from these short-term interest-free credits is not higher than EUR 1 million.

(240) Thus, the total aid element related to the conditions of the road service contracts attributed to *Tieliikelaitos* under negotiated procedure during the transitional period approximately amounts to EUR 9,5 million.

6.3.4. Attribution of contracts for ferry services under a negotiated procedure

(241) The Commission notes that the first attempt by the Finnish authorities to shift from negotiated to tendered contracts for ferry services did not bring the expected results. The prices obtained in the call for tenders were much higher than the prices of the negotiated contracts in force between the Road Administration and *Tieliikelaitos*. Furthermore, acceptance of the tender's results would not serve the goal

⁽⁴⁶⁾ The cost of the excess staff that were not employed in special service projects was compensated through the difference in margins of negotiated contracts as compared to the margins of tendered contracts

⁽⁴⁷⁾ Below 1 year.

of liberalizing the market as it would result in the strengthening of *Tieliikelaitos* position (*Tieliikelaitos* offer was still the cheapest). Therefore Finland is looking for a new procurement model that would put all potential bidders on a level playing field.

(242) The continuation of the negotiated contracts does not give any advantage to *Tieliikelaitos* since the conditions of negotiated contracts do not reflect adequately the need for renewal of equipment. Rather, the continuation of the negotiated contracts creates hence a disadvantage for *Tieliikelaitos*.

(243) Accordingly, the Commission takes the position that the price paid by the Road Administration to *Tieliikelaitos* for the negotiated ferry contracts is not above the market price. Hence, the Commission concludes that the remuneration does not involve State aid.

6.3.5. Special provisions for the reduction of overstaffing

(244) *Tieliikelaitos* was obliged, through the act governing its transformation from being a part of the administration to becoming a State Enterprise, to overtake the entire workforce of the Road production branch of the former Road Service, even though this staff was oversized compared to its needs. In addition, the act prohibited *Tieliikelaitos* to lay off any staff in the transitional period.

(245) The Finnish authorities contest that any of the measures aimed at solving *Tieliikelaitos*' overstaffing problem constituted State aid. Indeed, such measures would only serve to partially compensate a structural disadvantage suffered by *Tieliikelaitos* due to the overstaffing problem and costly employment conditions inherited from pre-liberalisation time as well as due to the ban imposed by the Finnish Parliament to lay off the employees during the transitional period. In this regard, the Finnish authorities rely on the *Combust* judgment by the Court of First Instance as described above.

(246) In the specific circumstances of the *Combust* case, the Court of First Instance has relied on the argument that, 'instead of paying the DKK 100 million directly to the officials employed by *Combust*, the Danish Government could have obtained the same result by reassigning those officials within the public administration, without paying any particular bonus, which would have enabled *Combust* to employ immediately employees on a contract basis falling under private law'.⁽⁴⁸⁾

(247) The Commission recalls that the reasoning expressed in the *Combust* judgment and referred to by the Finnish authorities has not been explicitly confirmed by the Court of Justice or indeed referred to in any subsequent judgment by the Court of First Instance. In any event, certain elements of the

case law of the Court of Justice militate against the assumption that the grant by the State of a compensation for a structural disadvantage could not qualify as aid and thus suggest that the *Combust* judgment should not be given an overbroad interpretation.

(248) In its constant case law, the Court of Justice has held that whether a measure constitutes aid must be established on the basis of the effects of the measure, and not on the basis of the causes or aims of that measure⁽⁴⁹⁾. The Court of Justice has also held that any measure which relieves an undertaking from the charges which are normally included in the budget of the undertaking constitutes State aid.⁽⁵⁰⁾ The Court of Justice has clarified that this includes in particular costs related to the remuneration of employees.⁽⁵¹⁾ On this basis, the Court has not accepted that a measure does not confer an advantage on the undertaking in question merely because it compensates a 'disadvantage' suffered by the undertaking.⁽⁵²⁾

(249) Based on these considerations, the Commission will assess separately each of the specific measures concerned.

6.3.5.1. Transfer of staff to the Road Administration and other public administration departments

(250) With respect to the transfer of 116 employees of *Tieliikelaitos* to vacant public administration positions, the Commission first needs to assess whether this transfer was financed through State resources. This is only the case if filling vacancies in the Finnish administration with former employees of *Tieliikelaitos* was more costly for the Finnish State than filling these vacancies with other candidates. In this context, it is important to note that the Finnish administration did not create any additional posts for former employees of *Tieliikelaitos*, but only filled posts that had become vacant due to a departure of a civil servant.

(251) The complainants claim that the employees from *Tieliikelaitos* were transferred back to the administration without any change to their employment conditions, and hence were more costly for the administration than other potential applicants.

(252) The Finnish government has undertaken that transfers of personnel between *Tieliikelaitos* and the Finnish administration were only possible when a post in the administration became open and it was published. *Tieliikelaitos*'

⁽⁴⁸⁾ *Combust* judgment, paragraph 57.

⁽⁴⁹⁾ Case 173/73, Italy/Commission, [1974] ECR 709, para. 13; Case C-310/85, Deufil, [1987] ECR 901, para. 8; Case C-241/94, France/Commission, [1996] ECR I-4551, para. 20.

⁽⁵⁰⁾ Case C-387/92, Banco Exterior, [1994] ECR I-877, para. 13; Case C-241/94, France/Commission, [1996] ECR I-4551, para. 34.

