

FOREWORD BY THE CHAIRMAN OF THE SABENA ENQUIRY COMMITTEE

The presentation of the Report of the Sabena committee has already taken place on February the 6th, 2003.

The original report has indeed been presented to the press in French and Dutch.

Taking into account the international dimension of the Sabena story and the request of foreign journalists, it appeared necessary to have the most important chapters of the report translated into English.

Today this is done.

A translation of the chapters related to the findings, the responsibilities, and the recommendations will be soon available on the internet.

Of course, for further details in parts which have not been translated, you can always refer to the original versions, also available on the internet at the address mentioned below.

I hope this tool will meet your demand.

Sincerely yours,

R. Langendries
Chairman of the Sabena enquiry Committee

Brussels, March 27, 2003

The original report is available on the internet on this same site,

in Dutch : <http://www1.dekamer.be/FLWB/pdf/50/1514/50K1514003.pdf>,

in French : <http://www1.lachambre.be/FLWB/pdf/50/1514/50K1514003.pdf>

1. Chronology of events in the recent history of Sabena

1. Background (1923-1975)

Sabena (*Société Anonyme Belge d'Exploitation de la Navigation Aérienne*) was set up on **23 May 1923**. From the outset, this company adopted the form of a *société anonyme* (limited liability company). However, some of its statutory provisions derogated from common commercial law. Until 1960, private shareholders and the State each held half of the capital of the company. However, in 1960 the Belgian State acquired 65% of the shares of Sabena (and in 1968 this stake was increased to 90%). The State therefore appointed virtually all the administrators. The company made a profit only in 1944-1947, 1951-1952 and 1955-1957. In the early 1970s, the financial results started to spiral downwards.

2. 1975-1994

From **1975** on, the successive governments took different measures to try to restore the situation of Sabena.

- On **1 October 1975**, a *chargé de mission* was appointed by the government for Sabena.
- On **23 May 1978**, the articles of association of the company were modified: the chairman of the Board of Directors was given more powers; he would also chair the Management Committee and ensure the day-to-day management of the company.
- On **9 February 1981**, the capital of Sabena was increased from 750 to 3,000 million francs. The Belgian State now held 97.5% of the shares of the company.

These measures did not improve the airline's situation. Its financial results continued to deteriorate in the early 1980s. In **1982**, different measures were therefore taken to radically reform the way the company was being run.

- On **30 March 1982**, the personnel approved by a referendum a draconian social plan which, among other things, envisaged salary cuts of up to 17% for certain categories of personnel.
- On **30 December 1982**, the capital of the company was increased from 3 to 9 billion Belgian francs. The Belgian State thus held around 54% of the capital, a few public credit institutions held 26% and a series of private companies (which were granted a guaranteed dividend and a buyback guarantee) held 19%. Sabena was also authorized to create specialized subsidiaries, which it did in the following years.
- On **30 December 1982** and **22 January 1985**, the automatic and statutory financial support of Sabena by the State came to an end.

For a few years (**1983-1989**), the financial situation of Sabena improved. In addition, during this period, the company looked around for foreign partners to forge an alliance. The persons responsible for the management of Sabena thus endeavoured to secure the company's future.

- In **1986-1987**, exploratory discussions held with SAS (Scandinavian Airlines System) failed miserably.
- In **1987-1988**, contacts were forged with KLM (Koninklijke Luchtvaartmaatschappij). As was the case with a previous rapprochement in 1975-1976, the attempt to form an alliance with the Dutch company failed.
- In **1988-1989**, Sabena held negotiations with British Airways. These negotiations involved KLM in a second phase. This attempt was crowned with success.
- On **13 December 1988**, Sabena set up a new subsidiary, Sabena World Airlines (SWA). The parent company,

Sabena, planned to entrust the air transport activities to this new company as soon as the foreign partners began their participation in its capital.

- On **15 December 1989**, this decisive step was taken: Sabena kept 60% of the capital of SWA while BA and KLM each held 20%. The company then undertook an ambitious expansion policy, in particular with a view to setting in place a hub in Zaventem.

However, from **1990** on, the airline again faced daunting financial problems. Various circumstances, such as the Gulf War, the rapid extension, friction between the partners and a power vacuum at the head of Sabena (due to the illness of its chairman), undermined the company. The government once again had to take measures to prevent Sabena going under.

- In **November 1990**, the government lured a new manager from the private sector, Pierre Godfroid, to help Sabena out of its rut and to restructure the company.

- In **December 1990**, the alliance with BA and KLM came to an end. Sabena once again found itself alone to face its problems. In addition, the new chairman took a series of social and organizational measures to put the company once again on an even keel (more precisely a social restructuring plan and the suppression and absorption of the subsidiaries).

- On **30 July 1991**, the government granted fresh funding of around 10 billion Belgian francs to Sabena. It also cancelled a debt of 16 billion Belgian francs to wipe out the company's financial burdens from the past. This operation was approved by the European Commission on condition that it would be the last time. Therefore, the capital of Sabena provisionally represented scarcely one billion Belgian francs. However, the government promised to pay an additional sum of 9 billion francs if the chairman could find a new partner who was willing to invest at least 6 billion Belgian francs in Sabena.

- On **30 April 1992**, this condition was met. Sabena and Air France signed a cooperation agreement. The capital of the company was increased to 16 billion Belgian francs. The Belgian authorities held 61.56% of the shares and the private company Finacta (within which Air France held a majority stake) held the remaining 37.49%.

Meanwhile, Sabena itself also gradually became a 'normal' *société anonyme*. Already in 1983 and 1985, the automatic financial aid given by the State to the company had already been discontinued (see above), but this initiative had been accompanied by the following measures:

- On **6 June 1990**, Sabena lost the legal monopoly on regular flights, a monopoly which it had held since 1949. Other Belgian airlines could now operate regular regional flights within the limits of the European Community. This liberalization of the air space was continued later.

- On **30 March 1992**, SA/NV Sabena became a *société anonyme* like any other: its articles of association no longer contained any exemptions from common commercial law.

Starting from October 1993 and during 1994, the alliance with Air France began to come under pressure, in particular due to the financial problems facing Air France and a change in its top-management structure as a result of these difficulties. Consequently, another airline had to be found which was willing to conclude a structural alliance with Sabena.

3. The start and strengthening of the alliance with Swissair (from 1995 to mid-1999)

While Finacta (i.e. Air France) was still a minority shareholder, the Swiss aeronautic group Swissair indicated that it was interested in a rapprochement with Sabena. For the Swiss company, an alliance with the Belgian national airline opened up interesting perspectives for expansion.

- **From the end of 1993 to the start of 1994**, negotiations were undertaken between the management of Sabena and Swissair. The Belgian government was also aware of and involved in these contacts. Various scenarios were examined with regard to the organization and sharing of power.

- However, **from the end of 1994 to the start of 1995**, the proposed alliance was called into question, because the idea of ‘flagging out’ pilots failed to materialize and was finally abandoned. Based on this new situation, the conditions for the participation of Swissair in Sabena were renegotiated.

The cooperation agreement between Swissair and Sabena was finally signed on **4 May 1995**. It contained the following main provisions (for a complete analysis of the Shareholders’ and Master Agreement – SMA – and its annexes, please refer to chapter II, point 2 of the original report - <http://www1.lachambre.be/FLWB/pdf/50/1514/50K1514003.pdf>):

- The capital of Sabena was increased to 25.6 billion BEF. Swissair became a minority shareholder (49.5% of the capital); the Belgian authorities retained 50.5% of the capital. Sabena thus preserved its European status as a Community Air Carrier.

- Although certain conditions were met (in particular the ratification and entry into force of the air transport convention concluded between Switzerland and the European Union), Swissair could, however, increase its stake in the future to 67.7% of the capital (through the exercise of rights linked to warrants granted to Swissair in exchange for a loan of 4 billion Belgian francs that the company had given to the Belgian Federal Investment Company with a view to taking over Finacta’s stake). However, the Belgian State maintained the right to buy back the shares of the Swiss group if its essential interests were seriously threatened.

- The chairman of the Board of Directors (who must be Belgian or a citizen of the European Union) was appointed at the proposal of the two main shareholders. However, the Chief Executive Officer (CEO) was appointed at the proposal of the chairman and of the Swiss group, who could also propose the Chief Financial Officer (CFO).

- An agreement concluded between Sabena and Swissair, attached to this SMA, stipulated that different forms of cooperation would be developed between the two airlines.

- On **12 June 1995**, at a time when the Belgian government was expediting current business, at the request of the European Commission the two shareholders signed an ‘addendum’ to this agreement. It basically stipulated that, for a certain period (until the entry into force of a convention between the European Union and Switzerland or until the European Union unilaterally modified its regulations), the CEO of Sabena would be proposed by the two main shareholders (and not by the Swiss alone, as stipulated in the initial SMA).

From 1995 on, cooperation between the two companies - Sabena and Swissair - gradually intensified at the level of the personnel and at an operational and organizational level.

- On **27 February 1996**, Pierre Godfroid resigned as chairman and CEO of Sabena in the wake of a social conflict. The posts of chairman and CEO would henceforth be exercised by two different persons. The post of chairman was entrusted to Jan Huyghebaert, who was succeeded by Valère Croes in April 1997. Day-to-day management (CEO and chairman of the Management Committee) was entrusted to the Swiss Paul Reutlinger, former commercial director at Swissair.

- On **22 June 1996**, Sabena and Swissair concluded an agreement giving the latter a mandate to draw up a fleet development plan in cooperation with Sabena.

- On **13 December 1996**, Sabena and Swissair signed a ‘Frame agreement concerning cooperation in the area of cargo transportation’, under the terms of which the commercialization of Sabena’s cargo capacity was entrusted to Swissair Cargo.

- On **5 February 1997**, Sabena and Gate Gourmet, the catering subsidiary of SAirGroup, signed a 'Technical assistance and service agreement' aimed at strengthening cooperation between the catering service of the Belgian company and that of the Swiss company.

- On **4 March 1997**, Paul Reutlinger signed (with his colleagues from SAirGroup and Austrian Airlines) a 'Statement for joint introduction and operation of the Airbus A330-200 aircraft'. The agreement provided for the joint uniform introduction and operation of the new aircraft by the partners. The scope of this agreement would subsequently be extended to include the other types of Airbus (decision of the Presidents' Meeting of the Qualiflyer Group on 20 March 1998).

- On **12 August 1997**, Swisscargo and Sabena signed a new Cooperation Agreement.

- On **30 March 1999**, Sabena joined the Qualiflyer Group, which included the different European airlines which had links with SAirGroup. Already in September 1996, discussions got under way with a view to including Sabena's 'frequent flyer' program in Qualiflyer, a commercial cooperation agreement concluded between Swissair and Austrian Airlines.

- On **4 May 1999**, the Board of Directors of Sabena gave its agreement by mail vote for the creation of an IT subsidiary called SA Atraxis Belgium (set up on 1 July 1999), within which Atraxis AG (IT subsidiary of SAirGroup) and Sabena each acquired a 50% stake. This decision was part of the option chosen by Sabena to subsidiarize certain departments (see below). For its part, Sabena acquired a 7% stake in Atraxis AG.

Within the framework of this increasing synergy between the Belgian and Swiss airlines, the Board of Directors and/or the management of Sabena (from the start of March 1996, under the management of CEO Paul Reutlinger) took a series of important decisions concerning the management and operation of the fleet. In particular, the following decisions would have considerable impact on the future of the company:

- On **30 August 1995**, the Board of Directors of Sabena decided to purchase 23 Avro RJ85s to modernize the short-haul fleet. The Board thus went against the advice of the Management Committee, who had preferred to purchase Fokker planes. The Board justified its decision based on the need to harmonize Sabena's fleet with that of the Swissair group.

- On **25 October 1996**, Paul Reutlinger and Vice-Chairman Philippe Suinen signed a wet lease contract with the newly-formed airline Virgin Express. This agreement, which was concluded for a period of one year, concerned flights to London-Heathrow. On the same day, Paul Reutlinger signed alone a cooperation agreement with the same company for flights to Barcelona and Rome. This agreement extended the duration of the contract from one year to eight years.

- On **13 March 1997**, Sabena signed a contract with Virgin Atlantic Airways under the terms of which Sabena's slots at London-Heathrow were sold to Virgin.

- On **28 October 1997**, Paul Reutlinger and the general secretary, Patrick du Bois, signed a cooperation agreement with another low-cost airline which had just been set up, City Bird.

- On **17 November 1997**, the Board of Directors of Sabena decided to purchase 34 new Airbus A319-320-321 planes to renew Sabena's medium-haul fleet and seven long-haul planes (the chronology and scope of this decision are analyzed in chapter II, point 1 of the original report - <http://www1.lachambre.be/FLWB/pdf/50/1514/50K1514003.pdf>). The contract relating to this purchase was signed in March 1998. As was the case with the purchase of the Avro planes in 1995, this decision was justified, according to the official statement, by the desire to harmonize the fleet within SAirGroup.

- On **3 April 1998**, Paul Reutlinger and Vice-Chairman Philippe Suinen signed a wet lease contract with City

Bird concerning two MD11 planes.

This contract was concluded for a period of three years, which would subsequently (on 20 October 1999) be extended to five years. These planes were assigned to three transatlantic destinations (i.e. Sao Paulo, Montreal and Newark).

- On **20 December 1999**, the Board of Directors decided to replace four Airbus A340-200 and -300 planes for long-haul flights by four new A340-300s (plus an option to buy four other planes of this type).

During this time, the management of Sabena also drew up several reorganization and development plans to restore the profitability of the company and direct future developments:

- On **30 August 1995**, Sabena's management team (which was still at that time headed by Pierre Godfroid) presented the 'Business Plan 1995-2000' to the Board of Directors.

- On **26 June 1996**, the management (now headed by the new CEO Paul Reutlinger) presented to the Board of Directors the 'Horizon 1998' recovery plan in response to the poor results of the previous financial year.

- On **8 December 1997**, the Board of Directors approved the definitive version of the 'Development Plan 1998-2000', which set out an ambitious growth strategy.

- On **16 March 1998**, Paul Reutlinger proposed to the Board of Directors a new recovery plan called 'Fit for the Cycle'.

- On **21 September 1998**, the Board of Directors adopted a basic plan aimed at radically reforming the structures of the company by creating separate business units. Following this decision, a number of new subsidiaries were set up over the following months, such as SA/NV Sabena Technics (set up on 30 December 1998) and the IT subsidiary Atraxis Belgium (see above).

At the start of 1999, an important new step was taken towards the increased interpenetration of Sabena and SAirGroup. The two partners drew up a draft plan aimed at regrouping the main activities of the Swiss and Belgian airlines (marketing, sales, network management, finances, etc.) into one single separate and common structure. This project, which was first known as 'Diamond' and 'Airline Management Company' (AMC), would later be definitively called the Airline Management Partnership (AMP) (see below). Here are the main steps in this process:

- On **27 February 1999**, the managers of Sabena and Swissair defined the basic principles and the outline of this joint structure (network planning, sales, marketing, etc. were regrouped into one single entity, while the two names were kept). During the following months, many preparatory meetings were held to refine this proposal.

- On **14 June 1999**, the Board of Directors gave its agreement in principle to the project, provided a series of specific conditions were met: the signing of an agreement between the two main shareholders on the future development of the shareholding of Sabena, the criteria for the valorization of the company; a 50-50 structure at the level of the shareholding; a balanced distribution of managerial staff, executives and personnel; a balance in the choice of sites and with regard to employment; safeguarding of the portfolio of the traffic rights of the two companies; the integration (as promptly as possible) of Crossair in the new structure; the maintaining of a minimum number of destinations in Brussels; conformity with the social agreements and traditions with regard to consensus and dialogue prevailing in Belgium.

This project would, however, be definitively ratified only after the concluding of a new Term Sheet signed prior to a definitive agreement between the two main shareholders of Sabena.

4. From the concluding of new agreements with SAirGroup to the bankruptcy of Sabena (from

mid-1999 to 7 November 2001)

At the end of 1999, the two main shareholders of Sabena (i.e. the Belgian State and SAirGroup) started negotiations with a view to modifying the 1995 agreement.

- In **October 1999**, the new minister in charge of the Sabena dossier, Mr Rik Daems, requested the Board of Directors of Sabena to discontinue for the time being the implementation of the AMP. The Belgian government first wanted to study the Sabena dossier in detail to decide whether the Belgian interests were sufficiently safeguarded and to evaluate other possible scenarios.

- On **25 November 1999**, the Board of Directors approved the draft AMP after the minister in charge, Mr Daems, and the head of SAirGroup, Mr Bruggisser, agreed, during a telephone conversation, to a new shareholders' agreement. Minister Daems was aware of the *de facto* implementation of the AMP and did not object.

- On **17 December 1999**, SAirGroup made known its intention to gradually increase its stake in Sabena to 100%.

- Between **December 1999 and February 2000**, the Belgian government took its stance on future relations with SAirGroup and negotiated with the Swiss shareholder concerning the development and modalities of the position of the two partners within Sabena and on the precise evaluation of Sabena.

On **26 April 2000**, these negotiations led to the conclusion of a Term Sheet between the Belgian State and SAirGroup. The main provisions of this agreement were as follows (for a detailed analysis please refer to chapter II, point 2 of the original report - <http://www1.lachambre.be/FLWB/pdf/50/1514/50K1514003.pdf>):

- The Swiss shareholder agreed to increase its stake in Sabena to 85%, on the one hand, through the exercise of the warrants that it acquired within the framework of the 1995 agreement (see above) and, on the other hand, by granting to the Belgian State a 3.3% share in the capital of SAirGroup (in addition, the remaining 15% Sabena shares held by the Belgian State could be exchanged at a later date for an additional stake, amounting to 2.2%, of the Belgian State in SAirGroup).

- The Belgian State was thus granted the right to appoint the vice-chairman of SAirGroup; in addition, it continued to have the right to two administrators within the Board of Directors of Sabena.

- Sabena would keep its status as a national carrier, with a minimum number of flights and destinations from Brussels.

- A few new provisions were inserted in the draft AMP to protect the Belgian interests more effectively. The agreement of 31 July 2000 provided for the formal creation of the AMP as a company under British law (with retroactive effect to 1 January 2000).

