

COMMISSION DECISION

of 1 December 2004

on the State aid which France is planning to implement for Bull

(notified under document number C(2004) 4514)

(Only the French text is authentic)

(Text with EEA relevance)

(2005/941/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 those comments,

Whereas:

I. PROCEDURE

- (1) On 13 November 2002, the procedure laid down in Article 88(2) of the Treaty opened in respect of a EUR 450 million cash advance granted by France to Bull was closed by the Commission by Decision 2003/599/EC ⁽²⁾ — a positive decision conditional on the aid being repaid by 17 June 2003. On 26 November 2003, the Commission brought an action before the Court of Justice of the European Communities for France's failure to comply with the decision ⁽³⁾. At the end of 2003 and beginning of 2004, a number of meetings took place in the course of which the French authorities and Bull explained the content of Bull's restructuring plan, and in particular its third stage, that of recapitalisation. France notified the aid proposal to which the present Decision relates by letter dated 20 February 2004.
- (2) By letter dated 16 March 2004, the Commission informed France of its decision to open the procedure laid down in Article 88(2) of the Treaty in respect of the said proposal.

- (3) The Commission Decision to open the procedure was published in the *Official Journal of the European Union* ⁽⁴⁾. The Commission called on interested parties to submit their comments on the aid in question.
- (4) The Commission received comments from representatives of Bull's employees. A meeting between a delegation of those representatives and the Commission took place on 8 June 2004, following which the representatives provided the Commission with additional information. The Commission forwarded the information to France for its comments, and at the same time asked a number of questions about several aspects of the case. It received France's comments and replies by letters dated 28 May and 29 July 2004. A meeting between the Commission, the French authorities and Bull took place on 10 September 2004.

II. DESCRIPTION

1. The aid recipient

- (5) Bull is an international information technology (IT) group based in Europe doing business in over 100 countries ⁽⁵⁾. It is active mainly in two areas:
- high-end professional computer servers: Bull designs and markets a range of large servers for professional use and provides maintenance services directly linked to those servers. Bull's market share in the Community as constituted on 30 April 2004 (hereinafter called the Community of Fifteen) came to approximately 3 % (approximately 5 % in the case of medium and high-end servers). Its main competitors in this field are IBM (34,3 % market share), Hewlett Packard (HP), which took over Compaq in 2001 (29,4 %), Sun (12,6 %) and Fujitsu/Siemens (8,9 %),
 - specialised IT engineering services: Bull develops and integrates different applications, builds software architectures, etc. Following the sale of its Integris division to Steria, Bull's activities in this market sector have been centred particularly on France and Italy. Bull's main competitors here are IBM and HP. Bull's market share in the Community of Fifteen comes to less than 1 %.

⁽¹⁾ OJ C 102, 28.4.2004, p. 12.

⁽²⁾ OJ L 209, 19.8.2003, p. 1.

⁽³⁾ Case registered under the number C-504/03.

⁽⁴⁾ See footnote 1.

⁽⁵⁾ <http://www.bull.com>

- (6) In 2003, Bull's turnover amounted to EUR 1 265 million, broken down as follows: products 46 %, associated maintenance 27 % and services 27 %.
- (7) Bull is a limited company incorporated under French law. Its shareholders, after the July 2004 recapitalisation and the exercise of share warrants by existing bondholders, are France Télécom and NEC, each with 10,1 %, Axa Private Equity and Artemis with 8,6 %, Bull's senior management with 5,1 %, Motorola with 3,0 % and Debeka with 2,9 %. The French State now holds only 2,9 %, the remaining 57,3 % being accounted for by floating shareholders.
- (8) Starting in 1994, to resolve the difficulties encountered in the early 1990s Bull introduced the measures provided for under an earlier restructuring plan in accordance with the commitments given by France of which the Commission took note in its Decision 94/1073/EC of 12 October 1994 concerning the grant of State aid by France to the Bull group in the form of a non-notified capital increase⁽⁶⁾. In particular, Zenith Data Systems was sold off and the OSS (open systems and software) division was closed down. France privatised Bull by opening up its capital. In 1999, Bull again had to dispose of assets and announce redundancies. In 2000, a plan resulted in a strategic refocusing of the company, the sale of non-strategic assets and a reduction in costs. At the end of 2001, Bull employed only 9 500 people throughout Europe, compared with 11 500 in 1999.
- (10) For a number of years, Bull had invested heavily in Internet technologies, focusing its commercial activities on the concepts of 'e-services' and 'net-infrastructure'. The crisis in the Internet sector revealed that Bull had made, in this respect, poor technological choices and had concentrated on markets in which it was unsuccessful. Moreover, Bull showed a marked lack of consistency between, on the one hand, its ambitions in terms of markets targeted and products offered for sale and, on the other, the technological development investment and commercial and administrative expenditure undertaken.
- (11) In addition, the group felt the backlash from the very high charges linked with its employees' pension schemes in the United States. In accordance with American standards, the assets of the consolidated balance sheet included the cost of pensions due, which represented the excess value of the pension fund assets (current market value) over the discounted liability of the projected pension rights. In 2002, Bull decided to transfer all of its pension obligations to insurance companies. In combination with falling stock values, this decision resulted in a financial loss of EUR 87 million for the whole of the years 2002 and 2003.
- (12) The uncertainty surrounding the company's financial health led to a degree of reticence on the part of customers to carry out large projects, given that they were no longer sure that the company could fulfil its obligations in the years ahead. Suppliers imposed stricter payment terms at a time when Bull's access to bank guarantees had almost dried up.