⁽⁵¹⁾ Case C-5/01, Belgium/Commission, [2002] ECR I-1191, para. 39.

⁽⁵²⁾ Case 30/59, Gezamenlijke Steenkolenmijnen, [1961] ECR p. 3, 29-30; Case C-173/73, Italy/Commission, [1974] ECR 709, para. 12-13; Case C-241/94, France/Commission, [1996] ECR I-4551, para. 29, 35. Case C-251/97, France/Commission, [1999] ECR I-6639, para. 40, 46-47. Cf. equally case T-109/01, Fleuren Compost, [2004] ECR II-127, para. 54.

employees were only hired if the vacancy arose at the corresponding level of seniority, and if their level of qualification corresponded to the published vacancy. Prior to the transfer, *Tieliikelaitos'* employees had to undergo an assessment of his/her suitability for the position.

- (253) The Commission notes that the complainant has not submitted any proof for its allegation, according to which filling vacancies with former *Tieliikelaitos* employees rather than with other candidates was more costly for the Finnish government.
- (254) In the view of the Commission, the assessment of all information at its disposal has not revealed any indication that the Finnish administration has incurred additional cost through the transfer of 116 employees of *Tieliikelaitos* to vacant public administration positions. In particular, the Commission notes that the 116 employees had been formerly, when they were still working for the road service, been subject to the same employment conditions as civil servants in the Finnish administration. By re-integrating former civil servants into the public administration, at positions corresponding to their seniority and to their qualification profile, the Finnish State had the same costs as if it hired other people on these positions.
- (255) In the light of these considerations, the Commission concludes that the transfer of 116 employees has not created any additional costs for the Finnish State. Accordingly, it does not constitute State aid, as it does not involve the transfer of State resources.

6.3.5.2. Funding of Special service projects

- (256) As far as the special projects for redundant, but not laid-off, workers are concerned, the Road Administration has paid a total of approximately EUR 68 million to fund them, including EUR 56 million funding of personnel costs (Cf. Section 5.5)
- (257) The Commission recognises that the respective service projects were clearly targeted at alleviating the undertaking's structural disadvantage relating to overstaffing.
- (258) From the explanations given by the Finnish authorities as confirmed by Expert statement, it considers that the payment of EUR 68 million by the State did not involve overcompensation for carrying out the respective services (cleaning of roadsides, restoration of buildings and outdoor areas). On the contrary, the service projects had generated losses (Cf. Section 5.5).
- (259) Nevertheless the Commission considers that in the absence of such special service projects the undertaking would have had to remunerate its redundant workers without them contributing to the increase of revenues of the undertaking. There are no proofs that in other circumstances the Finnish authorities would still have considered contracting out the respective services and that it was the most economically

advantageous solution for the State to award the respective contract(s) to *Tieliikelaitos*. As such, the measure must be held to be financed through State resources.

- (260) Furthermore, unlike the transfer of staff to the administration, the situation of *Tieliikelaitos* as regards the special service projects is different to the situation contemplated by the Court of First Instance in *Combust*.
- (261) Unlike what happens when the 116 employees are transferred back to the administration, with this measure the overstaffing is not directly addressed. Rather the State is procuring from *Tieliikelaitos* exclusively and without any form of competitive tendering, the realisation of special service projects that it seems it otherwise would not have procured, or would not have procured to the same extent. The State is then by the same token clearly distorting the competitive playing field in the market undergoing the liberalisation process. The measure does not remove the structural disadvantage of the company, it rather allows it to survive in spite of that disadvantage, and does not in itself provide any incentive to put an end to this situation.
- (262) The above considerations, examined in conjunction with the relevant jurisprudence, including the *Combust* judgment, thus lead to the conclusion that the measure concerned must be regarded as aid.

6.3.5.3. Staff adjustment measures

- (263) In addition to the two above described measures EUR 20,1 million were transferred from the Road Administration's budget for the purposes of helping *Tieliikelaitos'* employees to find new jobs, financing supplementary education and retraining and for supporting pensions for early retirement.
- (264) The Finnish authorities have not provided detailed information about the relevant measures. As mentioned above, the *Combust* jurisprudence must be interpreted narrowly and the Commission can therefore not conclude that these measures do not lead to the grant of a selective advantage to *Tieliikelaitos*.

6.3.6. Fiscal measure related to land purchases by *Tieliikelaitos*

- (265) As regards the fact that during the transitional period those persons that sold land to *Tieliikelaitos* were largely relieved from tax on capital gains, the Commission notes that the Finnish authorities in fact do not provide any argument contesting the qualification of that measure as aid, as claimed by the complainants. On the basis of the information at its disposal, it must conclude that the measure in question may involve the grant of an advantage to *Tieliikelaitos*.
- (266) The Commission notes that *Tieliikelaitos* was not the direct beneficiary of respective fiscal advantages. Besides, the Commission notes that not all land sellers could benefit

from these advantages — only the sellers other than a corporation, partnership or limited partnership. *Tieliikelaitos* might have benefited from the measure provided that the direct beneficiaries would have (partially) passed these advantages onto *Tieliikelaitos*.

(267) Should there have been any advantage to *Tieliikelaitos*, this measure is in any case to be classified as existing aid pursuant to Article 1 (b)-v of the Council Regulation (EC) No 659/1999 — ‘aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the common market and without having been altered by the Member State’ — for the following reasons:

(268) *No aid at the time it was put into effect.* When *Tieliikelaitos* predecessor (‘road production’ part of the Road Service) was still part of the Finnish administration, it benefited from the fiscal advantages in question: According to Section 49(1)(4) of the Income Tax Act, all State agencies and State Enterprises benefit from this tax exemption.