However, a number of important events took place during the **second half of 2000 and at the start of 2001**:

- In **August 2000**, Paul Reutlinger was replaced as CEO by the German Christoph Müller, who since 1 December 1999 had worked at Sabena as Chief Operating Officer. Although Reutlinger declared (even during two interviews with the Prime Minister) that he was leaving Sabena in good shape, Müller had to draw up a recovery plan ('Blue Sky') due to the serious worsening of Sabena's financial results.

- However, during the **summer of 2000**, the financial problems of SAirGroup itself became overwhelming. Internally, the Swiss group began considering a strategy of foreign takeovers (referred to as the 'hunter strategy') in which the Belgian stake was only one aspect. These takeovers represented an important financial burden.

- In **November-December 2000**, the Belgian government was informed that SAirGroup wished to come back on

the Term Sheet signed just a few months before on 26 April 2000. The Belgian authorities once again had to consider the future of the alliance with the Swiss group, with which new negotiations were subsequently started.

On **22-25 January 2001**, these negotiations led to the signing of a series of agreements between the Belgian State and SAirGroup. The main provisions of these agreements were as follows:

- The two partners agreed to increase Sabena's own resources by 100 and 150 million euros respectively. The implementation of this provision was, however, subject to the condition that the recovery plan 'Blue Sky' be accepted by the workforce.
- The Swiss group undertook to take on at least 85% of the catering, ground handling and cargo divisions of Sabena, giving it an additional 100 to 150 million euros.
- SAirGroup also agreed to endeavour to cover Sabena's additional cash requirements (150 to 300 million euros). These needs could be further reduced by selling off non-strategic assets.

However, **at the end of January 2001**, immediately after the signing of these agreements, new complications arose. These indicated a constant deterioration of the understanding between Sabena's two shareholders and between the airline itself and its foreign private shareholder.

- On **23 January 2001**, Philippe Bruggisser had to resign from his post of CEO of SAirGroup and be replaced by Eric Honegger, who shortly thereafter was himself replaced by Moritz Suter (head of Crossair, a Swiss airline which formed part of SAirGroup). In turn, Moritz Suter resigned on 16 March and the post was filled by Mario Corti.

- On **16 February 2001**, the head of SAirGroup, Eric Honegger, had a discussion with the Belgian Prime Minister, Guy Verhofstadt, on the future of Sabena.

In a letter dated the same day, the Prime Minister thanked his interlocutor for his commitment to ensure the recapitalization of Sabena provided that the recovery plan 'Blue Sky' was implemented. He urged him to ensure that the two parties pursue their efforts, in spite of the temporary difficulties, so that this operation could be completed and that the signed agreements could be implemented.

In his reply of 19 February 2001, Honegger reiterated what he had said at this meeting, i.e. that SAirGroup, given its financial situation and discussions that he had recently had with its bankers, feared that it was not in a position to be a sufficiently strong partner to guarantee Sabena a successful future. However, SAirGroup declared that it was willing to subscribe to the participation certificates. Nevertheless, taking into account the uncertainties of the restructuring plan, the ongoing cash requirements and the deterioration in Sabena's position, Honegger felt that it would be preferable that the partnership be reviewed and that possible solutions be discussed (with the Prime Minister and with Minister Daems).

- On **23 February 2001**, the day after the workforce of Sabena accepted *in extremis* the recovery plan 'Blue Sky', the General Meeting of shareholders of Sabena approved the issuing of participation certificates to the tune of 250 million euros. These certificates were subscribed by SAirGroup and the Belgian authorities (for 150 and 100 million euros respectively) according to the terms of the agreements of January 2001.

- In **April-May 2001**, the new head of SAirGroup, Mario Corti, on several occasions informed the Belgian government in writing (i.e. in his letters of 3 April and 29 May 2001) that his company wished to come back on the agreements concluded in April 2000 and January 2001. According to Corti, the bankers of the Swiss group did not want to inject any additional financial resources into Sabena. In other words, SAirGroup wished to waive its majority stake and return to the situation created by the provisions of the 1995 agreement (minority stake). The Belgian minister in charge of the dossier, Rik Daems, responded on several occasions that SAirGroup must fulfil its obligations. During this period, however, the two parties continued to discuss ways in which a

compromise could be reached.

- On **26 April 2001**, the composition of Sabena's Board of Directors was changed and Ferdinand Chaffart was appointed as the new chairman.

- On **23 May and 18 June 2001**, the CEO of Sabena, Christoph Müller, presented a new restructuring plan to the Board of Directors. This Business Plan provided for a drastic reduction in the size of the network and in capacity and included measures designed to increase productivity and reduce the social costs. This plan also presented in precise figures the company's need for additional capital.

- On **19 June 2001**, SAirGroup made a proposal which was considered by the Belgian government as completely inadequate as, *inter alia*, the group was not injecting enough fresh capital.

- On **20 June 2001**, Minister Daems announced to SAirGroup that the Belgian State would take legal action if the Swiss group continued to refuse to comply with the agreements concluded in April 2000 and January 2001.

- On **2 July 2001**, SAirGroup submitted a new compromise proposal which was also considered by the Belgian authorities as totally unacceptable.

- On **3 July 2001**, the Belgian State officially instituted legal proceedings against the Swiss group. On 10 July 2001, Sabena joined in this action.

In **July-August 2001**, the Belgian and Swiss shareholders of Sabena made a final attempt to reach a compromise that would be acceptable to both parties.

- During the **night of 16-17 July 2001**, a meeting took place in Brussels (in the Astoria hotel) between, on the one hand, Mario Corti and, on the other hand, two representatives of the Belgian government (the Prime Minister, Guy Verhofstadt, and the Vice-Prime Minister, Johan Vande Lanotte, accompanied by their respective heads of cabinet, Luc Coene and Jannie Haek) and an administrator of Sabena, Patrick De Maseneire. The latter had over the previous few days contacted the CEO of SAirGroup to find a solution to the Sabena dossier. This meeting led to the concluding of an agreement between the two main shareholders. Neither the competent minister, Rik Daems, nor the chairman of Sabena, Ferdinand Chaffart, attended this meeting. In fact, they were not even informed of this meeting.

- On **2 August 2001**, this agreement became an official agreement, of which the main provisions were as follows: SAirGroup was released from the obligation to become the majority shareholder. In exchange, however, it had to make a final financial injection (of 258 million euros) to which the Belgian State would add 172 million euros. The payment of these amounts was spread over time; the first tranche was scheduled for around 1 October 2001. SAirGroup also agreed to take over nine Airbus A319s which were ordered by Sabena. The commercial cooperation between Swissair and Sabena was maintained. Furthermore, the Belgian State and Sabena interrupted the legal proceedings which had been brought against the Swiss group.

At the end of September-start of October 2001, however, it became clear that this agreement would also not be respected and that the days of the Belgian national airline were numbered. Meanwhile, the social climate became very strained. There were even strikes within the framework of the discussions surrounding the Business Plan of the CEO, Christoph Müller.

- On **25-26 September 2001**, the Belgian government learned through the lawyers of the two parties that the Swiss shareholder would not be in a position to come up with the promised financial resources.

- On **1 October 2001**, Mario Corti officially transmitted this message to the Belgian government; on the same day, the SAirGroup submitted a request for legal composition.

- On **3 October 2001**, Sabena submitted a request for legal composition before the commercial court of Brussels, which granted the legal composition on 5 October 2001 for a period running until 30 November 2001.
- On **7 November 2001**, after it became clear that there was no candidate to take over the company and that no recovery plan could offer a solution, Sabena was declared bankrupt.

2. Findings

1 . OBJECT OF THE FINDINGS

In conformity with the proposal setting up the Sabena commission of inquiry (DOC 50 1514/001), the task of the commission consisted, *inter alia*, in examining the following elements:

- the strategic decisions taken by the management of the company, the Board of Directors and the shareholders;
- the *de facto* management of Sabena by Swissair and the supervision of this management by the Board of Directors and the shareholders;
- the main reasons for the failure of the different restructuring plans at a social, economic and financial level;
- the reasons for the failure of the cooperation with the partners of the air transport sector;
- the reasons for the bankruptcy.

The commission is of the opinion that an investigation of the causal links would entail that its findings cannot be confined to a simple enumeration of all the factors detrimental to the operation of Sabena. On the contrary, it will concentrate on the elements which, in its view, led directly or indirectly to the bankruptcy.

2. DIRECT AND IMMEDIATE REASONS FOR THE BANKRUPTCY

On 7 November 2001, the Board of Directors of Sabena submitted its balance sheet for the following legal reasons:

2.1. The liquidity problems had at this point become so overwhelming that the short-term obligations could not be met.

These problems were linked to Sabena's inability to generate sufficient operational cash flow to meet its current obligations. The reason why these short-term obligations had reached such proportions was mainly because Sabena had invested through SPCs (special purpose companies) in new aircraft - consequently, the balance sheet did not mention any long-term debt - for which it had to pay a monthly operational lease, which was constantly increasing. The shareholders were providing no new capital because the minority shareholder Swissair had not met its commitments with regard to recapitalization. In view of the relevant European regulations, the Belgian majority shareholder was also unable to inject new capital.

2.2. Sabena's creditworthiness was undermined among creditors and banks.

A shortfall in liquidities is not a problem in itself, provided that transitional credit or a restructuring loan is obtained from financial institutions.

This means that a company must be creditworthy. In other words:

- It has sufficient operational cash flow;
- It offers sufficient guarantees, such as fixed assets or a favourable rating with 'credit agencies', it belongs to a group that is considered as solvent, etc.

Nevertheless, Sabena was unable to maintain this creditworthiness since, during the crucial period, there were no more credit facilities available and, initially, it was the shareholders of Swissair/the Belgian State who should have provided capital.

Sabena lost its creditworthiness for various reasons:

- Sabena, through the SPCs, relied heavily on calls for external financing by the banks. The banks now saw that their intervention had not generated sufficient operational cash flow within Sabena. Of course, a banker cannot provide double financing and finance, on the one hand, the fixed assets in the SPC and, on the other hand, the operating company which must pay a certain amount every month to this SPC. Proof of this can be seen in the unfavourable trend of the different ratios in 2000 and 2001.
- Another element is of course the fact that SAirGroup had not met its obligations vis-a-vis Sabena. It is clear that this fact was known not only within Sabena, but also, given the tremendous amount of external information, outside the company. All this further undermined the company's creditworthiness.
- The loss of a 'solvent' partner put paid to any possibility of external financing. Only additional resources provided by the shareholders could save Sabena.
- In addition, since the financial sector no longer considered Swissair as a first-quality debtor, the financial institutions were reluctant to grant credit to Sabena (despite the fact that 49.5% was held by this group and that Sabena appeared anything but creditworthy when the credit was needed), all the more as the fixed assets were no longer included in its own balance sheet, but in the balance sheet of the SPCs, which were financed almost 100% by the banks.

The demise of Sabena was, however, also due to many structural elements which will be discussed in more detail below.

3. FUNDAMENTAL ELEMENTS WHICH LED DIRECTLY OR INDIRECTLY TO THE BANKRUPTCY

3.1. Background

- In 1975, the Tindemans I government injected 4.25 billion Belgian francs into Sabena to bring its company capital to 5 billion Belgian francs. Within three years, these billions were completely lost through the cumulated losses.
- In 1979, the Martens I government decided to inject a further 3 billion Belgian francs into Sabena with a view to implementing the 'Van Rafelghem' plan, which was named after the person who had been appointed the previous year as the first crisis manager. The plan entailed the loss of 1,300 to 1,500 jobs. However, it was quickly scrapped, and the injection of capital was once again found to be inadequate.
- In 1981, in a damning report submitted to the government, the Belgian Financial Supervisory Authority stated that, without fresh capital, Sabena would be virtually in bankruptcy by the end of the year. The cumulated loss was greater than the capital, and the company had 20% surplus personnel.
- In 1982, the automatic cover by the State of the losses of the company came to an end through the scrapping of article 33 of the articles of association, a fundamental principle on which Sabena was historically based. However, article 10 of the articles of association would from then on be interpreted with greater flexibility. This article governed the financial support given by public authorities when aircraft were purchased. This form of subsidization would also be discontinued at a later date through the recovery law of 22 January 1985.
- Also during 1982, a recapitalization by the Belgian State was for the first time linked to an increase in additional capital by external investors. Nonetheless, they obtained a guaranteed dividend of 10% and the possibility of selling their shares to the State at the initial price. After this privatization operation *avant la lettre*, the Belgian State still held 54.72% of the capital, various public institutions acquired 26.11% and the private sector (insurance companies and savings banks) 19.17%.

- In 1983, Sabena was subsidiarized, on the one hand, to increase its financial transparency and productivity and, on the other hand, to pave the way for privatization. This led to the setting up of the *sociétés anonymes* Sabena Catering Services, Belgian Fuelling and Services Company (BFSC), Aviafin, Sabena Technics, etc.

- In 1987, negotiations aimed at creating an alliance with SAS failed due to fear of an excessive integration of Sabena in the Scandinavian company.

- In 1990, the year in which Sabena, KLM and British Airways participated in Sabena World Airlines (SWA), Sabena had never been in such a bad situation. The company was on the verge of bankruptcy.

Following the liberalization of the air navigation sector imposed by European legislation, the company was converted in 1992 into a purely private limited company (without statutory provisions derogating from common commercial law). However, the company never functioned properly and was never treated as a private company within a commercial environment. This hybrid situation contributed to a great extent to the company's fundamental problems. This can be seen from the various halfhearted reactions to the financial problems which Sabena had faced over the previous twenty years and which were of crucial importance for the survival of the company. This ambiguous situation (officially, Sabena was a private company, but, in daily practice, it had many characteristics of a public company) clearly had tremendous influence on the company's chances of survival.

During this period, Sabena was unable to operate on its own. However, thanks to the public authorities, it could continue to invest in and extend its network. Within the company, government support was taken for granted. This is one of the factors which explains why the national company was not able to take on the international competition.

By 1995, these problems from Sabena's past (corporate culture of a public company, sluggish decision-making process, low productivity and excessive cost structure) still existed but could not be eliminated.

The Swissair-Sabena alliance had visibly never succeeded in correcting these shortcomings.

Gaining the approval of the different actors for the successive restructuring plans was often tough going or these plans were not properly implemented.

In the strategy that consisted in seeking a partnership for Sabena (KLM, British Airways, Air France or Swissair), neither the shareholder nor the Board of Directors carried out a due diligence review (i.e. a detailed inspection which consists of examining not only the economic data but also the question whether the objectives of the future partner are, in its different components, compatible with the objectives of the party concerned, whereby both the new owner and the company to be taken over should make this kind of examination if they want their partnership to have any chance of succeeding). The choice of the partner was based on a comprehensive legal analysis and on a limited financial analysis.

3.2. Corporate strategy

3.2.1. Introduction

During the period under review, Sabena did not develop a coherent and consistent corporate strategy (with two exceptions, which are discussed below).

While the company had faced structural problems for several years (under-capitalization, recurrent deficits, etc.), the management had essentially reacted by taking ad hoc measures designed to meet the life-threatening challenges that the company was facing. It did not react proactively and did not develop a long-term vision. This type of approach could be qualified as 'sight navigation'.

This general observation must, however, be seen in the light of two strategic objectives which were pursued systematically by the company:

- 1) the search for an alliance with a foreign partner
- 2) the setting in place of a 'hub&spoke' system based around Brussels-National Airport.

3.2.2. *The search for an alliance with a foreign partner*

This objective was based on the conviction that Sabena was too weak to survive by itself. Since the 1980s, this increasingly came to be seen as the only choice due to the strategic option adopted by the main shareholder (the Belgian State) which consisted in cutting and even reducing to a strict minimum its stake in the airline, while preserving a blocking minority.

Sabena had been constantly on the lookout for a foreign partner since as early as 1975. After several failed attempts (KLM in 1975-1976, SAS in 1987 and once again KLM in 1988), this objective was finally achieved in 1989, with three successive alliances. However, all three of these alliances ended up in failure (British Airways and KLM in 1989-1990; Air France in 1992-1994; Swissair in 1995-2001). Given the precarious financial situation in which the company found itself, these alliances had each time been perceived as 'last chance' operations, and Sabena was therefore not in a strong negotiating position. The company therefore had to fall into line with the strategic considerations of the foreign partners, who chiefly saw in an alliance with Sabena the possibility of gaining access to Brussels-National Airport, which presented a potential for expansion.

In the long run, cooperation with the British-Dutch, French and, finally, Swiss partners had always had adverse consequences for the Belgian airline.

It is clear that the successive failures of the foreign alliances played an important role in the demise of Sabena. However, one might wonder whether there was any alternative. Belgian private investors were thin on the ground, and the viability of the stand-alone strategy was doubtful if Sabena was to retain its existing structure and size. In addition, the government was no longer willing - even if they had the budgetary means and had been authorized by the European authorities - to invest more taxpayer's money in a company which, during its 75 years of existence, had seldom made a profit. For all these reasons, it was impossible to maintain Sabena's existing structure and size.

Whenever a new alliance was formed, both the Belgian State and the partner of the moment injected fresh capital into the company. As a result, the ratio of own funds to the balance sheet total each time came close to the average of the sector (25%). This ratio subsequently fell to a level which could no longer guarantee the long-term viability of the company.

When each new alliance was formed, the State provided solid support at a legal level, but hardly ever at an economic level.

3.2.3. *The setting in place of a 'hub&spoke' system*

Sabena was the first European company to formulate this objective (from 1989-1990). It was based on three elements:

1. the importance of Brussels-National as the airport of the 'capital of Europe', the second growth area of the Belgian economy;
2. the limited size of the national market, which meant that transit passengers had to be attracted (most of Sabena's passengers came from abroad);

3. the strengthening of the intercontinental network.

It is very difficult to determine to what extent this strategic option contributed to the demise of the airline. However, it must be pointed out that, within the framework of the alliance with British Airways and KLM and with Swissair, this option was combined with a very ambitious growth strategy which, in both cases, proved to be detrimental to Sabena because it weighed on the general cost structure and led to a reduction in revenue per passenger.

This was particularly true for the alliance with Swissair, given that this strategic option was implemented at a time when the air sector was facing a problem of overcapacity.

It was only when Müller stepped in as CEO that Sabena's 'hub&spoke' strategy was for the first time fundamentally called into question and subsequently adapted for the first time within the framework of 'Blue Sky'. This plan, conceived by Mr Müller, was a restructuring and savings plan developed in the period following the signing of the Term Sheet of 26 April 2000, which created a new shareholders' agreement between the Belgian and Swiss partners and was designed to restructure the finances of the company and to prepare it for the new shareholdership structure following the signing of a definitive shareholders' agreement. The explosive growth in the number of passengers at the start of the 1990s did not result in an increase in profitability, quite the contrary.