2. Bull's difficulties prior to the restructuring plan to which this Decision relates

- (9) In spite of the measures referred to in paragraph 8, in 2001 the strategic plan failed. First of all, the crisis in the technology stock market prevented Bull from selling its heavily loss-making Integris division to an outside buyer. Secondly, the crisis in the Internet sector hit Internet-based technology businesses hard. The collapse of the telecommunications market, the bursting of the Internet bubble, greatly reduced corporate margins and international tensions resulted in a contraction in demand. Corporate expenditure on computers fell sharply in 2002 (-25 % in the case of medium and high-end servers). The services market suffered a drastic fall compared with the earlier rise owing to the Year 2000 problem and the changeover to the euro. The worsening economic situation after the events of 11 September 2001 weakened Bull's situation still further.

3. Restructuring plan

- (13) On 2 December 2001, a new chairman was appointed at the head of Bull. His restructuring plan, which was adopted by the board of directors in March 2002, involves a massive reduction in overheads and staff together with a refocusing on the company's strengths through substantial industrial asset sales. The growth strategy is based on three main elements:
- upgrading of the range of large business servers while at the same time guaranteeing the continuity of solutions used by customers, coupled with competitive technological development,
 - a positioning as European leader in Intel 64-bit architecture-based solutions and open source software in target markets,

⁽⁶⁾ OJ L 386, 31.12.1994, p. 1.

— continued development of service activities in those areas where Bull stands apart, in particular the provision of complete solutions (hardware + middleware + applications) to priority sectors such as the public sector (tax and customs authorities, social services, e-government), defence and security, and telecommunications operators (7).

(14) The main strands of the financial component are as follows:

— a 90 % reduction in the EUR 204 million debt owed to convertible bond holders, combined with an offer to convert their securities into equity or into equity coupled with stock-options. This is reflected in an extension of the due date of their bonds, a reduction in the yearly coupon payment and the abolition of the redemption premium. The terms of the offer to exchange their bonds are either, in the first alternative, 20 new shares per bond or, in the second alternative, 16 shares plus 16 stock options exercisable by 15 December 2004. Inasmuch as the vast majority have chosen the second alternative and supposing they systematically exercise their stock options, convertible bond holders will thus contribute EUR 17,2 million,

— a capital increase launched on the market and guaranteed to the tune of EUR 33 million by a group of investors: NEC and France Télécom (Bull's historical shareholders) for EUR 7,5 million each, Debeka (a German insurance company and one of Bull's major customers) for EUR 3 million, the investment funds Axa Private Equity and Artemis for EUR 7 million and EUR 2 million respectively and, lastly, 350 senior managers of the Bull group for EUR 6 million. In reality, the public has contributed EUR 13,8 million. Consequently, investors' contributions amount to only some 90 % of the amounts guaranteed. The total increase comes to EUR 44,2 million,

— the aid described in section 4, which consists of a EUR 517 million payment coupled with a better fortunes clause.

(15) Once all these measures have been implemented, the Bull group's equity capital should amount to EUR 59,2 million. The financial projections associated with the plan are given in the table below.

Table

	(EUR million)			
	2004	2005	2006	2007
Turnover	[...] ^(*)	[...]*	[...]*	[...]*
EBIT (**)	[...]*	[...]*	[...]*	[...]*
Net result	[...]*	[...]*	[...]*	[...]*

(*) Parts of this text have been edited to ensure that confidential information is not disclosed; those parts are enclosed in square brackets and marked with an asterisk.

(**) Earnings before interest and tax.

4. Description of the aid

(16) The notified aid will take the form of a EUR 517 million payment by the French State, to be made on 31 December 2004 at the earliest. This amount is equivalent to the rescue aid authorised by Decision 2003/599/EC, including interest since its payment in December 2001 and June 2002. The new aid will not actually be paid until after Bull has reimbursed the rescue aid. In exchange, the French State is imposing a better fortunes clause in the form of payment to the State by Bull of 23,5 % of its annual consolidated current result before tax for a period of eight years starting from the financial year ending 31 December 2005.

(17) According to the French authorities, the clause represents a present value of between EUR 50 million and EUR 60 million. The maximum amount of aid therefore comes to EUR 467 million, or approximately 90 % of the existing debt. In this way, the French authorities are seeking to ensure a treatment similar to that of convertible bond holders, who are likewise foregoing approximately 90 % of their claims.