(269) However, the Road service did not exercise any economic activity at the time when the measure was put into effect, for the following reason: according to its statute, the ‘Road service’ was not allowed to offer services against remuneration on the market. It was confined to exclusively working within the administration. Therefore, its activity of planning, constructing and maintaining public roads was constituted in a reserved area. In 1993 when the Income Tax Act came into force, *Tieliikelaitos* formed part of the Finnish administration and was not active in any other market. The Commission concludes that at the time the measure was put into effect, it did not constitute State aid, because it did not benefit an undertaking in the sense of Article 87(1) EC Treaty.

(270) *Subsequently aid due to the evolution of the common market.* As of 2001, the ‘production part’ of the Road Service, now established under the name *Tieliikelaitos*, could offer its services on the market, thanks to the reform of the Finnish road service market which is the object of the present decision. The decision of the Finnish government to liberalise the provision of road services was part of a major liberalisation movement, which has also prompted other EU and EEA Member States to successively open their markets for road services States on a voluntary basis (the most recent one being carried out by Norway). Today, many companies offer their services in the sector of road maintenance and construction ⁽⁵³⁾ across the entire EU and EEA territory.

(271) These reforms have changed the market in two ways: on the one hand, former government agencies have entered the market; on the other hand, the overall size of the contestable market has increased substantially (e.g. as a result of the liberalisation carried out by Finland, the size of the contestable market has increased by more than EUR 400 million).

(272) In the light of these developments, the Commission concludes that as of 2001, *Tieliikelaitos* is performing an economic activity, namely offering road services against payment, and hence constitutes an undertaking in the sense of Article 87(1) EC Treaty. Due to the evolution of the common market, the measure which at the time of its introduction did not constitute State aid has therefore become State aid.

(273) *Aid without being altered by the Member State.* As long as the Section 49(1)(4) of the Income Tax Act was applicable to *Tieliikelaitos* (till 1 January 2005), it was applied in unaltered way since 1993 when the Income Tax Act came into force.

6.3.7. Inapplicability of bankruptcy law

(274) The Commission considers that inapplicability of bankruptcy law provides an advantage for *Tieliikelaitos*.

(275) The Commission refers to its Notice on the application of Articles 87 and 88 of the EC Treaty to State aid in the form of guarantees, ⁽⁵⁴⁾ where it is stated in point 2.1.3: ‘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.’ ⁽⁵⁵⁾

(276) The Finnish authorities acknowledge that the fact that *Tieliikelaitos* cannot go bankrupt pursuant to the Bankruptcy Act could theoretically constitute an advantage as *Tieliikelaitos*’ financing expenses could have been reduced due to a reduction in the lender’s risks. But *Tieliikelaitos* did not borrow new funds on the financial market after it had been formed. Therefore, according to the Finnish authorities, it has not been possible for *Tieliikelaitos* to gain a competitive advantage in comparison with private competitors due to non-applicability of the bankruptcy law.

(277) As to the future external borrowing by *Tieliikelaitos*, the Commission does not agree that existence of a guarantee fee for the loans raised by *Tieliikelaitos* will eliminate the presence of aid as it is not possible to quantify the market price of an unlimited guarantee, simply because no market operator would grant such guarantee.

(278) Besides, *Tieliikelaitos* continually orders services and materials from external suppliers, which constitutes debt by *Tieliikelaitos* to these external actors. In view of non-

⁽⁵³⁾ The main EU companies active on the Finnish market are referred to throughout the text of the decision.

⁽⁵⁴⁾ Official Journal C 71, 11.3.2000, pages 14-18.

⁽⁵⁵⁾ See the decision to initiate the procedure, para. 103.

applicability of bankruptcy law to *Tieliikelaitos* the Commission considers it is not excluded that *Tieliikelaitos* benefits from more favourable payment terms than otherwise would have been possible. As the State bears the responsibility for eventual default by *Tieliikelaitos* with respect to its suppliers without being remunerated for this guarantee, the measure is 'financed from the State resources'.

(279) The Commission agrees however with the Finnish authorities that this measure is to be classified as existing aid pursuant to Article 1 (b) of the Council Regulation (EC) No 659/1999 'because it can be established that at the time it was put into effect it did not constitute an aid'. Indeed, the respective economic entity ⁽⁵⁶⁾ has never been subject to bankruptcy legislation, including the period before the liberalisation of road services sector in Finland. For the reasons set out above in point 0 and following, the measure did not constitute State aid at the moment of its introduction, and has become State aid due to the evolution of the common market.

6.3.8. Particularities of treatment for corporate income tax purposes

(280) The Commission considers that continuous *de facto* full exception from the corporate income tax provides an advantage for *Tieliikelaitos* ⁽⁵⁷⁾.

(281) The Commission considers that, as such, the exemption from the corporate income constitutes State aid. It is not justified by the nature and the economy of the tax system.

(282) When it comes to the determination of the State aid element, the Finnish authorities argue that although *Tieliikelaitos* does not pay corporate income tax to the State on its profits, this is taken into account when taking annual decisions on profit-crediting to the State by *Tieliikelaitos*, i.e. the percent of the profit that the undertaking gives away in profit crediting comes close to what the competitor companies pay as corporate income tax and dividends.