The 'hub&spoke' strategy could have been supported effectively by the public authorities, who were competent for the development and opening-up of the infrastructure, two indispensable factors for a growing airport. Although certain measures appear to indicate that this was the case (in particular, the extension of the airport buildings), the absence of other measures (for example, the opening-up of the airport thanks to a TGV line) suggests otherwise.

The public authorities took certain measures to support the hub&spoke strategy (the extending of the airport buildings), but failed to take other measures, and, in particular, to open up the airport by means of a TGV line.

3.3. Administration

In Belgium, the rules of corporate governance were formulated for the first time in 1998 by the FEB/VBO (Federation of Belgian Companies) and the Banking and Finance Commission. They were enshrined in the law of 2 August 2002, which entered into force on 1 September 2002.

During the period under review, the application of these rules within Sabena clearly was unsatisfactory.

Certain members of the management made direct contact with the administrators. The information supplied by the management to the Board of Directors was not always accurate and was even sometimes misleading, especially within the framework of the major investment dossiers, such as that of the renewal and extension of the fleet in 1997. In this way, acts of administration were carried out by the shareholders or by the management.

Several administrators complained that they had not received sufficient information or had received information too late. However, some members of the management contested this version of the events.

In addition, the Board of Directors failed to assert itself and approved the strategic options and the business plans submitted by the management under the direction of the CEO with barely a reaction.

In the case of the purchase of 34 Airbuses, it was only in December 1997 (i.e. one month after the decision had been taken officially) that it approved the development plan (based on a growth hypothesis deemed to justify the extension of the fleet). The management had, moreover, reported this decision in an incomplete and incorrect manner.

In addition, the financing of the new aircraft was fragmentary, without any global or long-term planning.

3.4. Management

The management was split into several divisions, which functioned as independent 'baronies', and there was hardly any communication among them. In addition, the exchange of information among executives, the management and the CEO was inadequate and often late.

The CEO enjoyed a position of very considerable power during the Reutlinger period, despite the separation of the functions of CEO and chairman of the Board of Directors.

The restructuring plan lacked precision, its follow-up was unsatisfactory and its implementation was too sluggish.

After the setting in place of the AMP, the management lost control of many of the activities.

3.5. Personnel

Taking account of productivity, the gross salary costs of pilots were high in relation to those of competitors. The productivity of the flight crew, measured in maximum number of flight hours, was much lower than the market average and saddled the company with a heavy competitive handicap.

The implementation of the restructuring plans did not basically change this situation. The personnel parameters which were incorporated in these plans were set by the consulting firm McKinsey and were never submitted to an external evaluation.

The planned savings on personnel costs took account of what was feasible (so as not to create social unrest and especially commercially harmful strikes) rather than the market-economic needs of the company.

Mr Reutlinger wanted at all costs to preserve social harmony after the cancellation of all the collective labour agreements at the end of the Godfroid period.

The corporate culture, which within Sabena was comparable to that of a public administration, was such that the demise of Sabena was never seen as being a possibility.

During certain periods, shortcomings in personnel organization and management resulted in excess staff in certain sectors of the company.

Especially the personnel of Sabena lost out from the creation of the AMP.

Considerable tension arose over time between the representative trade unions and the pilots' association, which conducted separate negotiations with the management. During the final phase, this tension significantly deteriorated the social climate and even led to an open conflict during the September 2001 pilots' strike.

The fact that certain central trade union associations intervened separately made social dialogue even more difficult.

3.6. Markets and marketing

It was difficult to define a marketing strategy in the absence of a clear corporate strategy.

The target figure for the increase in business travellers was never reached. In addition, the contracts with City Bird and Virgin Express were at odds with this objective.

The dependence on transit passengers resulted in a relatively high level of overheads. The rate of occupation required to remain profitable was seldom reached. Sabena was therefore faced with a problem of overcapacity, and the Swissair expansion policy aggravated this problem. However, even with a rate of occupation of 100%, certain flights, such as the Johannesburg route, were loss-making.

The quality/price ratio was not competitive in Economy class.

Through the creation of the AMP, Sabena delegated its marketing strategy, which was subject to the corresponding Swissair strategy.

The AMP certainly had a positive effect on Sabena's public image. Due to the implementation of the AMP, which resulted in the fact that the prices for identical destinations were the same for Swissair and Sabena, many customers from abroad systematically chose Swissair for their intercontinental flights.

With regard to destinations in Southern Europe and North America, according to the flight schedules Swissair planes systematically took off before Sabena flights, which resulted in a significant loss of passengers for Sabena.

The decisions to serve certain destinations - such as Sao Paulo, Madras, etc. - were not supported by any market studies. In the end, these destinations did not offer sufficient potential and were therefore loss-making.

3.7. Restructurings

The 'Blue Sky' plan was announced on 1 August 2000 by Mr Müller at a press conference (organized in the wake of the announcement of the company's poor results for the first half of 2000). The 'Blue Sky' plan, which was finalized on 15 October 2000, provided for a reduction in costs of 357 million euros, including 54 million euros resulting from a reduction in personnel costs. In addition, it included the sale of a certain number of activities to Swissair, and the closure of several routes. This plan has to be seen in the context of the shareholders' agreement concluded on 25 January 2001, whereby it was decided to grant recapitalization of 250 million euros (100 million euros by the Belgian State and 150 million euros by Swissair) on condition that 'Blue Sky' was approved by the trade union organizations. However, they gave their agreement only a month later, on 23 February 2001.

At an organizational level, subsidiarization and desubsidiarization followed between 1983 and 2000 with little or no effect on the global balance sheet.

The planned savings on personnel costs took account of what was feasible (so as not to create social unrest and especially commercially harmful strikes) rather than the market-economic needs of the company. In addition, these savings were made sluggishly and incompletely.

The progressive integration of Sabena in Swissair was virtually irreversible following the creation of the AMP.

3.8. Finances

In its 75 years of existence, Sabena hardly ever made a profit. The company therefore always depended on handouts from the public authorities and from the industrial partner.

After each new alliance, the ratio of own funds to the balance sheet total reached the average of the sector (25%), but this ratio subsequently fell to a level which could no longer guarantee the long-term viability of the company.

No global financing plan was drawn up for the renewal and extension of the fleet.

After the renewal of the fleet, Sabena's off-balance sheet obligations were very high in relation to the company's turnover.

The sale of the slots held at London-Heathrow to Virgin Atlantic in March 1997 and to Virgin Express in November 1999 was not correctly entered in the accounts, given that it involved exceptional operations and that these operations were entered as ordinary operating income.

With regard to the results of the second half of 1998, it should be pointed out that they were favourably influenced by the following exceptional elements, which had not been accounted correctly: an increase in value of 15 million euros from the sale of 13 B737s; 43.5 million euros from the sale of the hedging contracts, and, successively, 8 million dollars and 1 million dollars from the sale of the slots held at Heathrow.

3.9. Investments in the fleet

3.9.1. Decision-making

3.9.1.1. Short-haul fleet

In August 1995, the management proposed to replace the short-haul fleet. Just over one year later, in October 1996, 23 Avro aircraft and 6 BAE aircraft were purchased. Neither the Board of Directors nor the management asked for a second opinion from a party not related to SAirGroup to ensure the objectivity of the strategy on which the decision was based.

The decision was taken expressly with the aim of 'harmonizing the fleet', and more particularly to encourage possible synergies with Crossair. The management was divided over the role of synergies with Crossair, the regional subsidiary of Swissair. The decision therefore involved an interest beyond that of Sabena, whereas the 1995 cooperation agreement involved only the question of the 'coordination of the planning of the fleet'.

The management had not calculated the overall impact of this financing on the financial structure of the company.

Furthermore, no forecasts were made with regard to the future available and expected capacity after the bringing into service of the new aircraft.

The Board of Directors followed the management report without much critical input.

From May 1996 on, the Board of Directors was regularly informed of the problems with the financing. The solution that was finally adopted was the creation of a German SPC (Special Purpose Company).

In September 1996, there was still no Belgian bank willing to finance the remainder of the fleet, basically because of the social unrest within Sabena. The commission of inquiry found no trace whatsoever of any participation by Swissair in the financing.

In October 1996, the financing through the Sabena Interservice Center (SIC) was nonetheless finalized thanks to the *Bayerische Landesbank* and the European Investment Bank, but without Swissair.

In September 1997, *Midland Bank* and the *Kommerzbank* also became involved in the financing.

3.9.1.2. Medium-haul fleet

The decision to purchase 34 new Airbuses was taken by the Board of Directors at its meeting of 17 November 1997. This renewal and extension of the fleet was part of the expansion strategy of the group to which Sabena

belonged.

However, at the meeting of the Board of Directors on 8 December 1997 Mr Bruggisser stated: “*Nous sommes actuellement dans la dernière ou les dernières années du boom aérien. Après, ça descend ...*” (“We are currently in the final year or years of the airline ‘boom’. After that, things will go downhill...”).

The development plan, which was based on expansion and which consequently justified the extension of the fleet, was, however, approved at the same meeting of the Board of Directors, even though the contract relating to the purchase of 34 new Airbuses had not yet been signed.

The Board of Directors took its decision on the basis of inaccurate and incomplete information.

The detailed explanations given by Mr du Bois, general secretary, did not square with what had been said on this subject in the minutes of the Management Committee. It therefore mistakenly gave the impression that the Management Committee was unanimous, which meant that the Board of Directors had been misinformed. On the basis of the report presented, the administrators could not perceive any disagreement within the Management Committee. A certain number of notes were added selectively in the dossier communicated to the administrators.

3.9.1.3. Long-haul fleet

With regard to the long-haul fleet, discussions got under way on 21 October 1996 within the working group directed by Mr Peter Gysel (1). The management reported to the Board of Directors and, on 16 December 1996 the Board decided to purchase an Airbus-A330 plus five options. This decision was, however, subject to a decision of the Board of Directors of Swissair concerning its new long-haul fleet.

Once again, the interest of the group was a crucial factor.

On 17 November 1997, these six aircraft were supplemented by an A330-300 and six A330-200s (which brought the total number of aircraft to thirteen to replace two-thirds of the A340s dating from the Air France period). These aircraft were delivered and financed without the help of Swissair.

(1) Under the terms of an agreement concluded between Swissair and Sabena, Mr Gysel (who was an employee of Swissair at the time) was responsible for the preparation of Sabena’s Airbus dossier. After the bankruptcy of Swissair, he was recruited by Airbus.

The financing of these long-haul aircraft was problematic.

Once again, the management did not present a global plan, nor was one requested by the Board of Directors.

3.9.2. *The choice between Airbus and Boeing at the time of the renewal and extension of the fleet in 1997*

Already during the negotiations with Swissair in 1994, a general preference for Airbus had been clearly expressed.

All things considered, Boeing’s proposal on the participation in Sabena Technics was not of crucial importance to Sabena, but the delivery dates of the new aircraft were more staggered than in the Airbus proposal. Due to the fact that the seating capacity of an Airbus is greater than that of a Boeing, it was possible to purchase fewer Airbuses to meet the same forecasts.

Mr Reutlinger exerted strong pressure on the Management Committee to choose Airbus. In the explanations that he gave to the Board of Directors, Mr du Bois, general secretary, falsely claimed that there was unanimity within the Management Committee.

The choice of Airbus was interpreted by the Belgian administrators as an attempt to create better harmonization between the fleets of Sabena and Swissair. However, other witnesses disputed this interpretation and highlighted the limit of the synergies in this regard (around 30 aircraft).

The Belgian State had highly recommended that the Board of Directors take all the necessary measures to make cooperation with Swissair a success.

Belairbus drew the attention of the minister in charge, Mr Michel Daerden, to the fact that it was in the interest of the Belgian industry to choose Airbus. The minister sent the chairman, Valère Croes, and the CEO, Paul Reutlinger, a copy of the letter which he had sent on 17 October 1997 to Belairbus, but stressed that it was up to the Board of Directors to make the final choice.

3.9.3. *The number of new medium-haul aircraft*

The account of the progressive changes in the number of aircraft differs from one witness to another.

According to Mr Gysel, the number of aircraft increased from 13 (the number of obsolete Boeings that Sabena had to replace in the short term) to 17 (extension of the fleet by 4 additional aircraft), then finally to 34 (replacement of the 17 other aircraft which did not yet have to be replaced).

It is not known exactly when the decision was taken to increase the number of new aircraft to 34. Mr Gysel said that this decision was taken “some time during the second half of 1997”. However, it was only on 8 December 1997 (one month after the decision to purchase) that the Development Plan - which was drawn up to justify the purchase of 34 new aircraft instead of 17 - was definitively submitted to and approved by the Board of Directors. Furthermore, a letter of 2 April 1997 sent to Airbus by Mr Kreis of Swissair Technics already mentions 32 new aircraft.

There is no testimony to allow us to determine for certain why the number of Airbuses to be purchased was increased to 34 units.

There are certain indications that Airbus had already been chosen before the Board of Directors took a decision on the matter. This is further corroborated by the dossier of purchase options from Swissair to Sabena.

3.9.4. *Options*

There are clear indications that it was also in the interest of Swissair at a financial level for Sabena to choose Airbus. This in effect allowed it to transfer to Sabena the options that it had taken in 1990 on 19 Airbuses, which would allow it to recover from Sabena 300,000 American dollars in ‘deposits’.

‘Deposits’ or ‘option fees’ are a kind of reservation whereby an order is included in the delivery schedule of the supplier. This is an advantage for the customer as the aircraft ordered must be delivered according to a binding timetable. To do this, a relatively limited amount is charged which is included in the final price through ‘predelivery payments’. In other words, this option does not constitute an additional price condition, but is part of the overall price to be paid in advance. However, if a delivery is cancelled, this part of the advance payment can never be recovered.

- Options were already mentioned in a memo sent on 15 November 1997 by Mrs Van Itterbeek and Mr Rome (top executives at Sabena) to the general secretary, Mr du Bois, and a member of the Management Committee (Mr Marc Petit): “The firm purchased aircraft constitute an exercise of the options of Swissair with Airbus. (...) Aircraft means 13 firm plus 6 optional plus 15 additional.”

- On 17 November 1997, the CEO, Paul Reutlinger, and the general secretary, Patrick du Bois, signed the Memorandum of Understanding with Airbus relating to the purchase of 34 Airbuses, in which the transfer of 19

options from Swissair to Sabena for 300,000 American dollars per option was mentioned.

- On 27 November 1997, Mr Kreis of Swissair Technics wrote the following to Mr Rome (of Sabena), with a copy to Mr de Vaucleroy (of Sabena): "Sabena has executed 19 options from the Swissair portfolio. (...) I'm preparing the necessary invoice in the amount of 5,700,000 US\$. The remaining difference from 19 to 34 positions which are additional positions should be paid by Sabena directly to Airbus upon signature of the Memorandum of Understanding. This transfer of money would be in the amount of 1,500,000 US\$. All deposits could be taken into account by the first predelivery payment of each respectively aircraft."

Thanks to these notifications of 15, 17 and 27 November 1997, some of the members of the Management Committee were informed of the transfer of the options.

The option payment from Sabena to Swissair amounted to 300,000 American dollars per aircraft (for 19 planes). The direct option payment from Sabena to the Airbus supplier amounted to 100,000 American dollars per aircraft for the other planes. In December 1997, 15 options for the sum of 100,000 American dollars were paid to Airbus, and in February 1998 19 options for the sum of 300,000 American dollars were paid to Swissair.

On 2 December 1997, Mr P. Schultz (of Airbus) wrote the following to Sabena, with a copy to Swissair: "Due to the fact that Swissair has transferred 19 option dates to Sabena (instead of 21 as assumed in the Memory of Understanding)".

On 24 December 1997, FlightLease sent Sabena an invoice for 19 x 300,000 American dollars = 5,700,000 American dollars. This amount was immediately entered in the accounts as an advance on tangible fixed assets.

On 17 February 1998, Swissair sent a reminder, following which Messrs de Vaucleroy and Ruelle (both from Sabena) issued a payment order the same day.

An internal memorandum allows us to conclude that the sum of 19 x 300,000 American dollars, 15 x 100,000 American dollars and 5 x 100,000 American dollars was paid by Sabena, which corresponds to 34 aircraft ordered plus 5 aircraft on option.

The Memorandum of Understanding of 17 November 1997, signed by the general secretary, Mr Patrick du Bois, mentioned in paragraph 11.1 (ii) the following: "These non-refundable deposits shall be credited against the predelivery payment required upon signature of the Purchase Agreement."

Conclusions

- Swissair had options on medium-haul Airbuses before Sabena's Board of Directors decided to purchase the 34 Airbuses in question.

- This matter was discussed prior to the definitive decision to purchase with Sabena's management and with the general secretary, Mr Patrick du Bois.

- Nevertheless, it was not mentioned anywhere in the minutes of the meetings of the Management Committee and of the Board of Directors.

- The Memorandum of Understanding of 17 November 1997 mentioned the options.

- The option payments made by Sabena to Swissair amounted to 300,000 American dollars per aircraft; those made directly by Sabena to Airbus amounted to 100,000 American dollars per aircraft; these payments were included in the 'predelivery payment' and, according to the information brought to light by the commission, in the purchase price.

- The direct option payments from Sabena to Airbus were made on 29 December 1997; the payments from Sabena to Swissair were made on 17 February 1998.
- If Sabena had not taken up the Swissair options, it would not have been sure of fast delivery.
- Due to the fact that Sabena took up the Swissair options, Swissair received on 17 February 1998 the sum of 5,700,000 American dollars, which it would not have received without the transfer of the 19 options.

3.9.5. *The financing of medium-haul aircraft*

The commission did not find a global financing plan for all the 34 new aircraft. However, several witnesses have stated that they already had serious doubts at the time of the purchase as regards Sabena's ability to finance this purchase.

This concern can also be seen in the passage in the minutes of the meeting of the Board of Directors of 17 November 1997 where it mentions the "support of Airbus Industry and SAirGroup to guarantee the financing of this investment without jeopardizing Sabena's balance sheet structure". A 'side letter' drafted on 18 November 1997 was signed by Sabena and Airbus, but not by Swissair. The Board of Directors was never informed of the existence of this 'side letter'.