III. GROUNDS FOR OPENING THE PROCEDURE LAID DOWN IN ARTICLE 88(2) OF THE TREATY

(18) The decision to open the procedure laid down in Article 88(2) of the Treaty includes a preliminary assessment of the aid measure in the light of the Community guidelines on State aid for rescuing and restructuring firms in difficulty⁽⁸⁾ (hereinafter called the guidelines). In its decision, the Commission doubted whether the plan guaranteed a return to viability. The latest financial figures pointed to a return to viability in the event of the balance sheet being restored, but the Commission considered that one year was too short a period in which to demonstrate a return to viability. The

(7) For more details of the restructuring plan, see Decision 2003/599/EC.

(8) OJ C 288, 9.10.1999, p. 2.

forecasts for the relevant markets were not very detailed and they did not all agree, and it appeared that several of those markets would remain problematic, especially in the short term. More importantly, the information provided by the French authorities did not make it possible to assess whether Bull would be capable of benefiting from a growth in the markets inasmuch as the group's remaining industrial activities relied heavily on the manufacture of systems where the competition was intense. Furthermore, the recapitalisation plan did not involve any new partners beyond those already present, namely France Télécom and NEC.

- (19) In view of the large amount of aid involved, the Commission also doubted whether undue distortions of competition were avoided, whether the aid was limited to the minimum needed and whether it avoided providing the company with surplus cash which could be used for aggressive, market-distorting activities not linked to the restructuring process. For instance, it was not clear what the solvency and liquidity ratios would be after the aid was paid and how they would compare with those of competitors in the relevant markets.

IV. COMMENTS FROM THIRD PARTIES AND FROM FRANCE

- (20) France communicated discounted projections for the relevant markets together with information on leading competitors, on the financial data and on events in recent months, including the success of the recapitalisation plan.
- (21) France stresses that the aid is accompanied by substantial financial commitments from certain private shareholders and creditors. From a competition standpoint, Bull's continued existence is more likely to promote competition in the European market than to hamper it. Bull's market share is not such as to enable it to play a price leader role; it would play more the role of outsider, helping to make competition livelier. The implementation of Bull's strategy based on Itanium and open source would enhance this role in future.
- (22) France observes that the improvement in the company's results held up throughout 2003 despite the poor market conditions. The forecasts for 2004, which again must be viewed against the background of a difficult environment, show an operating result similar to that for 2003: an EBIT of EUR 17 million and a net profit of EUR 2 million for the first half of 2004. This indicates that the company has succeeded in appreciably reducing its break-even point. Under the circumstances, the improvement in discounted turnover next year due to a

hoped-for market recovery in 2005, the launch of Bull's new offerings and a restored financial situation will necessarily lead to a further growth in profitability. The business plan for the period 2004 to 2007 also shows that the company's return to viability will be lasting.

- (23) By also basing its growth on Intel 64-bit architecture-based servers, Bull has made technological choices which correspond to customers' needs in the years ahead. Moreover, the use of this technology on Bull servers offers fresh avenues for growth, especially in the scientific calculation field.
- (24) In relation to services, Bull's strategy stands at the meeting point between three distinct competences and three priority sectors. The areas of competence are: (1) the integration and deployment of open infrastructures; (2) the security of information systems; and (3) the information management of distributed systems. The priority sectors are those to which Bull's most faithful customers belong: government departments, telecommunications operators and public services (utilities).
- (25) These competences and these sectoral choices are perfectly in phase with the leading market trends apparent from expert analyses: optimisation of and reduction in infrastructure costs (which generate the need for open infrastructure deployment), urbanisation and consolidation of information systems (areas of excellence for Bull), and administration and securitisation (in which Bull is active in various guises: cryptographic equipment supplier, software publisher and integrator). Bull has also very quickly established itself in certain emerging markets: mobile platforms, electronic administration, and generalisation of electronic identity and signature.
- (26) Inasmuch as Bull's strength is highly relative and the degree of concentration in the market is very high, the aid to Bull is not likely to lead to undue distortions of competition. In certain specific markets, Bull's offering is the only credible alternative to IBM. Moreover, Bull's open-source-oriented strategy is likely to make competition in the servers market more dynamic in the years to come.
- (27) The aid will be kept to a minimum. The company's viability depends in fact on the reconstitution of the equity capital, of which the aid and the debt reduction are essential elements. The various investors would not have agreed to invest if part of the financing needed to restore the company's viability had been provided by borrowing.

- (28) Bull will not have any surplus cash once the aid has been paid. The aid will help to restore the equity capital to an adequate, but far from excessive, level, as is borne out by the debt to capital ratio and the ratio of coverage of short-term debt by circulating assets compared with the same ratios among leading competitors.
- (29) As far as the private contribution to the restructuring plan is concerned, three elements must be combined: the effort made by the company itself in 2002 to 2003, the capital increase and the contribution from convertible bond holders.
- (30) France recalls that, in recitals 60 and 70 of Decision 2003/599/EC authorising the payment of rescue aid to Bull, the Commission expressly states that France must not grant restructuring aid to Bull before 31 December 2004.
- (31) The representatives of Bull's employees support the restructuring plan and stress the importance of the aid when it comes to ensuring the company's survival and safeguarding existing jobs. They endorse the information provided by the French authorities, while transmitting additional data and reference material concerning, in particular, the company's viability and competitiveness. Their comments were forwarded to the French authorities, which voiced their agreement.