(283) In the view of the Commission, this argument of the Finnish authorities mixes the role of the State as fiscal authority and the role of the State as the owner of undertakings. The Commission considers that for the purpose of State aid control, it is important to clearly distinguish these two roles in line with the jurisprudence ⁽⁵⁸⁾. On the one hand, the Commission needs to verify whether the State, in its role as fiscal authority, has treated all undertakings in the same manner; on the other hand, the Commission needs to verify whether the State, in its role as the owner of undertakings, behaves like a private

investor, for example when it decides on dividend payments.

(284) Therefore the Commission considers that in order to ensure that *Tieliikelaitos* does not benefit from more favourable business conditions than its competitors, it is necessary to subject the undertaking to the standard taxation rules.

(285) The Commission notes that the exemption from the corporate income tax is to be classified as existing aid pursuant to Article 1 (b) of the Council Regulation (EC) No 659/1999 'because it can be established that at the time it was put into effect it did not constitute an aid'. Indeed, the respective economic entity has never been subject to standard corporate income tax rules. For the reasons set out above in point 0 and following, the measure did not constitute State aid at the moment of its introduction, and has become State aid due to the evolution of the common market.

6.4. Impact on competition and trade between Member States

(286) It is settled case-law that, 'where an undertaking operates in a sector in which producers from various Member States compete, any aid which it may receive from the public authorities is liable to affect trade between the Member States and impair competition, inasmuch as its continuing presence on the market prevents competitors from other Member States from increasing their market share and reduces their chances of increasing their exports to that Member State' ⁽⁵⁹⁾.

(287) In the present case, the Commission observes that the degree of opening of markets for the maintenance of road infrastructure in the various Member States has been sufficient to allow international groups, which are active in more than one Member State, to emerge. *Tieliikelaitos* itself has established, in 2004, a subsidiary in Estonia, thus engaging outside Finland. In addition, *Tieliikelaitos* is currently involved in a joint venture in Sweden. Therefore it is clear that *Tieliikelaitos* 'operates in a sector in which producers from various Member States compete'. As such, it must be held that the grant of a selective advantage to *Tieliikelaitos* finance by State resources constitutes State aid that is in principle prohibited pursuant to Article 87(1) EC.

6.5. Conclusion on the presence of State aid

(288) The Commission thus concludes that the measures 'Negotiated contracts for provision of ferry services' and 'Transfer of staff to public administration departments' do not constitute State aid in the sense of Article 87(1) EC, as they do not confer an economic advantage to *Tieliikelaitos*.

⁽⁵⁹⁾ Judgment of the Court of 21 March 1991 in Case C-305/89, Italian Republic v Commission, European Court reports 1991 Page I-01603.

⁽⁵⁶⁾ *Tieliikelaitos* and its predecessor — the Road Service.

⁽⁵⁷⁾ State enterprises operating primarily to satisfy the needs of other State institutions do not pay the tax.

⁽⁵⁸⁾ See paragraph 317 of joined cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission* [2003] ECR II-00435. See also paragraph 97 of Commission decision of 16 December 2003 relating to EDF (OJ L 49, 22.2.2005, p. 9) as well as Commission Decision of 19 May 2004 on measures implemented by Denmark for TV2/Danmark (OJ L 85, 23.3.2006, p. 1).

(289) However, the measures described above under the following terms: 'the grant of a preferential State loan', 'the attribution of negotiated contracts in road services' the 'Funding of Special service projects', the 'Staff adjustment measures', the 'inapplicability of bankruptcy law', the 'inapplicability of the normal corporate tax law' and the 'fiscal measure related to land purchase by *Tieliikelaitos*' constitute aid that is in principle prohibited pursuant to Article 87(1) of the EC Treaty. There might have been some aid involved also in relation to land and gravel sites.

7. COMPATIBILITY OF THE AID WITH THE COMMON MARKET

(290) The same reasons which prevented the Commission from declaring the package of measures carried out for the benefit of *Tieliikelaitos* as 'non-aid' based on the criteria developed in the *Altmark* judgement (cf. Chapter 6.1), make it impossible for the Commission to clear those measures of the package, which contain State aid elements, as compatible with the common market on the basis of Article 86(2) of EC Treaty. In line with the Community framework for State aid in the form of public service compensation⁽⁶⁰⁾, Commission cannot declare as compatible with the common market on the basis of Article 86(2) of the Treaty aid which is not clearly necessary for the performance of the tasks assigned and proportional to that end.

(291) As no other specific legal basis exists for examining the aid package in question, the Commission has to assess whether the aid granted to *Tieliikelaitos* is compatible with the common market on the basis of Article 87(3)(c) EC, which foresees that '*aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest*' can be declared compatible with the common market.

(292) In order for an aid measure to be compatible with the common market pursuant to Article 87(3)(c) of the EC Treaty, the aid must fulfil the following criteria:

- the aid must promote or further a project that is in the interest of the Community as a whole,
- the aid must be necessary for the achievement of this result, in that the objective it is seeking to promote could not have been obtained in its absence, and the duration, intensity and scope of the aid must be proportional to the importance of the intended result,

- the positive effects that are thus directly attributable to the aid measure must thus be balanced against the aid's negative effects on competition and trade between Member States, so that it can be concluded that the aid does not adversely affect trading conditions to an extent contrary to the common interest.