Moreover, it very quickly emerged from discussions between Mr Petit and Mr Schorderet that Swissair, as a minority shareholder, was at most willing to grant financing to Sabena at market conditions via Flightlease (which belonged to SAirGroup).

Later remarks by the management with regard to the problematic nature of the vague clause did not reach the Board of Directors.

3.10. **External factors**

3.10.1. *Liberalization at global and European level*

Up until 1977, air navigation was organized on the basis of bilateral agreements, and 'flag carriers', such as Sabena, were faced with hardly any competition. During the 1990s, the European air space was liberalized. The European Union now constituted one single market where the national airlines competed with one another and were free to set their own tariffs. New competitors obtained real access to the market based on European regulations. Between 1977 and 1997, prices dropped in real terms by an average of forty per cent and the number of travellers increased spectacularly.

It was in this context that there was an exponential increase in business of some low-cost carriers.

It was no longer possible for the national authorities to absorb the losses of their own 'flag carrier'.

3.10.2. *Infrastructure*

Belgium never opted for integrated airport/airline development. In addition, the public authorities did not succeed in making a smooth link between the airport and the TGV network. These structural weaknesses undermined the implementation of the 'hub&spoke' strategy.

3.10.3. *The sale of the 'hedging' contracts*

The sale of the 'hedging' contracts, which was aimed at embellishing the 1999 annual accounts, increased the company's dependence on the dollar trend and the price of kerosene.

3.10.4. *The September 11 attacks*

The attacks of 11 September 2001, which resulted in an international crisis for the air sector, no doubt precipitated but did not cause the bankruptcy of Sabena. These events made it much more difficult to find new owners.

3.11. **Role of the different actors**

3.11.1. *The personnel, the trade union organizations and the pilots' association*

3.11.1.1. Difficulty of social dialogue

The social dialogue within the company became increasingly difficult, especially during the Godfroid period, in particular due to the rapid succession of different restructuring plans. Consequently, the implementation of these plans was slowed down. This was also due to the fact that the works council was not properly informed. The trade unions were divided on the question of the quality of the transmission of information to the works council. The 1995 shareholders' agreement was therefore never properly explained within the works council.

The law of 1985 on the information that the works council must receive and provide had still not been complied with.

3.11.1.2. Complexity of the social consultation process

Within Sabena there was a high level of trade unionization and a strong trade union tradition.

In addition to the recognized trade union organizations (of which some had a complex internal structure; different associations within the same trade unions took part in the same negotiations), the pilots' association (BeCA) also negotiated separately with Sabena's management.

Several witnesses mentioned the partitioning of functioning and consultation at a vertical level (between the workers and the hierarchy) and at a horizontal level (among departments and subsidiaries).

The trade union delegates often defused social conflicts.

3.11.1.3. *De facto* misunderstanding of the social consultation bodies instituted by law

The legal consultation structure within Sabena sometimes had one single aim, particularly after negotiations between the pilots and the management, and that was to formally acknowledge the result of the consultations and to formalize them through collective labour agreements.

3.11.1.4. Dissension among the representatives of the personnel

The recognized trade union organizations sometimes acted alone. This sometimes led to internal tensions among the different entities and complicated the task of the trade union secretaries.

Several witnesses felt that there were too many trade union delegates.

Certain adopted stances and actions by the pilots' association (BeCA) reflected a certain corporatism. The failure of the second attempt to 'flag out' pilots is a case in point. The September 2001 pilots' strike was also detrimental to the company.

The lack of flexibility, in particular of the pilots' association, put the brake on the implementation of the different restructuring plans.

3.11.1.5. Informal contacts with politicians

There were sporadic contacts between trade union leaders and the representatives of the Belgian public shareholder.

3.11.2. *The CEO, the Management Committee and the general secretary*

3.11.2.1. The Godfroid period

Mr Godfroid, who was appointed as crisis manager, was entrusted with a threefold mission: to save Sabena from bankruptcy, to adapt the company's articles of association to privatization and to prepare a recapitalization of the company with a private partner.

This period was characterized by the dominance of the CEO, who was also the chairman of the Board of Directors. Mr Godfroid enjoyed considerable autonomy to compose his Management Committee, with which cooperation was good.

The cancellation, in November 1995, of all existing collective labour agreements is a good example of his radical sometimes headstrong decisions.

Apart from the fact that the different divisions were self-willed, the functioning of the Management Committee did not pose any particular problems. However, this committee should have submitted the strategic plan drawn up by McKinsey (Switzerland) for Swissair for an external evaluation.

Mr Godfroid resigned in February 1996, following a serious social conflict in which he did not get the support of the Board of Directors or the shareholders.

3.11.2.2. The Reutlinger period

Mr Reutlinger, who was appointed at the proposal of the two shareholders, was given the task of restoring social peace and integrating Sabena in Swissair.

The functions of the CEO and the chairman of the Board of Directors were separated.

Throughout this period, the Board of Directors found itself in a weak position in relation to the CEO, who, moreover, subsequently became a member of the Board of Directors.

Furthermore, at the end of this period, the availability of the CEO left something to be desired.

According to several testimonies, it would appear that the members of the Management Committee had very little power, unlike the CEO.

The letter of 14 October 1999 sent to Philippe Bruggisser, in which Mr Reutlinger discussed the appointment of Mr Rik Daems as minister in charge, revealed that the position of the Swiss CEO of Sabena was not neutral in the relations between the Belgian and Swiss shareholders. In this letter, Mr Reutlinger explained the strategy of the Belgian State with regard to the evaluation of the shares of Sabena and the impact that this would have on the price that Swissair would have to pay when it increased its stake. Questions might also be asked as to the position of Mr Reutlinger in the management of Crossair, a company of SAirGroup which was sometimes in competition with Sabena.

The information that the Board of Directors obtained from the CEO and the general secretary during this period was sometimes incomplete and even in some cases misleading (cf. point 3.3. the reports of the Management

Committee). The contracts concluded during this period with City Bird and Virgin Express went against the strategy outlined in the 'Horizon 98' plan with regard both to the objective, which consisted in attracting more business travellers (with the low cost carrier attracting another type of passenger on the same routes), and the desire to harmonize the fleet (with Sabena still operating two MD-11s).

Moreover, Mr Reutlinger exceeded his powers when he signed contracts with City Bird and Virgin Express for a period of more than twelve months. When agreements relating to the Brussels-Barcelona and Brussels-Rome routes were concluded, at his own initiative he extended to 8 years the duration of the agreement concluded with Virgin Express concerning the Brussels-London route, for which the initial agreement had been co-signed by the Vice-Chairman, Philippe Suinen. The Board of Directors never formally raised or corrected this clear abuse of power.

The CEO also sold the slots that Sabena held at Heathrow (although such a sale was not permitted and the person concerned had not been duly mandated to carry out such an operation). The revenue from the sale of these slots to Virgin Atlantic (in March 1997) and to Virgin Express (in November 1999) was not correctly entered in the accounts, given that it involved exceptional operations which were entered as ordinary operating income.

3.11.2.3. The Müller period

As soon as Mr Müller took up the post of CEO, he raised the alarm concerning Sabena's disastrous plight. He drew up the 'Blue Sky' plan in an effort to remedy the situation. However, Müller's 'Blue Sky' plan could not be implemented in time. It was only after the appointment of Müller as administrator, in April 2001, that the growth strategy was called into question. By this time, further social tensions had arisen.

Mr Müller looked for new partners, but in March 2001, at the end of his search, he admitted that there was no alternative to Swissair.

When it was clear that Swissair would not fulfil its obligations as regards refinancing, he requested a legal composition. The commercial court of Brussels granted a period of only fifty-five days, whereby it deemed that the restructuring plan submitted to it was inadequate.

According to Mr Müller, the streamlining of Sabena would have provided a means of avoiding a relaunch through DAT.

Mr Müller, who took on many other functions, in particular within the different companies of SAirGroup and the AMP, was therefore not always able to be as available as Sabena's plight required.

3.11.3. *Administrators*

3.11.3.1. Running of the company

There was a relatively large turnover of administrators, which was detrimental to the company's continuity and team spirit.

Throughout the Reutlinger period, the Board of Directors remained in a weak position. The 1995 shareholders' agreement was interpreted by the Belgian administrators in such a way that any conflict among shareholders had to be avoided until such time as SAirGroup formally became the majority shareholder. It was especially during this period that the communication of information to the Board of Directors left something to be desired. The Belgian administrators rarely reacted to this lack of information. They all too easily accepted the proposals of the Management Committee.

The Board of Directors did not submit the growth strategy defined for Swissair for an external evaluation and should have demanded a global financing plan when the fleet was renewed and extended in 1997.

Within the framework of the AMP, the Belgian administrators did not hinder its implementation and did not follow up the suspensive conditions. This is linked to the fact that the minister in charge, Daems, did not oppose the actual implementation of the AMP prior to the concluding of a definitive shareholders' agreement.

3.11.3.2. Independence

The mission of the members of the Board of Directors of Sabena was not defined in any document.

The composition of the Board was determined according to the strength of the traditional political parties (Christian Democrats, Socialists and Liberals), which, however, did not prevent some parties from appointing captains of industry.

The Swiss administrators of Sabena (which included some who had specific experience in the aviation sector) defended first and foremost the interests of Swissair, which were sometimes at variance with those of Sabena.

Within the framework of the AMP, the Belgian administrators, at the urging of the Belgian shareholder, postponed the signing of the contract. The basic instruction that they had received from the government was, however, to strengthen the partnership of Sabena and Swissair to promote integration within the framework of the majority shareholdership of Swissair.

The Chairman, Chaffart, consistently upheld the Belgian interests at the meeting of shareholders which was held in Zurich in June 2001.

The combining of the post of chairman of the Belgian Chamber of Representatives with that of administrator of a competitor of Sabena (in which, it should be remembered, the State held over 50% of the shares), i.e. City Bird, raised some questions.

3.11.3.3. Observations

Some administrators participated in an individual capacity in the preparation of administration actions, without having been mandated to do so, when the so-called 'hotel agreement' was drafted.

Leaks really complicated the functioning of the Board of Directors, at least in the final phase.

3.11.4. *Shareholders*

A distinction must be drawn between the role of the shareholders, including the Belgian State, represented by the minister in charge of Sabena, and that of the political authorities, including the ministers (and the staff of the ministers), who, although they did not take charge, nevertheless played a role in the life of the company.

This distinction is relevant for the period after 1991, when the government took a threefold decision:

- a. Sabena's capital was increased
- b. The company had to look for a private partner
- c. The articles of association were adapted to privatization.

From 1983 to 1992, privatization presented a certain number of singular features. The private shareholders received a 10% guaranteed dividend, which required a legal derogation, but which was not in conformity with the market. The refund of their contribution was also guaranteed.

Mr Jean-Luc Dehaene, who subsequently became the Minister of Communications, was convinced that Sabena should be converted into a *société anonyme* under common law to include other partners. In the longer term, it was hoped that this strategy would result in the integration of Sabena in a larger group which would acquire the majority. The Martens-Moureaux government then in power wanted to remain a minority shareholder.

On 12 June 1995, the Belgian shareholder drafted a rider to the basic agreement with Swissair which guaranteed that the effective control of Sabena could remain in the hands of the Belgians. The CEO had to be appointed by the Board of Directors by a joint recommendation presented by the Swiss and Belgian administrators. This rider was accepted by the European Commission. The government of the time was expediting current business.

The Swiss shareholder, Swissair, clearly followed the growth strategy defined by McKinsey, which was intended for Sabena, Swissair itself and Austrian Airlines. This growth strategy had not been evaluated by Sabena. Nevertheless, the creditworthiness of SAirGroup (i.e. its solvency and its good faith) was recognized by all the experts when the shareholders' agreement was concluded. From 1998, the indications suggested the contrary.

During the final phase, changes were made in quick succession at managerial level within Swissair, which made the dialogue with the Belgian shareholder more difficult.

When the decision was taken to purchase 34 Airbuses in November 1997, Swissair pledged through its Swiss administrators to seek common financing without jeopardizing Sabena's balance sheet structure. This commitment without firm guarantees was not honoured in any way. It is not clear whether the Belgian shareholder was informed of the nonfulfilment of this pledge. There are indications that certain responsible persons within Sabena had already undertaken to renew and extend Sabena's fleet through the purchase of Airbus before the formal decision of the Board of Directors was taken (through the take-up of Swissair purchase options).

On 1 October 1999, the minister in charge, Rik Daems, informed Sabena's Board of Directors in writing that the draft AMP, as approved by the Board of Directors on 14 June 1999, did not offer sufficient guarantees for the Belgian interests.

On 25 November 1999, the Board of Directors gave the go-ahead to start the implementation of the AMP, after having contacted by telephone Minister Daems and the head of SAirGroup, Mr Bruggisser, concerning the changes in the shareholdership.

The actual implementation of the AMP preceded the Term Sheet concluded between shareholders on 26 April 2000.

Minister Daems was informed of this and made no objection.

However, a certain number of suspensive conditions (in particular, the participation of Crossair and the 50/50 representation in the decision-making structure) had not been met and there was as yet no agreement on the conversion of the April 2000 Term Sheet into a definitive shareholders' agreement, which was finally signed in January 2001.

On 26 April 2001, the entire Board of Directors was renewed and all the outgoing administrators received a discharge, except for Messrs Bruggisser and Reutlinger.

3.11.5. *Political authorities*

3.11.5.1. The European Commission

When the capital was increased in 1991, the European Commission applied the 'one time, last time' principle to Sabena. No further recapitalization could now be made by the Belgian State without the majority participation of

a private partner. The Belgian government committed itself to this vis-a-vis the European Commission in a letter of 5 June 1991.

In addition, there could be no further recapitalization, except for purely economic reasons. An exception could be made to this principle only under exceptional and unforeseen circumstances. According to certain witnesses, it was impossible to obtain an exemption to this principle. An exemption could only be granted under exceptional circumstances. However, these circumstances were not defined anywhere in the directives. According to Mr Daniel Calleja, head of cabinet of the European Commissioner Loyola de Palacio, the breach of contract by Swissair would not have constituted an exceptional circumstance.

Since 1990-1991, the Belgian government has always respected the European regulations. The European Commission has, however, decided on a case-by-case basis. In this context, large Member States were given more favourable treatment than small Member States.

The European Commission later gave its blessing to the transitional credit intended to relaunch the company through DAT and to finance the new company SN Brussels.

3.11.5.2. Convention between the European Union and the Swiss Confederation

The 1995 shareholders' agreement provided for the possibility that Swissair could become Sabena's majority shareholder, either after the ratification of the Convention between the European Union and the Swiss Confederation or from 1 January 2000. The non-ratification, by the fifteen Member States of the European Union and the seven Belgian parliaments, of the bilateral convention signed in June 1999 between the European Union and the Swiss Confederation prevented Swissair from becoming Sabena's majority shareholder without Sabena losing its status as a 'European carrier'. Belgium was the last country to ratify the said convention (cf. Belgian State Gazette of 17 September 2002), and the Belgian State refused, on the advice of its lawyer, to use this ratification as a means of exerting pressure in the negotiations with SAirGroup concerning the acquisition of a majority stake. The convention entered into force on 1 June 2002. The non-ratification harmed relations between the Belgian and Swiss shareholders.

3.11.5.3. Government officials

In 1983, the Belgian government once again involved private partners in the capital. From the start of the 1990s, the Government wanted to involve Sabena gradually in a privatization operation which would allow other partners to participate in the company.

The public authorities continued to attach importance to the development of business at Brussels-National Airport. They could maintain their stake, preferably as a minority shareholder. This stake was part and parcel of the policy of successive governments, which felt that the Belgian State could no longer continue to invest alone in Sabena and that Sabena should look for a private partner and continue to develop within the framework of a partnership with a foreign airline.

For political, legal and budgetary reasons, the 1993-1995 flight personnel 'flagging out' project was not supported by the Belgian government of the day, much to the annoyance of Sabena's boss, Mr Godfroid, because this solution had been adopted for the *Compagnie Maritime Belge*.

With regard to the 1997 Airbus dossier, certain administrators stated that they had the impression that the government had a preference for Airbus, while the ministers had always indicated that the choice between Airbus and Boeing fell within the powers of the Board of Directors.

After privatization, the public authorities did not take any initiative to create a knowledge centre entrusted with advising them on the policy to be adopted. Both Sabena and the Belgian government sought advice from external consulting firms. The know-how was found within the company itself or was provided by lawyers or consulting

firms, but not by their own administration. The Aeronautics Authority, which is a purely technical-administrative body of the Department of Transport, was never able to play this role.

The loss of expertise and experience that can be seen at each change of government was partially compensated for by the fact that the company's activities were monitored almost constantly by the same law firm.

On 19 January 2001, the Prime Minister was mandated by the Council of Ministers to negotiate with SAirGroup.

A steering committee was set up following the definitive concluding of the recapitalization agreement of 25 January 2001. This committee was under the direction of Mr Luc Coene, head of cabinet of the Prime Minister, and was given the task of coordinating the policy to be followed.

3.11.6. *External actors*

3.11.6.1. The Interservice Center of the Sabena group (SIC)

After the cancellation in 1985 of the State guarantee, the Sabena Interservice Center (SIC) was set up on 21 June 1985. This Centre did not have any major need for credit. It held 20% of own funds out of a balance sheet total of 833 million euros.

3.11.6.2. International Special Purpose Companies (SPC)

The banks were all the more willing to grant credit through the SPCs (companies under Irish law in which each aircraft acquired was financed individually by international banking consortia) to meet the requirements of the major investment programs of 1997 concerning the fleet as the commercial value of the pledge (in this case the Airbuses) was increasing.

No precise figures were ever forthcoming on this matter.

As long as Sabena was the partner of SAirGroup (a company which was listed on the stock exchange and had a good credit rating), it had little problem obtaining credit.

3.11.6.3. Belgian banks

When it became clear that Sabena had a negative operational cash flow (its solvency dropped from 25% to 4% between 1995 and 2000) and that the creditworthiness of Swissair was also weakening (in particular because of the attitude adopted by Crédit Suisse, etc.), the Belgian banks were no longer willing to grant additional credit.

3.11.6.4. Swissair banks

According to a report of the Swiss *Comité de gestion du Conseil des Etats* of 19 September 2002, the shareholder banks of SAirGroup refused, on 21 April 2001, to supply any new capital to Swissair until such time as Swissair abandoned a number of loss-making foreign participations, including Sabena.