V. ASSESSMENT OF THE AID

1. Existence of aid

- (32) Article 87(1) of the Treaty states that 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market'.
- (33) The measure notified by France constitutes aid within the meaning of Article 87(1) of the Treaty. Granted by the State, it will be financed through State resources and will favour a specific undertaking, Bull. It is incompatible with the principle of a private investor in a market economy. In particular, it cannot be maintained that the State is acting in the same capacity and under the same conditions as convertible bond holders because France's claim concerns State rescue aid whose

reimbursement deadline has expired and because the renouncing of such a claim, or the granting of new aid of an amount equivalent to that of the aid which is to be reimbursed, is inconsistent with the conduct of a private investor and cannot therefore be assessed in accordance with the private investor principle. Moreover, the notified measure differs both as regards its form and as regards its underlying conditions from the financial measures taken by the shareholders and convertible bond holders. In any event, the notified measure is not accompanied by any comparable financial commitments on the part of the other shareholders. The aid affects trade between Member States and distorts or threatens to distort competition owing to the fact that Bull is an international company and its products are the subject of international trade. Furthermore, Bull has competitors in the common market, such as IBM, Fujitsu/Siemens, Sun and HP. The French authorities do not question this assessment.

2. Compatibility of the aid

- (34) The notified measure must be assessed as ad hoc State aid. Article 87(2) and (3) of the Treaty provides for derogations from the general incompatibility rule set out in Article 87(1).
- (35) Article 87(3)(c) of the Treaty provides that aid to facilitate the development of certain economic activities, where such aid does not adversely affect trading conditions to an extent contrary to the common interest, shall be compatible with the common market. On this basis, the Commission has adopted specific guidelines for the purpose of assessing aid for rescuing and restructuring firms in difficulty⁽⁹⁾. In the light of the figures relating to its capital, it is clear that Bull must be considered to be in difficulty within the meaning of point 5(a) of the guidelines and that the group as a whole is also in difficulty within the meaning of points 4 to 8 of the guidelines⁽¹⁰⁾. After consideration, the Commission takes the view that no other Community framework or other provision allows the aid in the present case to be declared compatible with the common market. France has, moreover, invoked no other derogation from the Treaty and has based itself exclusively on the guidelines in defending the compatibility of the aid in question. The Commission has therefore assessed the aid in the light of the guidelines.

⁽⁹⁾ A new version of the guidelines was published recently (OJ C 244, 1.10.2004, p. 2). In accordance with point 103 of this new version, the aid measure in the present case must be examined in the light of the criteria that were in force when the measure was notified, that is to say, in the light of the 1999 guidelines.

⁽¹⁰⁾ Since 2001, the equity capital has been negative, amounting to minus EUR 726 million at the end of 2003. Losses in 2000, 2001 and 2002 came to EUR 243 million, EUR 253 million and EUR 548 million.

- (36) The guidelines lay down four cumulative conditions for authorising restructuring aid: a plan guaranteeing long-term viability, the avoidance of distortions of competition, aid limited to the minimum and full implementation of the restructuring plan. Moreover, the principle of 'one time, last time' and that laid down in the judgment in *Deggendorf*⁽¹¹⁾ are applicable.

Restoration of viability (points 32 to 34 of the guidelines)

- (37) In accordance with the guidelines, the grant of the aid must be conditional on implementation of the restructuring plan, which must be endorsed by the Commission in all cases of individual aid. The restructuring plan, the duration of which must be as short as possible, must restore the long-term viability of the firm within a reasonable timescale and on the basis of realistic assumptions as to future operating conditions. Restructuring aid must therefore be linked to a viable restructuring plan to which the Member State concerned commits itself.
- (38) The aid in question is linked to the restructuring plan of March 2002 and its financial component as described in the aid notification. The plan concerns the period up to the end of 2007, after which the financial situation will have been restored and the new structure put in place. Most of the measures have already been implemented and the recapitalisation has already been completed. However, the period up to the end of 2007 may be considered to be a reasonable time-span which is necessary in order to restructure the company's offerings and adapt its activities to reflect trends in the relevant markets.
- (39) The plan seems to be based on realistic hypotheses concerning future operating conditions. It takes into account the slow market recovery and does not appear over-optimistic. It presents three scenarios for the outcome of the recapitalisation, the most optimistic of which is the closest to the current outcome. It underscores the re-establishment of consistency between the company's strategy, its strengths, customers' needs and technological developments. Given the technological and commercial uncertainties, the plan appears sufficiently precise in view of the additional information sent by the French authorities.
- (40) The improvement in viability stems mainly from internal measures, in particular the cessation of non-core business

activities, the restructuring of offerings and the reduction of overheads.

- (41) The company's difficulties were brought about above all by poor technological choices and by the concentration on markets in which Bull was unsuccessful. These activities have been abandoned, including the network of services in a number of European countries. Several reasons underlying specific losses, such as those related to pension schemes, are unlikely to recur. Most of the senior managers have been replaced. Bull has refocused on its strengths.