(293) In assessing the relevant measures against these criteria, the Commission will distinguish the various State aid measures identified above within two groups:

- existing aid measures (advantages related to the inapplicability of bankruptcy law, the inapplicability of the normal corporate tax law and the fiscal measure related to the acquisition of land by *Tieliikelaitos*),
- new aid measures mainly linked to the transitional period (advantages related to the State loan, the negotiated contracts in road sector, the special services projects, the staff adjustment measures, possible aid related to land and gravel sites).

7.1. Compatibility of the existing aid measures

(294) The Commission notes that the special corporate income tax provisions and the non-application of the bankruptcy law are measures inherent to the legal status of *Tieliikelaitos* as a State Enterprise. The same is true with respect to the fiscal measure related to land acquisition by *Tieliikelaitos*.

(295) Furthermore, these measures are not linked either to the opening of the Finnish market for road construction, road planning, road maintenance or to the development of other economic activities. On the basis of the information available to the Commission, the compatibility of the measures pursuant to Article 87(3)(c) of the EC Treaty can thus not be established.

(296) The Commission considers that the so called profit crediting mechanism and guarantee fee mechanism do not guarantee that the advantages related to inapplicability of bankruptcy legislation and corporate income tax legislation are entirely eliminated (see Chapter 6.2).

(297) The Commission also notes that the arrangements involving unlimited State guarantees for the benefit of entities engaged in commercial activities have always been found incompatible with State aid rules of the EC Treaty⁽⁶¹⁾.

⁽⁶⁰⁾ OJ C 297/4, 29 November 2005, pp. 4-7.

⁽⁶¹⁾ See Decision on the State aid granted by France to EDF and the electricity and gas industries (OJ L 49, 22.2.2005, p. 9). See also E8/2005 Spanish national public broadcaster RTVE (OJ C 239, 4.10.2006, p. 17; E50/2001 — Garantie accordée par CDC à sa filiale CDC Ixis (OJ C 154, 02.07.2003, p13); E10/2000 — State guarantees for public banks in Germany (Anstaltslast und Gewährträgerhaftung) — OJ C 150, 22.6.2002, p. 7).

(298) Consequently, the Commission concludes that the continuation of derogations from normal corporate income taxation rules and bankruptcy legislation are incompatible with the common market.

(299) In this respect the Commission welcomes the commitment of the Finnish Government to reorganise *Tieliikelaitos* as a government owned limited company by 1 March 2008. The Commission agrees with this deadline since it appears to be a reasonable time limit for carrying out such a procedure, in the light of its complexity from a legal standpoint.

(300) Finally, the Commission notes that the existing aid part of the fiscal measure related to the land acquisition by *Tieliikelaitos* was repealed in 2004.

7.2. Compatibility of the new aid measures

(301) This section concerns aid involved in the grant of a preferential State loan, funding of special service projects, attribution of negotiated contracts and funding of Staff adjustment measures, as well as possible aid related to land and gravel sites.

(302) By way of preliminary observation, the Commission notes that, as is clear from the submission of the Finnish authorities, the aid in question, which were mainly of transitional nature, do not seem to have negatively affected the competitive structure of the markets on which *Tieliikelaitos* operates. Indeed, the information submitted to the Finnish authorities and described above in Section 5.10, shows that competition in the relevant activity has significantly increased throughout the transitional period and that *Tieliikelaitos* is now subject to substantial competitive pressure. The evidence put forward by the complainants does not undermine this conclusion.

(303) As regards the alleged high market share of *Tieliikelaitos* in the sphere of regular road maintenance (see above, in Section 5.10), the Commission considers that, when the relevant figure put forward by the complainant is looked at in its proper economic context, it cannot be established that the competition would not function well in the respective market. This is in particular the case when the high number of bids submitted, the switching rate of customers, and the outcome of the tenders organised in 2006 are considered. ⁽⁶²⁾

(304) Commission notes in this respect that, according to the complainants themselves, already during the transitional period in 2001-2004, foreign operators were active in the Finnish infrastructure market, including Sweden's Skanska AB and NCC AB through their Finnish subsidiaries.

Furthermore, foreign undertakings have competed for the EUR 630 million contract to build a highway between Muurla and Lohja; Estonian contractors, among others, have competed for Finnish maintenance contracts ⁽⁶³⁾.

(305) The development of prices for road maintenance services (cf. Section 5.10) has been for the benefit of the Finnish tax payers and the economy as a whole. Convincing evidence to that effect, which has not been contested by the complainants, has been provided by the Finnish authorities.

(306) The Commission therefore concludes that the aid measures related to the transitional period do not appear to have affected competition and trade to an extent contrary to the common interest. It is against this background that the necessity and proportionality of the aid will have to be assessed, within the overall balancing test that is called for under Article 87(3)(c).

7.2.1. Project that is in the interest of the Community as a whole

(307) The common interest invoked by the Finnish authorities is the effective opening of the State segment of the Finnish road service market to competition, combined with the preservation of the industrial potential of the 'Road Production' section of the Road Service (*Tieliikelaitos*' predecessor), and allowing it to transform into a competitive undertaking while avoiding from the forced lay-offs of existing employees at least during the transitional period.

(308) The Commission considers that such a project can indeed serve the common interest of the Community.