3.11.6.5. Consulting firms

3.11.6.5.1. McKinsey

The management of Sabena made considerable use of the services of McKinsey as a consulting firm specializing in the development of airlines. This was particularly the case in 1990 for the general strategy, in 1996 for the development plan and subsequently for the changes to this plan, in 1999 for the impact study, etc.

McKinsey, which is a well-known expert in the aeronautic sector who had already been consulted by Sabena in

1975, outlined the strategy for Swissair. As a result of this strategy, Swissair began to acquire a stake in different European airlines, including Sabena.

McKinsey (Belgium), which was the consulting firm commissioned by Sabena especially after the arrival of Mr Paul Reutlinger as CEO (and who drew up the 'Horizon 98' plan and the 'Development Plan 1998-2000', which were then approved by the Board of Directors), evidently monitored the growth strategy advocated by McKinsey (Switzerland).

This 'hunter' strategy was never submitted for a second opinion. However, with hindsight it can be seen that it was fatal for both Swissair and Sabena.

In 1997, the growth strategy defined by McKinsey raised some questions within Swissair and Sabena. On 8 December 1997, the growth strategy - which included the renewal and extension of the fleet - was brought into question by Mr Philippe Bruggisser himself who stated: "*Nous sommes actuellement dans la dernière ou les dernières années du boom aérien. Après, ça descend ...*" ("We are currently in the final year or years of the airline 'boom'. After that, things will go downhill..."). The handling of the transfer of purchase options from Swissair to Sabena shows that Swissair was reducing the number of Airbuses that it had ordered for itself.

3.11.6.5.2. Other consulting firms

During the period studied by the commission, Sabena did not consult only McKinsey. The following firms were also consulted:

a) *by the management:*

- Clifford Change for everything concerning the financing contracts for purchases the of the Avros (in 1995) and the Airbuses (in 1997); and
- KPMG (Ireland) for everything relating to the creation and maintained operation of the SPCs (special purpose companies) in Ireland.

b) *by the public authorities:*

- ING-Barings in 1995 for the negotiations on the buyback of the Air France shares, and in 1999/2000 concerning the adaptation of the contract with Swissair;
- Boston Consulting Group in 2000 for the 'SN strategic position' study;
- KPMG (Belgium) in 2000 for the determination of Sabena's capital requirements;
- An unknown consulting firm, on 17 October 2001, for the 'Draft Newco'; and
- Various lawyers for different negotiations; and finally
- The law firm NautaDutilh in April 2002 for a fact-finding mission requested by Minister Daems on the possible liability of the Belgian State in the management of Sabena.

c) *by the pilots:*

- USAIpa (in 2000) for a second opinion on Sabena's strategy.

d) *by the European Union:*

- Ernst & Young France (in May 2001) for an analysis of government support granted to Sabena.

Once again, it can be seen from this summary that as the Belgian public authorities did not have their own expertise centre, they often called upon external consulting firms.

3.11.6.6. Auditors

3.11.6.6.1. Introduction

The commission of inquiry sent a detailed questionnaire to KPMG on its mission as auditor. On behalf of KPMG, Mr P.P. Berger, associate, answered this questionnaire in a detailed memorandum (dated 2 January 2003).

The commission obtained from the examining magistrate through the public prosecutor at the court of appeal of Brussels a copy of the management letters transmitted by KPMG to Sabena from 1996 to 2000 (for 2000 only one draft was found). KPMG explicitly stated in this regard that the replies given concerned only itself and that there had been no consultation on this matter with the colleagues, with whom at that time it formed a board of auditors within Sabena.

3.11.6.6.2. Identification

During the period under review, the following intervened in their capacity as auditors:

- 1985-1986: Messrs E. Kirschen and P.E. Berger;
- 1987: KPMG represented by Mr P.P. Berger;
- 1988-1995: a board of auditors made up of KPMG and Fernand Detaille;
- 1996-2000: a board of auditors made up of KPMG and Michel Delbrouck;
- 2001: KPMG represented by Messrs E. Clinck and Ph. Longerstay.

In addition to their mandate for Sabena, these auditors examined the accounts of the other companies belonging to the Sabena group.

The task of the auditor (or the board of auditors) was to submit a report on whether the annual accounts presented at the general meeting gave a true and fair view of the situation of the company.

3.11.6.6.3. Reporting

A simple declaration of approval was issued for Sabena itself (individual annual accounts) and for the Sabena group (consolidated annual accounts) for 1985 to 1999.

A declaration of approval with explanatory notes concerning continuity was issued for financial year 2000 for Sabena and for the Sabena group. It should be pointed out in this regard that this 'declaration of approval with explanatory notes concerning continuity' was also issued for a number of other companies in the group, i.e. for Betrix (1998 and 1999), Edipras (1995-2000), Sabena Hotels (1999 and 2000), Sabena Leasing (1998 until 2000 inclusive), Sabena Technics (1999 and 2000), Sobelair (1999 and 2000), Sobelair Broker (1999 and 2000) and Sodehotel (from 1995 to 2000 inclusive).

In their reports to these individual companies, the auditors therefore sent out signals of continuity problems.

With regard to ‘the consolidated company Sabena’ and the ‘consolidated accounts of Sabena’, the first signals were given in 2000.

When questioned by the experts of the commission of inquiry as to why this remark concerning continuity appeared only in an explanatory note and there was no reservation or refusal of approval, KPMG answered as follows: “Given Sabena’s shareholdership structure, it was not clear to me at any time that Sabena was in a hopeless situation.”

3.11.6.6.4. Audit findings and management letters

Before drawing any conclusion on the annual accounts, an auditor carries out investigations which lead to the drafting of an ‘internal document giving the audit findings’. This document is then discussed with the competent authorities (financial management, general management, chairman of the Management Committee, etc. according to need) and may lead to the drafting of a detailed report referred to as a ‘management letter’. This report is normally sent to the chairman of the Management Committee, who then personally decides on the follow-up measures to be taken in the light of this report.

The auditors transmitted to the commission of inquiry a list of the audit findings for the period from 1995 to 2000. The examining magistrate through the public prosecutor at the court of appeal of Brussels communicated to the commission the management letters relating to 1996 to 1999, and, in Sabena House, its experts found a draft management letter relating to the year 2000.

It can be deduced from the audit findings that the inspections were meticulous. The audit findings are very pertinent, but nevertheless did not result in the drafting of any explanatory notes or reservations for 1996 to 1999. This means that the auditor came to the conclusion that, according to the rules imposed by the Belgian Institute of Auditors (IRE), his audit findings were not sufficiently material to frame an explanatory note or a reservation. However, for financial year 2000, an explanatory note was drawn up on discontinuity.

The management letters relating to 1996 to 1999 focused on the ‘internal audit systems’ which existed within Sabena and indicated the reactions of the managers of the departments which were internally audited, the discussions with these managers and their proposals for adaptations. The draft management letter for 2000 focused entirely on the procedures of the accounting system, including the method of drawing up the consolidated accounts. It is, however, surprising that this draft management letter contained no remarks concerning the ‘risk of discontinuity’, whereas this was definitely the case in the final declaration on the annual accounts. No mention is made in the consulted minutes of the Management Committee or of the Board of Directors that the audit findings were the subject of in-depth discussions, even in 2000, when a declaration of approval with explanatory notes on continuity was issued.

3.11.6.6.5. Investment dossiers: purchase of new planes and financing of this purchase

The answers to the questions which the auditors were asked on this matter prompt the following observations:

- The auditors gave a precise inventory of the fleet, indicating the status that the aircraft had in the annual accounts (ownership, financial leasing, operational leasing) and in the consolidated annual accounts. In a number of cases, there was a clear difference in status between the two due to the fact that the Belgian accounting standards (applicable to individual annual accounts) are different from the international accounting standards (applicable to consolidated annual accounts). KPMG gave the management of Sabena recommendations on how to handle this difference in accounting practices.

- KPMG confirms that it examined Sabena’s audacious investment policy from the angle of the financing possibilities and the changes in solvency and continuity and that it concluded that the usual organization of cash flow in the sector (very quick collection of income from sales, conventional techniques of ‘sale & lease back’, the practice of starting the financing only when the plane is about to be delivered and an open market for the

creation of financing vehicles for planes) would not cause problems for Sabena either. It was only in 2000 that KPMG pointed to certain difficulties and therefore informed the management and made a remark concerning the survival of Sabena.

- The auditor confirms that it examined in depth to what extent it would be appropriate to include the SPCs in the individual annual accounts of Sabena and in the consolidated annual accounts of the Sabena group, according to the Belgian accounting standards and the international accounting standards respectively. It concluded from this that it was not necessary to include them, except for the SPCs 'Waypoint Aviation' and 'Newpoint Aviation'. As the SPCs did not have to be included in the consolidation perimeter, they would no longer be part of the audit and their annual accounts were therefore not requested.

These answers show that, based on accounting standards, the auditor made all the necessary inquiries and applied the principle of 'form over substance' (i.e. it confined itself to checking that all the legal provisions had been respected). It therefore scrupulously conformed to the standards governing annual accounts.

However, the question raised above concerning 'substance over form' (in other words, whether the auditors should have examined the content of the operations rather than the strict application of the legal rules) remained unanswered. This is confirmed by the fact that the auditors came to the conclusion in 2000 that there were problems with the financing - with all the known consequences. If the management of Sabena had had a consolidated financial status even though this was not required under the terms of the accounting standards, it would have clearly perceived the financial risks whenever an investment dossier was opened, which was not the case.

In addition, the Board of Directors did not insist on this either. On the contrary, it can be seen from the answers that the auditor gave to the questions put by the experts of the commission of inquiry that the way in which the aircraft and their SPCs should be entered in the accounts according to the Belgian accounting standards and according to the international accounting standards had been very carefully examined and that the auditor's opinion was even sought on this matter. This was included within the framework of a decision taken by the Board of Directors that the financing of the aircraft could not affect the solvency of the company. An endeavour was therefore made to enter the planes as far as possible off-balance sheet, which was once again an application of the aforementioned 'form over substance' principle.

3.11.6.6.6. The AMP and Sabena

- The auditors of Sabena were not entrusted with auditing the AMP. The AMP was audited by Coopers & Lybrand, the auditor of Swissair. To do this, the auditors of Sabena based themselves on the work of their colleague and confined themselves to requesting for confirmations of balances.

- One of the particular audit findings concerning the AMP mentioned by KPMG is that the accounts of the AMP were kept according to the Swiss accounting system, which caused problems for the conversion of the AMP data into the accounts of Sabena (which were kept according to Belgian standards). It was for this reason that, for example, another IT system was used for the accounting of the income so that the system previously used by Sabena (incorporation in the profits of the deferred income over two years) was no longer in harmony with the Dolphin system used within the framework of the AMP (incorporation in the profits of deferred income over three years). Thus, it was no longer possible to compare AMP's profit and loss account with Sabena's.

3.11.6.6.7. General observations - Conclusion

From a review of the answers given to the questionnaires and an examination of the management letters it can be confirmed that KPMG carried out a substantial amount of work to reach its judgment on the annual accounts.

The answers confirm the findings already reported under the point concerning the Management Committee and the Board of Directors:

- The 'form over substance' principle was clearly stressed. The managers of Sabena endeavoured to apply the accounting standards to the letter, which explains why as many off-balance sheet operations as possible were carried out. The auditor KPMG, at the request of Sabena's management, even carried out studies which went beyond its mission.

- Following the application of this 'form over substance' principle, the actual financial risks run by the group were less clear. When the auditor realized this in 2000, it reported it. This mention of the risk of discontinuity in the explanatory notes of a declaration without a reservation is, however, very unusual. Generally, this type of mention takes the form of a reservation or a declaration that the approval is refused. The message nevertheless got across, albeit feebly.

- However, the Management Committee and the Board of Directors paid no attention to the management letters of the auditor.

- The report of the auditor was public and intended for the general meeting. The shareholder could examine it and was therefore aware of Sabena's problem of discontinuity, as described in the declaration with the explanatory notes.

3.11.6.6.8. KPMG (Ireland) within the framework of the SPCs

When the present report was finalized, KPMG (Ireland), which played a key role within the framework of the SPCs, had not yet answered the questionnaire which was sent to it (see annexes).

3.11.6.7. Other operators

The attitude of some subsidiaries of SAirGroup had adverse consequences for Sabena. Despite the promises made in this regard, at the start of 2001 Flightlease refused to take over four Airbus A340s which had been ordered by the Belgian company. This refusal aggravated the company's financial situation. On several occasions, cooperation between Swisscargo and Sabena caused friction between the two companies as the Belgian company suffered financial damage due to the attitude of its Swiss partner. For its part, Crossair became a competitor of the Sabena group and refused to become fully integrated in the group's strategy.

The Board of Directors made the participation of Crossair in the AMP a suspensive condition. This condition was never met. However, the actual implementation of the AMP was tolerated by the minister in charge, Mr Daems.

4. THE BANKRUPTCY

4.1. **The attempts to rescue the company**

Major liquidity problems arose from May 2000 on. It is not possible to say for certain whether rescue operations were envisaged at this point. The commission, however, found an internal document dated 17 October 2001 entitled 'Newco'. This document gives a clear overview of a number of possibilities.

The draft document, which was intended for internal use and was not signed, was detailed and gave 'deadlines' from which it can be assumed that this was internal preparation within Sabena for possible negotiations.

From February 2001, Sabena applied the *dépistage* procedure, and the president of the commercial court of Brussels, Mrs Anne Spiritus-Dassesse, insisted that the company request legal composition. In this regard, she also sent signals to the shareholder, who on several occasions had received suggestions to this effect from its lawyer, Maître Jan Meyers.

However, Sabena was reluctant to do this, mainly for commercial and other reasons. It feared that legal composition would accelerate bankruptcy.

Since at this point Swissair appeared to be Sabena's sole partner, the Belgian State concluded with Swissair on 26 April 2000 a Term Sheet under the terms of which the Swiss undertook to acquire an 85% stake in Sabena as soon as the Treaty between Switzerland and the European Union was ratified. In addition, the Belgian State would couple its minority stake with audit rights. The conversion of this Term Sheet into a definitive agreement lasted until an agreement was concluded between the shareholders on 25 January 2001. By this time, the AMP had already been implemented for one year. This meant that a *de facto* merger had started without Swissair taking a majority stake.

A lot of precious time was lost between the approval of the 'Blue Sky' plan by the Board of Directors in October 2000 and the definitive approval by the personnel of the savings plan on 22 February 2001. Furthermore, during this period, Sabena's management could not fundamentally intervene in the functioning of the company.

At the General Meeting of shareholders on 23 February 2001, Swissair and the Belgian State contributed 150 million euros and 100 million euros respectively towards the financing of 'Blue Sky'.

However, these amounts were defined in the agreement of 22 January 2001, which stipulated that the Belgian State would contribute the sum of 100 million euros and that Swissair would guarantee 650 million euros, including 150 million in cash and 500 million through the purchase of Sabena assets and the assumption of costs.

In February 2001, a letter from the head of SAirGroup, Eric Honegger, and a discussion between Mr Honegger and the Prime Minister, Guy Verhofstadt, were indications that SAirGroup was calling into question the agreements that it had just concluded with Sabena.

When it became clear, with the arrival of Mr Suter as head of SAirGroup in March 2001, that the Swiss were not reliable, alternative scenarios were envisaged and other partners were sought. However, the financial obligations arising from the purchase of the Airbus and the high degree of integration between Sabena and Swissair through the AMP made this impossible.

In April 2001, it became clear that SAirGroup did not want to respect its contractual obligations. The minister in charge, Rik Daems, strongly urged Mr Corti, CEO of SAirGroup, to comply fully with the obligations arising from the agreements of April 2000 and January 2001. On 20 June 2001, the Belgian shareholder threatened to take legal action.

At the end of June 2001, a few days before the claim for damages was made, the Belgian government proposed a final compromise to Swissair, according to which the Belgian State would waive all the contractual obligations in exchange for an immediate and substantial contribution in capital by SAirGroup. The response of Swissair was once again inadequate.

4.2. Final aborted attempts to save the company

The Belgian State never had a representative within the Board of Directors of SAirGroup, although it was entitled to have a representative under the terms of the recapitalization agreement of January 2001. The first candidate, Mr Charles d'Arenberg, head of cabinet of the minister in charge, Daems, had been rejected. The second candidate, Mr Philippe Bodson, had been proposed late in the day, i.e. on 29 June 2001, by Zephyr-Fin, but finally he too was not authorized to sit on the Board of Directors. Moreover, there was a misunderstanding between the minister in charge, Daems, and Mr Honegger, CEO of SAirGroup, who - erroneously - thought that the minister had in March 2001 waived the Belgian State's right. The Belgian State was consequently denied essential information.

On 23 May and 18 June 2001, the CEO of Sabena, Christoph Müller, submitted a new restructuring plan to the

Board of Directors. This plan provided for a drastic reduction in the size of the network and in capacity and included measures designed to increase productivity and reduce the social costs. This plan also presented in precise figures the company's need for additional capital.

On 19 June 2001, SAirGroup made a proposal that the Belgian government deemed totally inadequate.

On the same evening, an informal meeting was held at the official residence of the Prime Minister. This meeting was organized at the Prime Minister's initiative. The following attended: Mr Luc Coene (who took minutes), the Prime Minister, the Vice-Prime Minister, Mr Vande Lanotte, his head of cabinet, Mr Jannie Haek, and his fellow administrators, Messrs Patrick De Maeseneire and Paul Borghgraef. The purpose of this meeting was to discuss Sabena's financial situation and the implementation of the Müller business plan. Neither Fred Chaffart, chairman, nor Rik Daems, minister in charge, were invited to attend. In fact, they were not informed of this meeting.

On 20 June 2001, Minister Daems informed SAirGroup that the Belgian State would take legal action if the Swiss group continued to refuse to respect the agreements concluded in April 2000 and January 2001.

On 26 June 2001, the Belgian government proposed a final compromise to Swissair, under the terms of which Swissair would be released from all its contractual obligations in exchange for a substantial capital contribution.

On 2 July 2001, SAirGroup, in reply to this proposal, tabled a new compromise proposal that the Belgian authorities also considered totally unacceptable.

On 3 July 2001, the Belgian State, Sabena's majority shareholder, officially instituted legal proceedings against the minority shareholder, SAirGroup, to force it to respect its commitments contained in the agreements of April 2000 and January 2001.