Restructuring and operational performance

- (42) For the years 2000 to 2002, the gross margin on turnover was between 21 % and 25 %. However, research and development expenditure, commercial expenses and administrative costs together exceeded the gross margin by about EUR 100 million a year. The restructuring plan provides for a righting of this imbalance: research and development expenditure is set to fall from EUR 160 million in 2000 to EUR [...] (*) million by the years 2005 to 2007. Commercial expenses and administrative costs are set to fall from EUR 706 million in 2000 to EUR [...] (*) million by the years 2006 to 2007. The projections take account of contingency provisions for possible judicial awards. This heading will increase to [...] (*) % of turnover by 2007. On the basis of these projections, future EBIT is estimated at [...] (*) % after contingencies. Current costs for 2003 and the first half of 2004 support the projections. From this point of view, the Commission considers that the restructuring plan makes for a satisfactory operational performance.

Forecasts for the relevant markets

- (43) In the future, demand is expected to pick up, albeit more slowly than during the past decade, owing to several factors combined: lower communication charges, the development of high-speed networks, the growth of tele-procedures in the public sector, the upsurge in applications sharing via the Internet, increased mobility, the increasing account taken of security constraints and, lastly, the generalisation of digital technologies everywhere in place of the pre-existing analogue tools. According to the latest forecasts by IDC (International Data Corporation) for the years 2003 to 2007, the European market for servers should grow in volume by 44 % and that for medium and high-end servers by 39 %. The market for servers based on Intel 64-bit components, which is a major growth area for Bull, should enjoy considerable expansion. It is estimated that it should be worth USD 2,4 billion in 2007, accounting for 16 % of the servers market (compared with less than 1 % in 2003).

⁽¹¹⁾ Judgment of the Court of Justice of 15 May 1997 in Case C-355/95 *P Textilwerke Deggendorf GmbH v Commission of the European Communities and Federal Republic of Germany* [1997] ECR I-2549.

- (44) Thus, IDC, in a study dating from December 2002, foresees in western Europe an increase of 30 % in corporate expenditure on services and of almost 20 % on servers between now and 2006. The more recent forecasts by Gartner (November 2003) concerning services in western Europe are for + 3 % in 2004 and an annual average growth rate of 6,2 % between 2002 and 2007. In the case of servers, the amount of growth will depend above all on the technologies used; in particular, Intel Itanium components, which form the basis of Bull's new range of servers and which were first used in 2003, should generate a turnover of EUR 8 billion in 2008. The market for services is highly dispersed, highly competitive and in a permanent state of restructuring, but in the medium to long term it will expand more rapidly than the market for products. In conclusion, conditions in the relevant markets are not such as to call in question the return to viability and they make possible an increase in the share of total sales and of the gross margin accounted for by services, as provided for in the restructuring plan.
- (45) Several studies confirm the growth projections in the niche markets targeted by Bull and the opportunities in the technologies chosen ⁽¹²⁾.

Viability in the medium and long term

- (46) The large GCOS servers installed in current customers' businesses are an important cash cow. However, after [...] (*)⁽¹²⁾, the replacement for the GCOS servers will be almost ready and Bull will have to face up to its competitors and fulfil its ambitions, even if they are modest, under other conditions. Against this background, the Commission has noted, in particular, what follows in recitals 47 to 54.
- (47) In opting for Intel 64-bit architecture-based solutions, open source software and the benefits of component standardisation (commoditisation), it would appear that Bull is plotting the right technological course, corresponding as it does to market developments and customer needs. These developments are going to increase the intensity of competition in the markets for servers and in the markets for services, but thanks to its size Bull is capable of investing not inconsiderable amounts in R & D and of offering a broader and more coherent range than start-ups and more specialised small firms. Its size may also provide it with a degree of dependability in the eyes of customers who attach strategic importance to their choice of server supplier. The giants such as IBM, HP and Dell, on the other hand, specialise more in large-series products whose scope of application is wider and where customers do not have the same need for 'tailor-made' products.
- (48) The plan targets those sectors where customers are the most faithful: the public sector, defence and security, and telecommunications operators. Bull has no ambitions beyond that of being a niche player.
- (49) The market introduction of the new NovaScale range of servers, which is designed to replace the GCOS systems, has been viewed favourably by independent experts ⁽¹³⁾. Bull has achieved substantial reference sales and this product line is said to differ from competing products in terms of cost, reliability, ease of use and size adaptability.
- (50) Bull's restructuring is enabling it to re-establish consistency between its know-how, its offerings, its organisation and its short-term objectives. A major cause of the company's difficulties was precisely the lack of such consistency. The rejuvenation of its staff, which was largely completed in 2002, and the substantial range of strategic partnerships should provide a technological springboard for the future.
- (51) The role planned for the new family of servers based on Intel processors, and in particular the 64-bit processor, is very important: in 2007, turnover should attain [...] (*)⁽¹²⁾ of total sales, with a gross margin of [...] (*)⁽¹²⁾ %. As a 'proprietary' technology is no longer involved, it is logical that this margin should not attain the level of the margins on the old servers, the GCOS servers. Although 64-bit servers make it possible to support more complex and broad systems, they are naturally more expensive than 'standard' 32-bit servers. Bull will try to gain its customers' trust through the technical quality of its 64-bit servers, adding its services offering, the specialised competences of which are recognised, to those products. It will establish cooperation between its own teams and those of its customers. The Commission acknowledges that this strategy is consistent with Bull's concentration on certain sectors.