(309) As correctly mentioned by the Finnish authorities, the opening of closed national markets to competition at European level constitutes a positive development and an important policy objective of the Community. ⁽⁶⁴⁾

(310) The Commission considers that the liberalisation of the road service market and the preservation of *Tieliikelaitos*' industrial tool were intimately linked. Firstly, it notes that the adoption of the liberalisation legislation was directly linked to the adoption of a provision guaranteeing that *Tieliikelaitos* could not lay-off personnel — although at that time the company had a serious problem of overstaffing. Secondly, as is evident from the evolution of the market, there was ample scope for *Tieliikelaitos* to play a significant role in the competitive landscape and offer road services that adequately met the demand by the various customers, in terms of both price and quality.

⁽⁶³⁾ Paragraph 80 of the complainants' June 2006 submission.

⁽⁶⁴⁾ See, *inter alia*, XXXth Report on Competition Policy (2000), p. 128; Lisbon European Council, 23-24 March 2000, Presidency Conclusions, SN 100/00; Communication to the Spring European Council, COM(2005) 24, p. 21, Brussels, 2 February 2005; Green Paper on Services of General Interest, COM(2003) 270 final, paragraph 5, Brussels, 21 May 2003.

⁽⁶²⁾ See Section 5.10.

(311) The examined State aid package, by relieving *Tieliikelaitos* from the extra personnel costs it had to bear due to inherited liabilities from the time when the respective services were part of the public administration system (in-house services), would enable the company to operate freely in the liberalised market and to make the necessary adjustments to respond to market and other technological developments that affect the company's viability in the long term.

(312) The Commission further notes that the complainants do not challenge in substance the argument by the Finnish authorities that opening the market to competition is in the common interest of the Community. Nor do they contend that there was no link between the opening of the market and the preservation of staff at *Tieliikelaitos*. They essentially argue that the desired results could also have been achieved without aid.

7.2.2. Necessity and proportionality of the aid measures, no effect on competition and trade contrary to the common interest

(313) In order to assess whether the relevant aid measures are necessary and proportionate to the objective of common interest identified above, it is appropriate to distinguish first between the various aid measures.

7.2.2.1. Land and gravel sites

(314) As set out in Section 6.3.2 of the present decision, State aid might have been granted to *Tieliikelaitos* by the Finnish government in relation to the land and gravel sites.

(315) The Commission acknowledges that if the Finnish authorities were to introduce competition in the road and ferry services, they had to transform *Tieliikelaitos* into a separate entity and to provide it either with the assets necessary to perform its tasks or with the capital necessary to buy these assets. Therefore, in the present case, taking into consideration the process undertaken by the Finnish authorities to open road services to competition, the possible State aid in relation to the land and gravel sites can be considered as a proportionate measure.

(316) The Commission concludes that, should there be State aid in relation to land and gravel sites, this State aid is necessary and proportionate.

7.2.2.2. Staff adjustment measures

(317) The various Staff adjustment measures described above in Section 5.5 provided incentives to *Tieliikelaitos'* employees to leave the company. Such measures were clearly necessary to the objective sought, in view of *Tieliikelaitos'* overstaffing, which is not contested by the complainants. They were also manifestly proportionate, since the State financed only 50 % of the respective expenditure (EUR 20,1 million were financed by the State and EUR 20 million by the undertaking). Since their effect

was largely dependent on whether the relevant staff would seize the opportunity of leaving the company, they were not sufficient to compensate the significant costs of *Tieliikelaitos'* overstaffing.

7.2.2.3. Funding of Special services projects

(318) As has been described above, Special service projects provided an activity to part of *Tieliikelaitos'* excess staff. Had not such projects been put in place, it is clear that, in view of the fact that Staff adjustment measures could only solve part of the overstaffing problem, *Tieliikelaitos* would have either maintained the remaining excess staff temporarily without work or would have affected it to maintenance contracts. Both such options would have been detrimental to the objective of common interest aimed at through the measure. Maintaining the staff concerned inactive would have wasted human capital accumulated in the period prior to liberalisation, in terms of specific skills and know-how. Affecting the staff to maintenance contracts would have prevented *Tieliikelaitos'* from progressively adapting its way of working in order to deliver the relevant road services in a cost-effective way. Therefore, the Commission considers that the funding of Special services projects through State aid may meet the criterion of necessity of the aid to a common interest objective.

(319) As regards the proportionality of that measure, the Commission notes that there was no overcompensation for the work carried out in the Special service projects. Convincing evidence to that effect was submitted by the Finnish authorities (see above, Section 5.5).

7.2.2.4. Attribution of negotiated contracts in road services

(320) There was naturally a limit as to the amount of work that could be done through Special service projects, this limit residing in the State's actual need for such services to be provided. The Commission concludes from the various data submitted by the Finnish authorities that the Special services project only absorbed a part of *Tieliikelaitos'* overstaffing-related costs. As mentioned above in Chapter 5.3, on average, *Tieliikelaitos* had during the transitional period, still 100 employees more than the optimum number, in spite of the Staff adjustment measures and the Special service projects.

(321) For the same reasons set out above in relation with Special service projects, it was not in the common interest for *Tieliikelaitos* to maintain this extra staff inactive. The ability not to overburden tendered contracts, where it was submitting bids to open tender, with the costs related to redundant staff was indeed essential if *Tieliikelaitos* was to adapt to a competitive market. Therefore the respective financial burden was compensated through the negotiated contracts.

(322) As regards the negotiated contracts, their existence was linked to the gradual nature of the liberalisation process as devised by Finland. These contracts represented at the beginning of the period a large portion of *Tieliikelaitos'* activity, which then gradually decreased. Not taking into account the additional costs borne by the undertaking as a result of its overstaffing would have led to significant deterioration of its financial situation.