On 10 July 2001, Sabena joined in this legal action.

Under pressure from the bankers, the summons brought Swissair back around the table with the Belgian shareholder.

On Friday 13 July 2001, Mr De Maeseneire contacted Mr Vande Lanotte, Vice-Prime Minister, and his head of cabinet, Mr Jannie Haek, after which he had several telephone conversations with Mr Mario Corti. Mr Corti refused to agree to Swissair becoming Sabena's majority shareholder or to increase its stake to 85%.

On Sunday 15 July 2001, Mr De Maeseneire drafted a summary note of his discussions with Mr Corti. He transmitted this note to the cabinet of Mr Vande Lanotte, requesting that it be passed on to whomever it may concern. Neither the Prime Minister nor his head of cabinet ever saw this note. The Prime Minister went directly to the Astoria hotel.

On Monday 16 July 2001, at midday, Mr De Maeseneire had informal discussions, in particular concerning Sabena, with Mr Karel De Gucht, Chairman of the VLD. On the same day, the Vice-Prime Minister, Johan Vande Lanotte, contacted the socialist trade union.

In the evening, Mr De Maeseneire went to the cabinet of Mr Vande Lanotte before going to the Astoria hotel, where, initially, he intended to be present only during the introduction to remind Mr Corti of his compromise proposals.

During the night of 16-17 July 2001, a meeting was held in Brussels (in the Astoria hotel) between, on the one hand, Mario Corti and, on the other hand, the Prime Minister, Guy Verhofstadt, the Vice-Prime Minister, Johan Vande Lanotte, their respective heads of cabinet and Mr Patrick De Maeseneire to find a solution to the Sabena dossier.

This meeting, which took place at the request of Mr Corti, led to an agreement between the two main shareholders. Neither the competent minister, Rik Daems, nor the chairman of Sabena, Fred Chaffart, were present at this meeting. Fearing leaks, the Prime Minister had decided that neither of them would be informed of this meeting.

The 'hotel agreement' was formally a transaction and was formalized in the agreement of 2 August 2001, which stated that the Belgian State would cancel its legal action only after the Swiss had met the conditions of the 'hotel agreement', which provided for a substantial injection of capital.

On 2 August 2001, this agreement became a formal agreement. It contained the following main provisions. SAirGroup was released from the obligation to become a majority shareholder. However, in exchange, it would have to make a final financial injection (258 million euros), to which the Belgian State would add 172 million euros. The payment of these amounts would be staggered over time; the first tranche was scheduled for around 1 October 2001. SAirGroup also agreed to take over nine Airbus A319s which Sabena had ordered. The commercial cooperation between Sabena and Swissair would be maintained. The Belgian State and Sabena also waived the legal proceedings which had been instituted against the Swiss group, under the suspensive condition that the latter respect its commitments under the 'hotel agreement'.

The 'hotel agreement' of 17 July 2001, which included elements which can be termed administration actions, was presented the next day by Mario Corti as definitive.

The Belgian negotiators agreed to a postponement and staggered payments, but did not demand a bank guarantee, after Mr Corti had ruled out immediate payment.

During the negotiations for the definitive agreement, which was signed on 2 August 2001, the Swiss once again tried, as usual, to bargain over the agreements concluded. No financial guarantees had been agreed.

On 6 August 2001, the Board of Directors of Sabena approved the 'hotel agreement' which had been legally hammered out.

At the end of January 2003 (just a few days before the end of the work of the commission), an expert appraisal by Ernst & Young concerning SAirGroup was made public in Switzerland. This report had been drawn up at the request of the receiver of SAirGroup.

Since the commission only had knowledge of the press reports and was not able to consult the original version of these reports, this must be treated with the utmost prudence.

According to the press reports, SAirGroup had concealed its actual financial situation over the two years preceding its legal composition. In addition, it was claimed that SAirGroup had underestimated the cost of the expansion policy and had not correctly applied the so-called 'hunter strategy'.

In addition, it was reported that important documents concerning Sabena had disappeared from the archives of SAirGroup. Finally, it was said that the Swiss group had sufficient financial resources to allow it to continue its flights after 2 October 2001. At the time of the immobilization of the Swissair fleet, it was said that the group could have mobilized liquidities amounting to 84 million euros for fuel and even made payments of 102 million euros at the end of September 2001.

Contrary to Sabena, which, under the terms of the agreement of 2 August 2001, should have received 132 million euros by 1 October 2001 at the latest, the French company AOM/Air Liberté received at the end of August 2001 197 million euros, and in this period Swissair loaned 296 million euros to the LTU group, its German subsidiary.

4.3. The legal composition

At the start of October 2001, Swissair and Sabena requested legal composition (after Swissair had announced its intention not to honour the ‘hotel agreement’).

This legal composition was not prepared in time and could not save Sabena.

The chances of survival were already less promising because of the tight deadline given by the commercial court, which reproached the government that its attitude was not sufficiently proactive. However, the government pointed out that it could not prevent and prepare the bankruptcy at the same time.

During the period of the legal composition, the president of the commercial court was contacted by the steering committee, under the direction of Mr Luc Coene, head of cabinet of the Prime Minister. The minister in charge, Rik Daems, was not always informed of these initiatives. This lack of coordination was repeatedly condemned in the correspondence between Minister Daems and the Prime Minister.

On 8 October 2001, three days after the request for legal composition, the government had taken the decision in principle concerning the financing of a social plan. At this time, the government therefore took account of the possibility of bankruptcy.

In its ruling, the commercial court of Brussels called the legal composition “the limbo of bankruptcy”. The restructuring plan which had been presented by Sabena was in its view manifestly inadequate.

No new owners were found during the period of the legal composition. There was therefore no sense in prolonging the legal composition.

4.4. The bankruptcy process

Already on 5 October 2001, the Belgian government had informed the European Commission of its intention to place transitional credit of 125 million euros at the disposal of Sabena. On 17 October 2001, the competent European commissioner informed the government that this support measure should be considered as compatible with the provisions of the Treaty of Rome on state aid.

Sabena did not use this transitional credit.

From 22 October 2001, preparations were made for the relaunch through DAT. On 4 October 2001, the date on which the legal composition took effect, Swissair carried out a similar relaunch through Crossair.

The government was not pleased with the fact that the Sabena dossier was in the hands of the courts, as this meant that it lost control of it.

The head of cabinet of the Prime Minister, Mr Luc Coene, clashed with the president of the commercial court of Brussels, Mrs Anne Spiritus-Dassesse.

On 3 November 2001, the proceedings instituted by the Belgian State and Sabena against SAirGroup were reactivated by additional claims.

Sabena was declared bankrupt on 7 November 2001.

Mrs Spiritus-Dassesse declared that she “felt threatened by a member of the government” in the course of a telephone conversation due to her handling of the SIC dossier (the Sabena Interservice Center).

4.5. The social plan and the reconversion units

The collective redundancy caused considerable commotion. The staff were not sufficiently informed of what was to become of them.

In April 2002, the economists of the *Bureau du Plan* calculated for three different scenarios (from the worst case scenario to the best case scenario) that the impact of Sabena's bankruptcy on the national revenue would represent 0.5% of the gross domestic product in the first scenario, 0.37% in the second and 0.30% in the third.

The negative impact on employment was, according to them, much greater than the direct effect of the bankruptcy. Compared with the basic simulation, the loss represented approximately 14,000 units in 2002. The figure of 17,000 - the number of jobs lost directly and indirectly in the communication and transport sector - was not attributable to Sabena's bankruptcy alone. The economy was in recession. Some of the 8,000 direct jobs lost within Sabena would have been lost anyway without the bankruptcy.

There was not enough time for the Belgian government or Sabena to prepare a social support plan. Since it had not been signed by the staff representatives, it was not actually a social agreement. It provided for bonuses which were higher than those defined by law.

Problems arose with regard to the transmission by the bankrupt company of the information required to work out the social plan. It was impossible to supply in time accurate and up-to-date data on the personnel.

The implementation of the social plan took a long time. A year after the bankruptcy, only 1,500 out of the some 7,000 outstanding payments were submitted by the receivers to the company closure fund. The exact figures are as follows:

- 925 requests in October 2002
- 688 in November 2002
- 569 in December 2002, and
- 565 in January 2003.

This brings the total at the end of January 2003 to 2,747 requesters, of which 2,168 received payment.

The compensation bonus could be paid only after the legal bonuses and the compensations for dismissal had been paid by the company closure fund.

A year after Sabena's bankruptcy, most of the former employees had still not received anything.

Under the terms of the law, pensioners and those on early retirement are not privileged creditors so they forfeited the pension top-up that they were entitled to receive from Sabena. The situation of the workers who would reach fifty years of age during the period of validity of the collective labour agreement was problematic. However, the receivers refused to take these workers on again, at the expense of the public authorities, until they reached fifty years of age. This group was therefore not entitled to early retirement.

Despite the good work of the reconversion units, 45% of former Sabena workers registered with the FOREM in the Walloon region are still looking for jobs. In this regard, a significant difference can be observed between men and women. Women are less in demand, especially when they were part of the flight crew. The kind of training they request is mainly basic IT training (data and word processing), training to obtain a bus drivers' license, training courses for security agents, baggage handlers, etc.

Some workers have been tempted, within the framework of the receivership, to return to their old job, even if the

working conditions have deteriorated in the meantime.

Due to their often specific qualifications, the personnel are having great difficulty finding a job.

Workers who have found another job must often be content with less attractive working conditions.

The personnel of City Bird and Delsey Airlines did not benefit from the same social plan as former Sabena workers.

5. A FEW OBSERVATIONS CONCERNING THE FUNCTIONING OF THE COMMISSION OF INQUIRY

5.1. Preliminary contacts among former administrators

Mr du Bois, the last general secretary, along with eight former administrators (i.e. Messrs Croes, Haek, Huyghebaert, Moulaert, Suinen, Van der Stichele, Wymeersch and Ysebaert) drafted a summary note on Sabena for the period 1990-2001.

This note was transmitted to the commission on 22 January 2002.

Preliminary meetings were organized on at least two occasions to harmonize the declarations of the administrators.

5.2. Problems with the cabinet of the Prime Minister, Guy Verhofstadt, relating to access to his archives

The commission had difficulty obtaining access to the archives of the cabinet of the Prime Minister. For the chronology of these events, please refer to chapter I, 3, point 6 of this report.

Observations

- The documents relating to the Council of Ministers were communicated immediately.
- The services of the Prime Minister did not appear to have a watertight system of recording and searching for both incoming and outgoing mail.
- The incoherent and sluggish manner in which the Prime Minister and his services handed over the archives of his cabinet to the commission of inquiry is unacceptable.
- Ministers Daems and Vande Lanotte complied with the law on parliamentary inquiries as regards the communication of their respective cabinet archives.
- The expert was only able to complete his investigation mission very late in the day.
- In addition, the documents that were finally transmitted were incomplete.
- Certain information was handed over to the members of the commission during the meeting. It was therefore impossible for them to confront the witnesses with the documents transmitted.

5.3. Retention of a law firm by Minister Daems *inter alia* to organize his defence in preparation for his appearance before the commission

Minister Daems retained the law firm NautaDutilh to ascertain whether the Belgian State, from a legal point of view, could under his policy be held liable for the handling of the Sabena dossier. The minister declared that this was not under any circumstances a note in his defence in preparation for his appearance before the commission

of inquiry.

However, we can read in the introduction of the “study of the facts and legal analysis of the Sabena dossier as handled within the cabinet of the Minister for Telecommunications, Public Enterprise and Participations during the period from July 1999 to the end of 2001” that: “the memorandum was drafted within the framework of the inquiries of the Sabena parliamentary commission of inquiry”.

The initiative to draft a similar memorandum was taken by Minister Daems, and he informed the inner cabinet.

An examination of the fees of the law firm shows that the following actions were taken to assist Minister Daems and to organize his defence:

- an examination of the prerogatives of a commission of inquiry;
- an examination of parliamentary documents on the Heysel tragedy;
- an examination of the jurisprudence and of the legal doctrine concerning statements made before parliamentary commissions of inquiry;
- an examination of the report of the ‘Dutroux’ commission;
- presence of the law firm at (virtually) all the hearings of the commission of inquiry;
- the obtaining and examination of confidential documents sent by the experts Vanthemsche and De Lembre;
- the expert Vanthemsche was received when he completed his investigation within the cabinet of the minister;
- a list was drawn up of possible questions that could be asked at the hearing of the receivers van Buggenhout and d’Ieteren;
- a memorandum was drawn up relating to the AMP;
- possible questions were put together that could be asked at the hearing of Mrs Spiritus-Dassesse;
- meetings were organized with the VLD members of the commission of inquiry.

The commission deplors these unacceptable initiatives by the minister. Furthermore, it wishes to state clearly that the accusation of Minister Daems, according to which a member of the commission of inquiry unduly handed over documents of the Court of Auditors to the press, is completely unfounded, given that these were public documents which were obtained by this member by exercising his right of information and consultation.

Observations

- To date, Minister Daems has used 157,160.46 euros of budgetary resources, among other things, to organize his defence in preparation for his appearance before the commission of inquiry. This amount has been paid to the law firm for services rendered during the fourth quarter of 2001 and the 1st, 2nd and 3rd quarters of 2002.
- Minister Daems made statements which were at variance with the reality concerning the purpose of the mission entrusted to the law firm.
- At the request of Minister Daems, the VLD fraction transmitted confidential documents to the law firm and to the minister himself.

3. Responsibilities

INTRODUCTION

According to the organic text, the task of the commission of inquiry is, among other things, to determine any political and other responsibilities: “To this end, it will examine how the shareholders and the public authorities played their role as shareholders”.

Despite the particularly broad scope of this mission, the commission believes it must be pointed out that a parliamentary commission of inquiry can decide only on the political responsibilities (1) within the framework of article 101, paragraph 1 of the Constitution.

With regard to civil and criminal liability, it has already been stated (2) that a commission of inquiry can be assimilated to a ‘court’ within the meaning of article 6-1 of the European Convention on Human Rights (ECHR) only if it issues conclusions which have a crucial outcome for a civil right or which would lead directly or indirectly to the imposition of a severe penalty.

If the commission were to act as a ‘court’, it would have to offer the persons concerned all the guarantees provided for in article 6 of the ECHR and in article 14 of the International Pact on Civil and Political Rights (ICCPR) as well as those established by our internal procedural law. However, the implementation of all these guarantees - which are not in any way confined to the prohibition against forced self-incrimination, within the meaning of article 8, paragraph 10, of the law of 3 May 1880 - is practically impossible before a parliamentary commission of inquiry.

Moreover, if a commission of inquiry ruled on civil and criminal liability, this would be in violation of the terms of article 144 of the Constitution, which in these matters assigns exclusive competence to the courts which form the judiciary.

(1) J. Velu, *Considérations.. (Overwegingen...)*, pp. 57 and 117; N. Lagasse and X. Baselen, *Le droit d'enquête parlementaire*, Brussels, Bruylant, 1999, 251-252; F. Meerschaut, *Het parlementair onderzoeksrecht..*, no. 212-213, pp. 143-148 and the cited references.

(2) See above, chapter I, 2, § 2, B, 2.

The same applies, *mutatis mutandis*, for the determination of the disciplinary liability.

Of course, this does not mean that a commission of inquiry cannot objectively bring to light the existence of facts which constitute grounds to indicate or suspect a criminal offence, a civil misdemeanour or a disciplinary breach. In this case, it can only report these indications or suspicions and make remarks in this regard. When this concerns elements relating to a possible criminal or disciplinary violation, it can inform the competent authority thereof (1).

On the other hand, it cannot rule, as a court would, on the existence itself of a criminal offence or a breach of articles 1385 et seq. of the Civil Code, accuse a specific person of this offence or breach or decide on the existence of a causal link between a civil violation and damage incurred by third parties.

However, observations made by a commission of inquiry can be used to support civil proceedings or to defend oneself from such suits (2).

The observations that would thus be used would constitute only one of the many elements of the legal debate; the parties against which they are invoked or to whom they are opposed would therefore be free to dispute them. The observations made by the commission of inquiry and the conclusions which it draws therefrom cannot under any circumstances bind the civil judge or restrict his power of appraisal.

The analysis of the responsibilities relates essentially to the Swissair period but is not confined thereto.

(1) J. VELU, *Considérations... (Overwegingen...)*, p. 59.

(2) At a criminal level, this question is more delicate given the prohibition against forced self-incrimination - See above, Chapter I, 2, § 2, B, 1.

1. SABENA'S STARTING OPTIONS

1.1. CONTEXT UNTIL 1995

During the decades before 1995, Sabena suffered the adverse consequences of different structural factors (recurrent deficits, functioning of the company in all its components, relations with the personnel, increased competition, inadequate opening-up of the airport, etc.). The combination of these elements made the Belgian airline vulnerable on the international aeronautic scene, and some of these factors had repercussions beyond 1995.

Sabena was partially privatized in three stages - 1983, 1989 and 1992 - due to the fact that a substantial portion of the shares was transferred to the private sector. In 1992, all the provisions that derogated from common commercial law were removed from the articles of association of SA Sabena. Sabena now had to operate as a normal *société anonyme*.

From 1992 to 1995, the Belgian State injected a total of 19 billion Belgian francs (around 450 million euros) into the company.

At the time of the takeover of Air France shares - when the alliance with Swissair was concluded in 1995 - Sabena's equity reached the average for European airlines, i.e. 25% of the total balance sheet.

The level of capitalization in 1995 cannot therefore be considered as one of the direct causes of the company's bankruptcy.

The attitude of the authorities was primarily confined to opting for rapid privatization through successive alliances with foreign partners. When successive decisions were made concerning alliances, the public authorities were not sufficiently critical with regard to the chances of success of these alliances.

1.2. CONTEXT AFTER 1995

In the 1995 shareholders' agreement, it was specified that strategic decisions must be taken by the Board of Directors (cf. chapter II, 2). The Belgian State, which held 50.5% of the shares, remained the *de jure* majority shareholder, but it quickly became clear, among other things in the investments in the fleet, that Swissair was not acting as a conventional minority shareholder, but as a *de facto* majority shareholder.

RESPONSIBILITIES

Shareholders

- The shareholders did not have an in-depth study (due diligence) that allowed them to identify their strengths and weaknesses. The lack of diagnosis of these structural weaknesses hampered the deployment of the 'hub&spoke' strategy. The public authorities did not therefore have sufficient information to have a long-term vision.