⁽¹²⁾ For example, Forrester, 'Market overview — Exploiting open source in Europe', 22.6.2004.

⁽¹³⁾ See The Clipper Group Navigator, 'Bull transitions GCOS 8 to Open Systems — Novascale 9000 to the Rescue', 15.10.2003 and IDC, 'Vendor needs and Strategies, Bull fills out Novascale line — targets commercial and High-Performance Computing (HPC) Customers in 2004', April 2004. IDC, for example, concludes that 'Bull's introduction of NovaScale servers in 2003 saw it enhancing its approach to the high-performance computing market — a market it had previously addressed. It has won a reasonable number of reference customers in this sector over the last year. ... The addition of the Microsoft Windows 2003 Server operating system and SQL Server, plus new ISV software — especially from Oracle, SAP and BEA — will see it matching an expected growth in demand for high-end commercial applications in the recovering European market.'

- (52) In the services segment, mention should be made of a few conclusions of the abovementioned Forrester report⁽¹⁴⁾. Concerning open source services, Bull's expertise is considered superior to that of other global generalists such as IBM. Among global generalists and those of medium size, Bull is alone in offering full technological coverage. The report mentions only one small open source specialist offering the same coverage.
- (53) The recapitalisation plan involves no new industrial partner apart from the operators who are already present, i.e. France Télécom and NEC. However, the participation of Debeka, an insurance company, backs up the strategy of focusing on a limited number of sectors. In addition, Bull has entered into a number of partnerships and has embarked upon several projects for developing technologies that are key to future activities. Lastly, by way of example, mention should be made of the signature of an initial original equipment manufacturer contract with Kraftway, the leading Russian producer of Intel-based servers. Another agreement concerns the distribution of servers in China.
- (54) In conclusion, the Commission considers that the restructuring plan enables Bull to position itself satisfactorily. Notwithstanding the technological and commercial risks inherent in the relevant markets, the Commission considers that the return to viability is sufficiently guaranteed.
- Avoidance of undue distortions of competition (points 35 to 39 of the guidelines)*
- (55) In order for it to be authorised by the Commission, restructuring aid must fulfil a second condition, namely that measures must be taken to mitigate as far as possible any adverse effects of the aid on competitors.
- (56) As was pointed out by France, Bull's market shares in the area of services and in that of servers are very small. In the area of servers, the relevant geographic market must be considered to be worldwide or at least Europe-wide. In 2002, in the whole servers market in the Community of Fifteen, Bull held a market share of the order of 3 %. In the segment of medium and high-end servers, Bull had retained a position evaluated at approximately 5 %, far behind its main competitors IBM (40 %), HP-Compaq (24 %), Sun (17 %) and Fujitsu (9 %). In the high-end segment, the market share will be higher. Bull wishes to position itself as European leader in Intel 64-bit architecture-based solutions and open source software in target markets. The market for Intel 64-bit architecture-based servers is estimated at nearly USD 2,4 billion in 2007, which would account for 16 % of the servers market (compared with less than 1 % in 2003).
- (57) In the area of services, there is evidence to suggest that the relevant geographic market must be considered to be Europe-wide, although the existence of regional or national markets cannot be ruled out. In the services market of the Community of Fifteen, Bull held in 2002 a market share of approximately 0,4 %, and since 2002 Bull has refocused itself even more on infrastructure services and its other specificities, experiencing strong reductions in its turnover in services. In a study dated September 2003, published by the Gartner Institute, Bull does not number among the first 10 competitors in the world market for IT services and in 2002 it occupied only 22nd place in the European market. That market is, moreover, highly competitive, a circumstance which made possible, by way of illustration, the authorisation by the Commission of the merger operations concerning several competitors of Bull (HP — Compaq⁽¹⁵⁾, Cap Gemini — Transiciel⁽¹⁶⁾, ATOS Origin — SEMA⁽¹⁷⁾) on the ground that these mergers would not affect competition in the markets for IT services.
- (58) Clearly, the company's presence is stronger in certain geographic areas, notably France. But the competition remains strong, including at the level of these geographic areas.
- (59) In some segments of the servers market in Europe, Bull's continued existence is quite likely to stimulate competition in the market, especially in those segments where IBM's position is preponderant. In the segment of high transactional intensity systems, for example, Bull's offerings seem to be the only alternative to IBM for all customers who cannot easily migrate to the solutions proposed by Sun, HP or Wintel (banks, insurance companies, social services, social security organisations, etc.). [...] (*) shows that this type of customer wishes to see Bull's offerings maintained. The markets concerned are, however, highly specific niche markets and Bull's continued existence has little impact on competition in the high-end server segment as a whole.

⁽¹⁴⁾ See footnote 12.