(323) In the light of the above considerations, the Commission considers that the aid mechanism linked with negotiated contracts was necessary.

(324) As regards the proportionality condition, a procedure was organised in order to limit risks of overcompensation. The Commission considers that the annual expenditure adjustment procedure described above at the beginning of Section 5.3 was appropriate in this regard.

7.2.2.5. Preferential loan and overall conclusion on necessity and proportionality

(325) As regards finally the preferential loan granted to *Tieliikelaitos*, the Commission notes firstly that it yields a net advantage for the undertaking of EUR 7,2 million, which is approximately 8 % of the overall amount of aid granted to *Tieliikelaitos*.

(326) When adding this aid amount to the amount represented by the above-mentioned aid measures, *Tieliikelaitos* received from the State directly or indirectly EUR 92,8 million ⁽⁶⁵⁾. This manifestly did not compensate the structural disadvantage borne by *Tieliikelaitos*, which was estimated at EUR 157 million. ⁽⁶⁶⁾ As such, *Tieliikelaitos* made a significant contribution from its own resources in order to solve the overstaffing problem it inherited from pre-liberalization time. In this regard, one should mention in particular EUR 20 million that were allocated by *Tieliikelaitos* for financing severance packages. ⁽⁶⁷⁾

(327) In the light of the financial statements of *Tieliikelaitos*, it appears that the undertaking could have faced difficulties, had it contributed much more from its own resources to the personnel adjustment measures. *Tieliikelaitos'* operating

profit/turnover ratio during the transitional period stood at a low level of 2,4 % whereas for its competitors the average indicator was 4,5 % ⁽⁶⁸⁾. As staff reduction measures were not completed during the transitional period, the respective indicator was even worse in 2005 (1,6 %). In 2005 the undertaking had to bear the financial cost of reducing its staff number by more than 400 persons without any State support. The operating profit indicator improved again in 2006 (2,2 %) and continues to improve ⁽⁶⁹⁾. It therefore seems that the own contribution of *Tieliikelaitos* to removing the respective structural disadvantage had a negative impact on the undertaking's profitability and hence its competitive position.

(328) Furthermore, it must be recalled that the aid measure package does not seem to have had any lasting impact on the structure of competition (Cf. Section 5.10).

(329) In this regard, the Commission notes that the Finnish authorities had designed the aid package to *Tieliikelaitos* in a way that limited possible distortions of competition. In particular this concerns the approach chosen with respect to the structure of the opening balance sheet of *Tieliikelaitos* (not distributing the entire stock of financial assets as equity) in order to align it with the balance sheets of private undertakings in the sector. This also concerns the efforts to limit as much as possible the differences between the margins of negotiated and tendered contracts, *inter alia*, through the annual expenditure adjustment procedure.

(330) The Commission also notes that the Road Administration carried out a number of measures to facilitate entry of new market players. To reduce possible barriers to market entry which could be caused for instance by the complexity of tender documents, the Road administration arranged briefings for contractors and prepared the procurement programmes and tendering rules involving to the extent possible all the interested parties. The Road administration's procurement strategy has been prepared by taking into account the opinions of actors in the sector about e.g. how big the maintenance contracts should be. Offer fees paid (5 000 EUR per offer) with respect to offers meeting the minimum requirements set by the Road Administration also were conducive to the entry of new market players ⁽⁷⁰⁾.

(331) In 2006 the Ministry of Trade and Industry blocked *Tieliikelaitos'* negotiations with several cities about setting up joint ventures that would combine the technical service units of the cities with *Tieliikelaitos* local service units. The

⁽⁶⁵⁾ This includes EUR 7,2 million aid element of preferential loan, EUR 9,5 million aid element related to the negotiated contracts, EUR 56 million financing of staff expenditures related to Special service projects and EUR 20,1 million financing for staff adjustment measures.

⁽⁶⁶⁾ This sum comprises only additional staff-related costs. As to the foregone income due to restrictions on the use of land resources during the transitional period, the Commission takes on board only real costs; besides, in this particular case it is very probable that the undertaking will very soon recuperate the foregone income. The so called public service obligation costs are of relevance only under Article 86(2) of the Treaty. They would have been looked at only if the whole of the aid package could not be approved on the basis of Article 87(3)c of the Treaty.

⁽⁶⁷⁾ See above, in Section 5.5.

⁽⁶⁸⁾ These figures are based on the data from annual reports submitted by the Finnish authorities (data from the annual reports of *Tieliikelaitos*, YIT-Yhtimä Oyj, Lemminkäinen Oyj, Skanska Oy, NCC Finland Oy, Palmberg Group, Oy VR-Rata Ab)

⁽⁶⁹⁾ Data taken from the publicly available *Tieliikelaitos* annual reports.

⁽⁷⁰⁾ The Government's 2005 report to the Parliament about the road service reform.

Ministry required that the cities wishing to set up the planned joint ventures select their partner through an open competitive tender ⁽⁷¹⁾.