- The 1995 agreement stipulated that the minority shareholder could become the majority shareholder, either after the ratification of the Convention between the Swiss Confederation and the European Union or from 1 January 2000. After this agreement was concluded, and in spite of the rider of 12 June 1995, the Belgian authorities acted more like a minority shareholder. The Belgian members of the Board of Directors and of the Management Committee therefore believed that in this way they made it easier for Swissair to be the majority shareholder. The Belgian interests within the company were thus insufficiently guaranteed and defended.

The public authorities

- Prior to 1992, the Belgian public authorities - by not providing, for example, sufficient recapitalization for Sabena - failed to draw the conclusions from the steps that they had taken in 1983 and 1985 with a view to privatizing the company, when they decided no longer to absorb Sabena's deficits automatically or to pay its depreciation costs. From 1985, the State guarantee was discontinued for new loans, but was maintained for outstanding loans.
- Upon examination, it appears that Sabena did not have a well-thought-out strategy.
- In the long term, the varying strategies of the successive governments undermined the coherence of Sabena's management policy.
- Whenever the government changed, information was not always circulated as well as it should be among the ministers in charge, in particular due to the fact that there was no permanent structure entrusted with the State participation dossiers. The minister in charge, Rik Daems, was therefore unaware of the existence of the rider of 12 June 1995 to the shareholders' agreement, even though it had appeared in the Official Journal of the European Communities.
- After he took up his post in 1999, the minister in charge, Rik Daems, negotiated new guarantees (such as the guarantee with regard to destinations and flights and the participation in the capital and the management of SAirGroup). He also called on consulting firms to look into the possibility of forging new partnerships with foreign companies. However, there appeared to be no alternatives in this regard.
- Minister Daems did not succeed in linking the effective implementation of the AMP to a definitive shareholders' agreement. However, the AMP was implemented at a legal level after the concluding of a Term Sheet between shareholders.

2. FLEET INVESTMENTS AND FINANCING

2.1. SHORT-HAUL FLEET

In August 1995, the Management Committee proposed to replace the short-haul fleet. Scarcely one year later, in October 1996, 23 Avro and 6 BAE planes were purchased. Evidently, neither the Board of Directors nor the Management Committee requested a second opinion from a group which was not linked to SAirGroup to provide better guarantees of the objectivity and relevance of the decision.

The decision was taken explicitly with the aim of "harmonizing the fleet" and more particularly to encourage possible synergies with Crossair.

The Management Committee was divided with regard to the role of the synergies with Crossair, the regional subsidiary of Swissair.

The decision therefore involved an interest which went beyond that of Sabena, whereas the 1995 cooperation agreement involved only the question of the 'coordination of the planning of the fleet'.

The Management Committee could take into account the interest of the group, but it failed to insist on an intervention of the group in the financing of the aircraft.

Moreover, it did not calculate the overall impact of this financing on the financial structure of the company. The option of partial financing was adopted.

Furthermore, no forecasts were made with regard to the future available and expected capacity after the bringing into service of the new aircraft.

The number of Avro planes to be purchased (i.e. 23) was not demonstrated.

In addition, the Management Committee did not ask itself whether it was possible to finance this purchase.

Despite the terse nature of the minutes of the Management Committee, the Board of Directors did not ask any questions about these flaws in the process and accepted the report of the management without much critical input.

From May 1996 on, the Board of Directors was regularly informed of the problems with the financing. The solution that was finally adopted was the creation of a German SPC (Special Purpose Company).

In September 1996, there was still no Belgian bank that was willing to finance the remainder of the fleet, among other things because of social unrest within Sabena. The commission of inquiry found no trace whatsoever of any participation by Swissair in the financing.

In October 1996, the financing through the Sabena Interservice Center (SIC) was nonetheless finalized thanks to the *Bayerische Landesbank* and the European Investment Bank, but without Swissair.

In September 1997, *Midland Bank* and the *Kommerzbank* also became involved in the financing.

The Board of Directors never requested an overview of the global financing.

Furthermore, the Board of Directors never requested a due diligence review of the situation of SAirGroup, which was involved in investment decisions.

RESPONSIBILITIES

The Board of Directors

- The Board of Directors lacked a critical approach, due to the failure to get a second opinion whenever a decision was taken which involved the interest of the group.
- It lacked a critical approach with regard to the reporting of the Management Committee, which gave anything but a complete overview.
- Although the legal regulations on the accounts reporting were respected, the Board of Directors did not sufficiently spell out the economic risks for the company.

The Management Committee

- The functioning of the Management Committee was partitioned and lacked a global approach.
- The Sabena Interservice Center succeeded in arranging the financing without anyone being concerned about the global impact.
- There was no harmonization of the technical approach of the new fleet with the economic approach, which once again shows the lack of internal coordination.

Personnel

- The financiers gave a clear signal that they were wary about supporting Sabena in case of social unrest.

2.2. MEDIUM-HAUL FLEET

Swissair initially supported Sabena in its 'hub&spoke' strategy and on certain long-haul routes (McKinsey (Brussels), 1996).

It was this consulting firm that defined this strategy for Swissair, Austrian Airlines and Sabena.

The Boeing and Airbus working groups correctly reported on the growth strategy, but it was not evaluated by the Management Committee. Since Swissair was a minority shareholder of Sabena, there was a risk of a conflict of interests. The Board of Directors should at least have asked for a second opinion regarding the parameters used by McKinsey.

Once again, it can be seen that the strategy of Sabena was defined according to the business plan of the minority shareholder and not according to its own business plan.

The Sabena Interservice Center always declared that it could finance 13 aircraft itself. Finally, 30 aircraft (28 leased and 2 owned) were financed using credit backed up by a State guarantee.

With regard to the renewal and extension of the medium-haul and long-haul fleet, the entire decision-making process was particularly confused, both at a management level and at the level of the Board of Directors.

2.2.1. Approach of the Management Committee

- Two teams worked totally independently of one another. The first - led by Mr Richard Rome - was concerned with the Boeing development plan, while the second - led by Mr Peter Gysel - was concerned with the Airbus development plan. At the start, a comparison of all the parameters showed that Boeing and Airbus were neck-and-neck.
- The Board of Directors was regularly informed of this process. The choice of Airbus would initially have been unfavourable to Sabena Technics, which was why intense negotiations were held with Airbus to win compensations for Sabena Technics.
- All this process was thwarted by the initiatives of Swissair, as can be seen from the letter of 2 April 1997 from Swissair Technics in which mention was made of 32 new aircraft.
- The minutes of the Management Committee, directed by Mr Paul Reutlinger, did not mention the comparison between the Boeing group and the Airbus group. The Management Committee was put under great pressure by Mr Reutlinger to choose Airbus.
- With regard to the reporting to the Board of Directors, it must be said that the administrators had to take a decision of crucial importance for the company within an unreasonably short period. The bids from Boeing and Airbus were again altered on the same day as the final decision.
- The Belgian members of the Board of Directors were also personally and verbally informed of the choice of Airbus by the Management Committee.
- The explanatory notes drafted by the general secretary, Patrick du Bois, presented the 'all new Airbus' option as the most advantageous, while the two bids were difficult to compare due to the joint venture proposal of Boeing with Sabena Technics.
- The decision of the Management Committee was presented to the Board of Directors as being unanimous, which the members of the Management Committee disputed in their testimony.
- The transfer of 19 options from Swissair to Sabena, which may have played a determining role in the choice of

Airbus, was neither recorded in the minutes nor communicated to the Board of Directors (cf. chapters IV, 3.4.9, and V, 2.4).

- During the final negotiations, Sabena drafted an annex (side-letter) which provided for the creation of a financing vehicle to finance the purchase. The three parties - Sabena, Swissair and Airbus - would hold shares in it. However, Swissair refused to sign the document. This refusal was not reported to the Board of Directors of Sabena.

- During negotiations with Airbus, the Management Committee did not try to reduce the number of aircraft ordered.

2.2.2. Approach of the Board of Directors

- At the level of the Board of Directors, Mr Philippe Bruggisser stressed the importance of the group formed by Sabena and Swissair.

- The Belgian shareholder had impressed on the mind of the members of the Board of Directors that the cooperation with Swissair had to succeed.

- At the time of the purchase of the Airbuses, the Board of Directors did not request the agreement of the shareholders to this important purchase, even though there were authorized to do so by the coordinated laws on commercial companies.

- Belairbus sent the minister in charge a letter informing him of the economic compensations that would be generated by the choice of Airbus.

- Certain members of the Board of Directors were informed that at least a number of ministers had a preference for Airbus. However, this did not have any direct influence on the decision.

- It was only one month after the decision to purchase, in December 1997, that the Board of Directors approved the development plan which was to underpin the purchase. Curiously, Mr Philippe Bruggisser declared, at the same meeting of the Board of Directors, that the 'boom' that the air transport sector had enjoyed was over. Three months later, the purchase contracts were concluded.

- On 26 February 1999, McKinsey presented its impact study on the 'Development Plan 98-2000'. The report concluded that Sabena could anticipate enormous overcapacity.

- The Management Committee reported this to the Board of Directors, but the Board did not decide to reduce the capacity or start negotiations with Airbus to reduce the order of 34 aircraft.

- Also with regard to financing, this investment decision was quite surprising. The Management Committee knew that the financial division had a financing plan for only 13 aircraft. This point was not explicitly reported anywhere. And even if it had been reported, all that the Board of Directors had to go on was the vague promise that SAirGroup, Airbus and Sabena would together seek a solution to ensure financing without any considerable deterioration of the balance sheet.

- During the final negotiations, Sabena drafted an annex (side-letter) which provided for the creation of a financing vehicle to finance the purchase. The three parties - Sabena, Swissair and Airbus - would hold equal shares in it. However, Swissair refused to sign the document. This refusal was not reported to the Board of Directors of Sabena.

- Later proposals made by the Management Committee and which highlighted the problematic nature of this vague clause in the minutes of the meeting of the Board of Directors of 17 November 1997 on the financing with

the help of Swissair could no longer be discussed within the Board of Directors.

RESPONSIBILITIES

Shareholders

SAirGroup

- The Swiss shareholder exerted considerable pressure for Airbus to be selected and concerning the number of aircraft to be purchased.
- The Swiss shareholder did not respect its promises as regards financing.

The Board of Directors

- The Board of Directors adopted a very passive attitude in spite of the importance of the decision and never asked for a second opinion.
- The Board of Directors did not ask any questions when the decision was taken to purchase the Airbuses either as regards the number of aircraft, the global financing or the follow-up of the suspensive conditions linked to the decision.
- The Board of Directors made no attempt to reduce the number of aircraft ordered during the negotiations on the practical implementation of the decision to purchase, not even after learning of the changed circumstances.
- SAirGroup exerted pressure on the decision to purchase, in particular through the Swiss members of the Board and, more especially, Mr Philippe Bruggisser. This behaviour revealed a conflict of interests.

The Management Committee

- The selection process was particularly confused. On the one hand, there were the supporters of Boeing, which showed great interest for Sabena Technics, and, on the other hand, there were the supporters of Airbus, who upheld the interest of the group (harmonization of the fleet and common crew plan), which favoured Airbus.
- The Management Committee did not draw up a clear and comprehensive report on the exact situation.
- Despite internal dissension, the general secretary, Mr du Bois, informed the Board of Directors in detail of the existence of an alleged unanimity.
- Apart from a calculation of the 'net present value' of the fleet, no attempt was made to draw up a global financial plan including the special purpose companies.
- The potential problems were not clearly mentioned.
- The Management Committee did not object to the self-willed way in which the different departments went about their work, to implement a coherent policy.
- Even after the economic parameters no longer confirmed the optimistic hypotheses, the management remained passive and confined itself to looking for only financing solutions (with quite a bit of success in fact). Before the arrival of Mr Müller as CEO, there was no trace of any contact made with Airbus to reduce the order.
- The CEO did not play his role as coordinator.

2.3. LONG-HAUL FLEET

With regard to the long-haul fleet, discussions had already got under way on 21 October 1996 within the working group under the direction of Mr Peter Gysel. The Management Committee reported to the Board of Directors, which decided on 16 December 1996 to purchase an Airbus-A330 and to take five options. This decision was, however, subject to a decision of the Board of Directors of Swissair as regards its new long-haul aircraft.

Once again, the interest of the group was a determining factor.

On 17 November 1997, these six aircraft were supplemented by one A330-300 and six A330-200s (A340 from the Air France period). These aircraft were delivered and financed without the help of Swissair.

The financing of these long-haul aircraft was problematic.

Once again, the management did not submit a global plan and the Board of Directors did not request one.

RESPONSIBILITIES

All the remarks we have already made concerning the responsibilities within the framework of the purchase of the short- and medium-haul aircraft apply here. The following should be highlighted:

- The decision was taken on the basis of the expansion parameters in the business plan. The crucial factor was always the interest of the group (i.e. the interest of Swissair and not that of Sabena). However, the financing was borne entirely by Sabena. The assistance promised by Swissair never materialized.
- The financial impact of these investment decisions was never assessed globally.
- The price of an A330/234 is four times higher than that of an A319. No global assessment was made of the financial implications of all the off-balance sheet transactions or of the impact of these transactions on the operational lease to be financed. Therefore, it was impossible for the Board of Directors to carry out an impact study.

2.4. TRANSFER OF OPTIONS

On 27 November 2002, the commission received from the public prosecutor at the court of appeal of Brussels the text of testimony given by Mr Peter Gysel at the offices of Airbus in Toulouse (France). It was on this occasion that the commission for the first time found out about the existence of Airbus options (cf. chapter IV, 3.9.4) and their transfer from Swissair to Sabena.

Mr Gysel (1) declared that 21 options taken by Swissair with Airbus had been transferred to Sabena, so that it could get a faster delivery of the 34 Airbuses that it had decided to purchase on 17 November 1997.

Before the commission of inquiry, neither the members of the Management Committee nor the members of the Board of Directors mentioned this transfer. The commission did not ask anything specific on this matter, given that during the hearings of the Board of Directors the commission did not know about it.

After the statements of Mr Gysel, the examining magistrate, Mr Jean-Claude Van Espen, questioned the members of the Board of Directors, the CEO and Mr du Bois to obtain some enlightenment on this matter.

The upshot of these hearings was as follows:

- The Belgian members of the Board of Directors stated that they knew nothing about this transfer.

- Mr Bruggisser stated that he had been informed of this transfer, but that he considered it as an operational factor that was not essential within the framework of the decision of Sabena to purchase the Airbus.

(1) Under the terms of an agreement concluded between Swissair and Sabena, Mr Gysel (who was a top executive within Swissair at the time) was responsible for the preparation of Sabena's Airbus dossier. After the bankruptcy of Swissair, he was recruited by Airbus.

- Mr Reutlinger, CEO, declared that he was not aware of this transfer of options.

- Mr du Bois did not formally admit that he had been informed of the implementation of the options, but indicated that the question had been mentioned within the framework of a working group.

Once these details were known, the commission made further inquiries within Sabena House and found that:

- Already on 15 November 1997 (i.e. two days before the Board of Directors of Sabena decided on the purchase of 34 Airbuses), two members of Sabena's middle management (Mrs Van Itterbeek and Mr Rome) wrote to the general secretary, Mr du Bois, and to Mr Marc Petit, financial director of Sabena, stating that 19 Swissair options had been transferred to Sabena.

- On 17 November 1997, the CEO, Paul Reutlinger, and the general secretary, Patrick du Bois, signed the Memorandum of Understanding relating to the purchase of the 34 Airbuses, in which the transfer of 19 Swissair options to Sabena for the sum of 300,000 American dollars per option was mentioned. On the same day, the Board of Directors of Sabena met to take a decision on the investments to be made to partially or totally replace the fleet of Boeings. The options were never mentioned at this meeting of the Board of Directors.

- On 27 November 1997, Swissair (through Mr Kreis from Swissair Technics) informed two Sabena executives (Messrs Rome and Vaucleroy) that 19 options of Swissair had been transferred to Sabena for 300,000 American dollars per option and that the invoice (i.e. for the sum of 5,700,000 American dollars) would be sent to Sabena.

- This transfer of options was never recorded in the minutes of any of the meetings of the Management Committee organized to prepare the decision to replace the Boeings.

- Following the decision taken by Sabena in favour of Airbus, Airbus (through Mr Schultz) confirmed this transfer on 2 December 1997 to both Sabena and Swissair.

- In February 1998, Sabena paid 5,700,000 American dollars for the transfer to Swissair.

RESPONSIBILITIES

Shareholders

SAirGroup

- The Swiss shareholder was acting in bad faith. This transaction revealed that Swissair was seeking to serve its own interest through the activities of a company in which it held a 49.50% stake. The transfer of these 19 options allowed Swissair to rake in 5,700,000 American dollars in February 1998. Without this transfer, of course, there is no guarantee that the Swiss company could have obtained this money.

- The fact that the transfer of the 19 options was concealed from the Board of Directors is a damning element for Swissair in the discussion surrounding the immediate replacement of the Boeings by Airbuses. Without this, Sabena could have opted for gradual replacement. Swissair misused its position to make Sabena take a decision which was in Swissair's interest rather than in Sabena's, as can be seen from the following events:

- On 28 February 1997, the Management Committee of Sabena put on the agenda the replacement of 14 Boeings.
- On 4 March 1997, Reutlinger supported an Austrian/Sabena/Swissair 'joint introduction Airbus', without this matter being examined by the Board of Directors.
- On 2 April 1997, Swissair (through Mr Kreis from Swissair Technics) announced to Airbus, "on behalf of Sabena", its intention to acquire up to 32 Airbuses.
- On 3 September 1997, the *Bureau du Conseil* (1) expressly emphasized that it was in the interest of the group to opt for Airbus.
- At various meetings of the Board of Directors of Sabena, Mr Bruggisser intervened to emphasize that it was in the interest of the group to purchase 34 Airbuses for Sabena.

(1) Informal body set up by the Board of Directors of Sabena to facilitate the agreement between the Swiss and Belgian administrators.