⁽¹⁵⁾ Commission Decision of 31 January 2002 declaring a concentration to be compatible with the common market (Case No IV/M.2609 — HP/Compaq) on the basis of Council Regulation (EEC) No 4064/89 (OJ C 39, 13.2.2002, p. 23).

⁽¹⁶⁾ Commission Decision of 24 November 2003 declaring a concentration to be compatible with the common market (Case No IV/M.3307 — Cap Gemini/Transiciel) on the basis of Council Regulation (EEC) No 4064/89 (OJ C 295, 5.12.2003, p. 16).

⁽¹⁷⁾ Commission Decision of 10 November 2003 declaring a concentration to be compatible with the common market (Case No IV/M.3295 — Atos Origin/Sema Group) on the basis of Council Regulation (EEC) No 4064/89 (OJ C 295, 5.12.2003, p. 16).

- (60) The Commission also takes account of the fact that Bull's strategy is geared towards open source. The majority of competitors are, moreover, at the same time partners in several development projects. No competitor spoke of distortions of competition when the procedure was opened.
- (61) No external growth operation is planned, apart from the acquisition of 'grey matter', which is common practice in the sector. Bull considers that any major purchase would fly in the face of the restructuring plan's strategy and would pose problems of integration.
- (62) Bull has sold substantial assets. In the products segment, it has sold all of its businesses involving automated teller machines, payment terminals and smart cards and a large part of its businesses involving middleware software. In the services market, it has disposed of most of its commercial network outside of France and Italy by selling its Integris division to Steria. The restructuring plan provides for a refocusing on core activities. This also limits the aid's negative impact on competition between Member States. In this context, it is important that this strategy, which is provided for in the restructuring plan, is actually implemented.
- (63) In the light of the above, the Commission considers that undue distortions of competition are avoided. Bull's position in the relevant markets, combined with compliance with the restructuring plan and the refocusing carried out, does not render any further *quid pro quos* necessary.
- Aid limited to the minimum (points 40 and 41 of the guidelines)*
- (64) In order for the aid to be authorised, a third condition must be fulfilled, i.e. the amount and intensity of the aid must be limited to the strict minimum needed to enable restructuring to be undertaken in the light of the existing financial resources of the company, its shareholders or the business group to which it belongs. Aid recipients must make a significant contribution to the restructuring plan from their own resources. In any event, it must be demonstrated to the Commission that the aid will be used only for the purpose of restoring the firm's viability and that it will not enable the recipient during the implementation of the restructuring plan to expand production capacity.
- (65) The contribution from the recipient and its shareholders is substantial. Since 31 December 2001, Bull has contributed EUR 160 million to the restructuring from the sale of non-core business assets in 2002 and during the first half of 2003. In addition, it had reserved for restructuring measures EUR 94 million out of its free cash available on 31 December 2001 ⁽¹⁸⁾. Shareholders, both existing and new, have contributed to the recapitalisation to the tune of EUR 44,2 million, which is a substantial contribution. The fact that the subscription to the investors' capital stems partly from companies having partnerships with Bull (France Télécom, NEC), from customers (Debeqa) and from senior managers of the Bull group in no way detracts from this finding. The Commission can also take into account the capital contributed at the time of exercise of share warrants to the tune of EUR 17 million, since former convertible bond holders were not obliged to choose this option.
- (66) The solvency and liquidity ratios, after payment of the aid and viewing the aid as a debt, are at levels comparable to those of competitors. The restoration of financial health will make it possible above all to obtain bank guarantees for current activities. Bull is to continue to have recourse to external short-term financing based on the securitisation of its assets to the tune of EUR [...] (*) — [...] (*) million. In view of the risks inherent in the markets and Bull's niche player strategy, it is unlikely that financial institutions will be prepared to grant fresh credit lines for aggressive activities not linked to the restructuring process.
- (67) According to the French authorities, had there been less aid on the table the other partners would not have agreed to invest and convertible bond holders would not have agreed to exchange their claims for new securities. As for the main alternative proposed by an American investment fund — an alternative which was rejected — the French authorities explained to the Commission's satisfaction that it would not have led to less aid. The fund proposed a larger capital injection than the EUR 33 million proposed by the group of investors, but the EUR 11 million guarantee provided by convertible bond holders covers the difference.
- (68) In conclusion, the Commission considers that the aid does not provide the company with surplus cash which could be used for aggressive, market-distorting activities not linked to the restructuring process.

⁽¹⁸⁾ This amount does not include the advance granted by the State at the end of December 2001 or the resources which Bull may have generated thanks to that advance.

One time, last time principle

(69) In order to prevent firms from being unfairly assisted, point 48 of the guidelines states that restructuring aid should be granted only once. If the company concerned has already received restructuring aid in the past and if less than 10 years has elapsed since the restructuring period came to an end, the Commission will normally allow further restructuring aid only in exceptional and unforeseeable circumstances for which the company is not responsible. The aid notified in the present case will be paid on 31 December 2004 at the earliest. In 1993 and 1994, the French State granted Bull restructuring aid which was approved by the Commission at the end of 1994. The restructuring plan in question concerned, however, a period lasting until the end of 1995. Decision 2003/599/EC, by which the Commission approved the rescue aid ⁽¹⁹⁾ and which in recital 60 refers to the date of 31 December 2004 as being the date as from which further restructuring aid may be granted, is incorrect on this point. The 10-year period has therefore not elapsed in the present case.