- (332) The Commission rejects the complainants' allegation according to which *Tieliikelaitos* would have been using predatory pricing practices during the transitional period or in 2005. The information provided by the Finnish authorities shows that *Tieliikelaitos* had positive margins from the tendered contracts it entered into. In fact, the Commission notes that the level of *Tieliikelaitos* profit during the transitional period would have corresponded to the average of its competitors if it did not have non-compensated additional costs (EUR 65 million — see Section 7.1.2) resulting from the legacy of the previous regime.
- (333) In the light of the above, the Commission concludes that, on balance, the examined new aid measures, which were transitory in nature since they were linked to the transitional period, are compatible with the common market, since they are necessary and proportionate to an objective of common interest and do not distort trade and competition to an extent contrary to the common interest.
- (334) This conclusion is in line with the Commission's decision practice, notably in the *OTE* ⁽⁷²⁾ and *EDF* ⁽⁷³⁾ cases.
- (335) In *EDF*, the Commission declared compatible a measure by which the French State relieved enterprises in the French electricity and gas sectors of the payment of some of the specific pension rights the employees had acquired in the past, at a time when companies were operating under a legal monopoly. The Commission considered that at that time the companies were shielded from any intra-industry competition and could thus bear the higher pension rights without suffering any significant economic disadvantage. The Commission acknowledged, that these 'past liabilities' represented a significant difficulty for these enterprises, once they were operating in competition with other electricity or gas enterprises that did not have to bear similar costs from the past (par. 143 of the Decision). The Commission regarded the aid granted 'with the view to such sectoral reorganization' as necessary and proportionate on the grounds that the other aspects of the sectoral reform did not involve any State aid (paragraph 146 of the Decision). In the present case, similarly, the overstaffing that burdened *Tieliikelaitos* was inherited from the pre-liberalisation period; the measures contributed to alleviate that burden in a proportionate manner and to allow *Tieliikelaitos* to participate fully in the competitive process, and hence take part in the reorganisation of the road services sector.
- (336) In *OTE*, where the Commission explicitly referred back to the *EDF* decision ⁽⁷⁴⁾, the Commission assessed the Greek

government's contribution to the Hellenic Telecommunication Operator's (*OTE*) voluntary early retirement scheme. Due to the life tenure status of *OTE* employees, which was inherited from the time when *OTE* had a monopoly position, *OTE* could not unilaterally dismiss personnel, but had to have recourse to voluntary redundancy offers. To make such offers attractive, *OTE* had to offer its employees voluntary redundancy terms and conditions that reflect the latter's permanent status, which, in turn, led to higher costs for *OTE* than the costs of comparable early retirement schemes offered by other companies under general labour laws and regulations. The Commission verified that the respective aid measure would only partially compensate for the extraordinary costs caused by the structural disadvantages resulting from *OTE*'s former position as State-owned monopoly, and that the burden was not associated with directly related advantages of its former status that would mitigate it. The Commission also assessed whether the relevant market was fully liberalised in the sense that an appropriate legal or regulatory framework existed and concluded that the aid measure was compatible with Article 87(3) of the EC Treaty. In the present case, the overall compensation obtained by *Tieliikelaitos* does not go beyond the burden derived from the overstaffing, which is not compensated through other advantage, and the market development point to a development of effective competition in the relevant market.

8. CONCLUSION

- (337) In the light of the above considerations, the Commission considers that the aid provided during the transitional period (2001 to 2004) to *Tieliikelaitos* is compatible with the common market on the basis of Article 87(3) c of the EC Treaty. At the same time the Commission considers that the continuation of exemptions from the application of normal bankruptcy law and corporate income tax rules are not justified and that such derogations have therefore to be abolished.

HAS ADOPTED THIS DECISION:

Article 1

State aid provided to *Tieliikelaitos* on a transitional basis and consisting of the following measures:

- preferential State credit in the amount of EUR 41,44 million granted at the time of transformation of undertaking from the production part of the Road Service into the State Enterprise,
- aid amounting to EUR 9,5 million provided through negotiated contracts for services/works contracts with respect to State roads during the period 2001-2004,
- aid provided through Special service projects for employment of excess staff of *Tieliikelaitos*, which were financed by the Road administration at the level of EUR 68 million,

⁽⁷¹⁾ Source: the Annual Report of *Tieliikelaitos* for 2006.

⁽⁷²⁾ The Commission decision of 10 May 2007 in State aid case No C 2/06 (ex N 405/05), see http://ec.europa.eu/comm/competition/state_aid/register/ii/

⁽⁷³⁾ Commission Decision of 16 December 2003 'on the State aid granted by France to EDF and the electricity and gas industries', OJ L 49/9 of 22.2.2005

⁽⁷⁴⁾ *OTE* decision, paragraph 116.

- staff adjustment measures financed by the Road administration at the level of EUR 20,1 million (measures helping employees to find new jobs, financing supplementary education and retraining and supporting pensions for early retirement),
- possible aid related to the land and gravel sites put at the disposal of *Tieliikelaitos*

is compatible with the common market on the basis of Article 87(3)(c) EC.

Article 2

Existing aid measures for the benefit of *Tieliikelaitos* consisting of inapplicability of bankruptcy legislation, inapplicability of normal corporate income tax and the fiscal aid measure related to land purchase by *Tieliikelaitos* are not compatible with the common market. Those existing aid measures which are still in force (inapplicability of bankruptcy legislation and inapplicability

of normal corporate income tax) have to be repealed by 1 March 2008 at the latest in accordance with the commitment provided by the Finnish authorities.

Article 3

This Decision is addressed to Finland.

Finland shall inform the Commission, within two months following notification of this decision, of the measures already taken and planned to comply with it.

Done at Brussels, 11 December 2007.

For the Commission

Jacques BARROT

Vice-President