(70) However, the one time, last time principle cannot be applied absolutely. As the Court of Justice has held ⁽²⁰⁾, admittedly within the framework of the ECSC Treaty, although it holds true even more so within the framework of the EC Treaty, the purpose of the provisions concerning aid is to grant the Commission power to meet unforeseen situations by taking account of the changing nature of market conditions. This being so, indiscriminate application of the one time, last time principle would excessively restrict the category of aid capable of being regarded as necessary and would not allow the Commission to examine, in each particular case, whether a project for restructuring aid was necessary in order to attain Treaty objectives. Similarly, the Commission cannot in principle base itself exclusively on the existence of an earlier decision in order to prohibit subsequent aid to the same recipient ⁽²¹⁾.

(71) It is against this background that the guidelines provide for the possibility of derogating from the one time, last time principle in exceptional and unforeseeable circumstances for which the company is not responsible. In this respect, it should be pointed out that, although the crisis in the information and communication technologies sector in 2001 was neither exceptional nor unforeseeable, its scale, especially in the segment of technologies related to the Internet and telecommunications, was exceptional, unforeseeable and not the fault of Bull. Another consideration to be taken into account in the present case is the very high speed of technological developments in the relevant sector.

⁽¹⁹⁾ See footnote 7.

⁽²⁰⁾ Judgment of the Court of 23 November 2000 Case C-441/97 P *Wirtschaftsvereinigung Stahl, Thyssen Stahl AG, Preussag Stahl AG and Hoogovens Staal BV, formerly Hoogovens Groep BV v Commission of the European Communities* [2000] ECR I-10293, paragraph 55.

⁽²¹⁾ Opinion of Mr Advocate General Jacobs in Case C-110/02 *Commission v Council*, paragraph 43 (not yet reported).

(72) Moreover, it should be stressed in this context that Bull and the French State had scrupulously adhered to the earlier restructuring plan, notably as regards the privatisation, the partnership with NEC and France Télécom and the sale of several assets, as proposed by an independent expert and as supported by the Commission, and that the said plan could not have foreseen the current difficulties. The financial difficulties at that time were largely linked to divisions and subsidiaries which were sold under the restructuring plan, notably Zenith Data Systems in the microcomputers sector and the OSS division. A first restructuring of Bull has indeed taken place, in the course of which the company tried to adapt to its environment. The downsizing of the company's workforce reflects this radical change: from 44 500 in 1990, it shrank to 24 000 in 1995 and to 11 500 in 1999. The current difficulties, as described in recitals 9 to 12, differ in their nature from those which led to the 1993-95 restructurings.

(73) It follows that, in the present case, the philosophy behind the one time, last time principle, namely the wish to prevent firms from being unfairly assisted, is respected. The State has not propped up Bull artificially despite the fact that its difficulties are of a recurring nature; on the contrary, the aid to which this Decision relates was intended to deal with difficulties that are new in nature.

(74) It should be added that the 10-year period has almost elapsed.

(75) In conclusion, in the circumstances of the present case, the Commission considers that the one time, last time criterion is not a bar to the notified aid being authorised.

'Deggendorf' principle

(76) According to the judgment of the Court of Justice in *Deggendorf* ⁽²²⁾, when the Commission examines the compatibility of aid, it must take all the relevant factors into account, including any cumulative effect of that aid and other aid which has not been repaid. In the present case, Bull has at its disposal the rescue aid the authorisation of which was subject to its being reimbursed by Bull by 17 June 2003 at the latest. According to the French authorities, the notified aid will, however, not be paid until after the rescue aid has been reimbursed. This being so, the 'Deggendorf' principle is respected, although the Commission will have to ensure that that is the case.

⁽²²⁾ See footnote 11.

Implementation of the restructuring plan communicated

- (77) In accordance with point 43 of the guidelines, the restructuring plan communicated to the Commission, as explained and added to, must be implemented in full.

Monitoring and reports

- (78) In accordance with points 45 and 46 of the guidelines, annual reports must be communicated to the Commission.

VI. CONCLUSION

- (79) The Commission considers that the restructuring aid for Bull notified by France may be declared compatible with the common market provided that all the commitments undertaken by France and all the conditions imposed are fulfilled,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which France is planning to implement for Bull, which consists of a EUR 517 million payment coupled with a better fortunes clause, is compatible with the common market subject to the conditions laid down in Article 2.

Article 2

1. Bull's restructuring plan, as communicated to the Commission by France, shall be implemented in full.
2. The aid referred to in Article 1 shall not be paid until the rescue aid approved by Decision 2003/599/EC has been reimbursed. It shall be paid on 31 December 2004 at the earliest.
3. France shall submit to the Commission annual reports on the implementation of the restructuring plan for the period up to the end of 2007.

Article 3

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

Article 4

This Decision is addressed to the French Republic.

Done at Brussels, 1 December 2004.

For the Commission

Neelie KROES

Member of the Commission