The Board of Directors

- Mr Philippe Bruggisser declared, at the meeting of the Board of Directors of 8 December 1997, that the end of the airline "boom" was imminent. One might wonder whether this statement should be connected with the fact that Swissair would not exercise its options relating to the Airbuses and, therefore, did not have to take delivery of the Airbuses ordered in 1990.
- Furthermore, the transfer of options, according to the statements made the Belgian members of the Board of Directors to the investigators, was not communicated to the Board.
- On 13 December 2002, after his hearing by the federal police, an administrator wrote on his own initiative to the commission on this matter: "I wish to state formally that we, as Belgian administrators, would have examined the dossier for the purchase of the Airbuses from a totally different angle if we had known of the existence of these options. Our Swiss partner should have informed us. Unfortunately, this was not the case within the Board of Directors or outside."

CEO Paul Reutlinger

- It is impossible for the CEO, Paul Reutlinger, not to have been informed of this transfer of options, given that on 17 November 1997 he signed the Memorandum of Understanding relating to the purchase of 34 Airbuses in which the options were clearly mentioned.
- This point was never recorded in the minutes of the Management Committee.

General secretary Patrick du Bois

- As the correspondence of 15 November 1997 was sent directly to the general secretary, Mr du Bois, who also co-signed the above-mentioned Memorandum of Understanding, Mr du Bois must have known about the transfer. However, he did not convey this information to the Management Committee or to the Board of Directors.

The Management Committee

- At least one member of the Management Committee must have been aware of this transfer, given that he

received a copy of the letter of 15 November 1997. However, he did not spontaneously mention this before the commission.

- This point was never mentioned in the minutes of the Management Committee.
- Neither was this reported to the Board of Directors.

The Commission

- The commission believes that a more in-depth examination of this affair is the responsibility of the legal authorities.
- The commission has communicated to the public prosecutor of the court of appeal of Brussels the elements that have come to its knowledge.
- The commission believes that this 'options' chapter does not in any way alter its conclusions on responsibilities. Although these elements may be presented as stemming from a desire to create group synergies, the 'options' element, which was concealed, is a damning factor.

The foregoing point, relating to the investment policy, clearly showed how the intensive investment, along with off-balance sheet financing, finally led Sabena to bankruptcy. The data on the options add to this conclusion the suspicion that Swissair was pursuing its own financial interests.

2.5. GENERAL CONCLUSION AS REGARDS THE FLEET INVESTMENTS

- All the investments went beyond the interest of Sabena alone. At every turn there was the 'group' argument.
- None of the investments were the subject of a global financial plan.
- All the investments were based on very favourable growth hypotheses, even though these were soon called into question after the decision (for the medium- and long-haul fleet).

RESPONSIBILITIES

Shareholders

a. Public authorities

- The Belgian government certainly did not use its majority shareholding to create a balance of forces that was favourable to it within the Board of Directors or within the Management Committee, which confirmed the impression that the Belgian State was only too pleased to see Sabena controlled by Swissair.
- There was no clear vision of the role and mission of the administrators.

b. SAirGroup

- There are indications of a confusion of interests.

The Board of Directors

- The Board of Directors adopted a very passive attitude.
- No initiatives were taken to ensure greater objectivity, for example, by requesting a second opinion concerning

the growth hypotheses presented by McKinsey, by asking questions concerning the global financial planning with regard to the commitments undertaken by Sabena vis-a-vis the SPCs or by verifying the alleged unanimity within the Management Committee.

The Management Committee

- The Management Committee lacked cohesion despite the presence of competent individuals who worked hard on their own.
- The CEO did not play his role as coordinator.
- The consensus model was not strictly applied; the chairman sometimes took decisions unilaterally.
- There was no counterweight within the Management Committee for a strong CEO.
- Given that the reports had to be drawn up according to the legal requirements as regards form, the result was sometimes inaccurate financial reporting, a lack of transparency in the global financing and incorrect reporting to the Board of Directors.

Personnel

- Social unrest temporarily complicated the financing of the Avro aircraft.

3. OPERATIONAL FUNCTIONING

A. GENERAL

The liberalization of the European air space prompted Sabena to be more competitive, especially from 1991 on. Because of its very poor performance compared with the average European airline, especially as regards the leasing and personnel costs, Sabena constantly had to carry out restructurings.

The business and functioning plans followed one another in quickfire succession, but their implementation often left something to be desired. In spite of the best-laid plans, the company did not manage to bring the personnel costs into line with the European average.

The Management Committee, under the direction of Mr Paul Reutlinger, who wanted at all costs to preserve social harmony, did not succeed in improving the results in relation to the European average.

The Board of Directors, the CEO and the entire Management Committee were manifestly unable to make the savings required to bring the different ratios (yield, rate of occupation, etc.) up to a competitive level.

RESPONSIBILITIES

Shareholders

The public authorities

- The assistance given over the years - thanks to which Sabena survived from its formation until 1985 - created a climate in which the corporate economy requirements were not sufficiently taken into account.
- The attitude of the public authorities to the different restructuring plans designed to meet the economic objectives lacked clarity.

The Board of Directors

- The reporting to the Board left something to be desired, even though the Board of Directors was presented at each meeting with a dossier containing the operating figures. The minutes contained practically no indication of a vision that would allow the Board of Directors to devise or, *a fortiori*, to develop the financial policy.
- The Board of Directors did not exude enough moral authority vis-a-vis the personnel and the Management Committee at the time of the restructurings.
- There was no follow-up of critical remarks made by the Board of Directors with regard to the different business and operational plans.
- The Board of Directors could not exercise its collegiate action. The attempt by the chairman to bring together the Swiss and Belgian administrators through the *Bureau du Conseil* could not prevent polarization and resulted in some administrators not being involved in the essential decisions.

The Management Committee

- The Management Committee did not, in its day-to-day management, have enough cohesion and authority with regard to the personnel to be able to impose cost savings or to penalize failings in this area.
- The Management Committee did not succeed in maintaining the balance between social peace and economic requirements.
- The Management Committee did not succeed in forging a balanced relationship with the personnel in general or with the pilots in particular to create a new corporate culture.
- The CEO, Paul Reutlinger, flagrantly breached the principle of neutrality that any CEO must observe vis-a-vis his different shareholders by secretly informing one of the two groups - the Swiss group - of the attitude and strategy that it should adopt vis-a-vis the Belgian State.
- The CEO, Mr Reutlinger, did not tolerate any criticism by the competent executives as regards certain actions of the subsidiaries of Swissair which were prejudicial to Sabena.
- The successive CEOs did not bring an end to the policy of the 'baronies'.
- CEO Müller took up functions that were likely to generate conflicts of interest.
- The financial reports did not always give a faithful image of the operational functioning of Sabena, which led to collective 'blindness' within the company itself and outside.
- The Management Committee failed to communicate the correct financial information in its reports (several errors of classification were noted, whereby non-operational results were accounted as operational results); there was also a lack of precision as regards the 'non-IATA' discounts (specific resources), indemnities and expenses for personnel abroad.
- The Management Committee did not always succeed in developing constructive interaction with the CEO or in attracting the attention of the Board of Directors to the abuses.

Personnel

- The representatives of the personnel (including some who belonged to central trade union associations which were active in public services) never thought that the public authorities would allow Sabena to go bankrupt. The

personnel were too attached to the old culture of a public company, despite the company's privatization in an increasingly competitive sector.

- Even though efforts were made by the trade union organizations and the pilots to consult in certain fields, the efforts of the pilots were not sufficient due to their lack of flexibility.

B. VIRGIN

The agreement with Virgin Express was concluded on 25 October 1996 at the initiative of Mr Paul Reutlinger who feared competition from this low-cost company. In exchange for abandoning its projects to operate routes to Zurich and Geneva, it managed to operate the Sabena flights to London, Barcelona and Rome through 'codesharing'. On these routes, Sabena lost the image of quality that it had painstakingly forged.

Under the terms of the same agreement, the issue of Heathrow slots was settled at a later stage.

The way in which this agreement was concluded is strange: the wet lease relating to the Brussels-London route for a period of one year was concluded by the CEO, Paul Reutlinger, and the Vice-Chairman, Philippe Suinen. On the same day, however, a cooperation agreement was concluded for the Brussels-Barcelona and Brussels-Rome routes which was signed by Mr Reutlinger alone and which increased the duration of the agreement for the Brussels-London route from 1 to 8 years. Sabena was thus bound for an abnormally long period to a contract, which weighed heavily on the operation of the company.

Mr Reutlinger had not received a mandate from the Board of Directors to prolong the contract relating to the route to London or to extend the routes to Barcelona and Rome.

RESPONSIBILITIES

The Board of Directors

- The Board of Directors accepted an agreement which was in flagrant contradiction to the development plan that it itself had approved and which was aimed at increasing the revenue thanks to a policy geared towards attracting more business passengers.

- The Board of Directors did not react to Mr Reutlinger's abuse of power, no doubt so as not to displease Swissair.

The Management Committee

- The CEO, Paul Reutlinger, concluded this agreement without a mandate and placed the Board of Directors before a *fait accompli*.

- The Management Committee did not take a position concerning the duration of the agreement.

- The CEO, Mr Reutlinger, sold precious slots held by Sabena at London-Heathrow Airport and failed to inform the Board of Directors formally of this transaction.

- The CEO, Christoph Müller, once again tried to cancel the agreement but found it impossible to do so due to the very high damages stipulated by the contract in the event of breach of contract.

C. CITY BIRD

On 3 April 1998, the CEO, Paul Reutlinger, and the Vice-Chairman, Philippe Suinen, signed a wet lease contract with City Bird concerning flights to Newark, Montreal and Sao Paulo. To operate these flights, Sabena leased

MD-11 aircraft from City Bird. Originally, these aircraft had to be manned only by City Bird personnel. Under pressure from the pilots, these flights were finally manned by Sabena personnel, which made the contract more costly. It is strange that on 19 January 1999 the wet lease was increased from two to five years, whereas, on 15 December 1998, it was still a much less wide-ranging agreement concerning the joint operation of two routes. Less than two months later, on 9 March 1999, City Bird concluded an agreement with Lignes Aériennes Congolaises (LAC), which had inherited the traffic rights from the defunct company Air Zaïre and was therefore the only Congolese company that could operate line services to Belgium. Under the terms of this agreement, City Bird could transport passengers and freight to Kinshasa under the flag of LAC, so that it competed with Sabena on this vital route. On 18 March 1999, Mr Reutlinger had discussions with Messrs Hasson and De Croo on this matter. On 17 May 1999, City Bird nonetheless inaugurated a weekly flight between Brussels and Kinshasa. In April 1999, Sabena had already reacted by bringing an arbitration procedure to terminate the contract concluded with City Bird and to obtain 350 million Belgian francs in damages. City Bird lost the case.

RESPONSIBILITIES

The Management Committee

- The CEO, sure of his valid mandate, concluded a contract which went against the harmonization of the fleet advocated by Swissair and Sabena and against the 'Horizon-98' plan.

Personnel

- The pilots' demands increased the cost of this contract considerably.

D. THE AMP (AIRLINE MANAGEMENT PARTNERSHIP)

The AMP, the agreement concluded on 31 July 2000 between Sabena and Swissair which entered into force on 1 January 2000, was aimed at creating synergies through the integration of network management, sales, marketing, financial policy, IT and human resources and was part of the development of Swissair towards the position of majority shareholder. However, the partnership was quite unlike the 1995 shareholders' agreement, which provided for agreements concerning the coordination of a certain number of line management functions, but maintained the ultimate decision-making power of the Board of Directors. This element, moreover, was necessary so as not to violate the decision of the European Commission of 24 July 1992 on effective control.

On 14 June 1999, the Board of Directors issued a favourable opinion on the principle of this integration, on condition that a prior agreement was concluded between the Belgian State and SAirGroup concerning future changes in the shareholdership. In addition, it made a number of additional suspensive conditions.

When the minister in charge, Daems, took up his post he took control of the negotiations relating to the AMP and managed to negotiate new guarantees.

On 25 November 1999, the Board of Directors gave the go-ahead for the implementation of the AMP, after having been informed of a telephone call between Minister Daems and the head of SAirGroup, Mr Bruggisser, concerning the changes to be made to the shareholdership. At the request of the minister, the Board of Directors had waited to do this, given that the minister felt that the structure of the AMP at the time did not sufficiently guarantee the Belgian interests. The actual implementation of the AMP preceded the Term Sheet concluded between shareholders of 26 April 2000. Minister Daems was informed of this and made no objection. However, this Term Sheet concluded between shareholders preceded the agreement signed relating to the AMP of 31 July 2000. A number of suspensive conditions were not, however, met at the time: there was no 50/50 representation within the decision-making structure, and Crossair did not form part of this construction as it refused to participate.

A formal agreement was finally reached on 25 January 2001, at a time when the fate of the AMP was already being discussed by Swissair and Sabena. The Term Sheet should have been translated into an agreement more quickly which would have been signed at the same time as the AMP agreement. The AMP was then implemented and a *de facto* merger was initiated without Swissair offering sufficient determining guarantees as regards the take-up of a majority stake. This weakened the negotiating position of the Belgian shareholder. When it appeared in addition that Swissair did not wish to honour all its commitments stipulated in the agreement of 25 January 2001, the wide-ranging integration complicated the search for new partners.

RESPONSIBILITIES

Shareholders

The public authorities

- The Belgian State tolerated the fact that the implementation of the AMP preceded the negotiations on the taking of a majority stake separately from the implementation of the AMP and thus gave up an instrument that it could have used during the negotiations. In addition, the creation of the AMP led to a *de facto* merger of Sabena and Swissair, which would subsequently complicate the search for other partners.

- The AMP was therefore implemented *de facto* without the suspensive conditions being met.

The Board of Directors

- The Board of Directors did not sufficiently ensure compliance with the suspensive conditions, and the minister in charge tolerated the implementation of the AMP without the suspensive conditions in question being met.

- The Board of Directors did not ensure a balanced distribution - which was essential for the partnership - of the functions within the AMP among the personnel who previously worked for Swissair and those who previously worked for Sabena.

- The Board of Directors did not provide for efficient auditing due to the fact that the auditor of the AMP was simply the auditor of Swissair (Coopers & Lybrand) and that the auditor of Sabena (KPMG) was not in any way involved, whereas the AMP agreement provided for the possibility of a board of auditors.

The Management Committee

- At the time of the launch of the AMP (which used the Swissair system (cf. chapter IV, 4.6.6.6.)), the management failed to set the necessary equivalencies with the Sabena standards, which seriously hindered any form of internal audit.

- The management appeared unable to control certain increases in costs resulting from the creation of the AMP, which to say the least indicates a lack of effective control by Sabena.

4. AUDITOR

- From 1996 to 2000, the auditor issued a declaration of approval for Sabena's individual and consolidated annual accounts. It must be said that, for financial year 2000, this declaration of approval was accompanied by explanatory notes on the problem of discontinuity. This signal of discontinuity was, however, particularly weak and was based on the opinion of the auditor according to whom "the nature of the activity and of the shareholders did not suggest that the problems of discontinuity would one day be insurmountable".

- The auditor fully supported the off-balance sheet accounting of the investments in planes and even issued a recommendation in this regard. This recommendation, which was within the scope of its mission, indicated the

conditions which the related investments and financing had to meet for off-balance sheet accounting. This strict formalism, which was preferred to a more content-based approach, no longer reflected a faithful image of Sabena.

In 1998, clear errors of classification were made between Sabena's 'operational' results and 'exceptional' results. According to the auditor, these errors were not sufficiently serious to be the subject of a reservation or explanatory notes in the declaration.

5. RESTRUCTURING, THE 'HOTEL AGREEMENT', LEGAL COMPOSITION AND BANKRUPTCY

The management of Sabena worked out the 'Blue Sky' recovery plan in the second half of 2000. The purpose of this plan was, among other things, to evaluate the capital requirements (430 million euros) to continue the company's activities on a new basis. The auditors KPMG said that the estimated amount was sufficient to keep the company alive.

However, the plan was not approved until 23 February 2001. This delay was due, among other things, to social unrest. The long delay did not facilitate the implementation of the definitive recapitalization agreement concluded with Swissair in January 2001 (by giving the Swiss the possibility of combining this agreement with the implementation of the 'Blue Sky' plan).

The Swiss immediately called this agreement into question, but paid 150 million euros. Contrary to what had been agreed, Swissair did not purchase a portion of Sabena's fixed assets for the sum of 500 million euros. At the same time, SAirGroup indicated that it no longer wished to become the majority shareholder of Sabena.

The Belgian State then started negotiations, which lasted forever and after which the Belgian State, followed a little later by Sabena, took legal action against SAirGroup. The implicit aim of this initiative was to bring the Swiss back to the negotiating table. This aim was achieved during the night of 16-17 July 2001 when the 'hotel agreement' was concluded.

Two weeks later, this agreement was formalized by the shareholders' agreement of 2 August 2001, which was also approved by the Board of Directors.

On 1 October 2001, Mr Mario Corti announced that SAirGroup would not honour its commitments. The Belgian shareholder made inquiries to the European Commission to ascertain whether this breach of contract by Swissair could be considered as an exceptional circumstance which allowed for an exemption from the 'one time, last time' principle.

By the Royal Decree of 15 October 2001, the Belgian shareholder placed transitional credit of 125 million euros at the disposal of Sabena, which did not use it.

On 5 October 2001, the court granted Sabena legal composition until 30 November 2001. However, once it was clear that there was no alternative, Sabena filed for bankruptcy on 7 November 2001.

RESPONSIBILITIES

Shareholders

- SAirGroup and its Swiss subsidiaries - especially Flightlease - on several occasions flagrantly breached their commitments. Previous agreements were called into question. At the start of 2001, for example, Flightlease did not honour its promise to take over four A340 aircraft which had been ordered by Sabena.

- Within the framework of the agreements of April 2000 and January 2001, the minister in charge, Rik Daems, was able to negotiate new clauses which were advantageous to the Belgian interests.

- The minister in charge, Daems, tolerated the effective implementation of the AMP, which opened the way for a *de facto* merger, without there being sufficient determining guarantees regarding a new shareholders' agreement.
- Given the sluggishness with which the Term Sheet of April 2000 was converted into a definitive shareholders' agreement, SAirGroup was offered the possibility of making a definitive shareholders' agreement conditional upon the prior approval of the 'Blue Sky' plan.
- The relations among the Belgian and Swiss shareholders deteriorated due to the fact that the ratification of the treaty concluded between the European Union and the Swiss Confederation was delayed. Belgium was the last country to ratify this treaty.
- The Belgian shareholder did not take sufficient account of the signals - in particular from the lawyer of the Belgian State - concerning the deterioration in the solvency of SAirGroup (which itself called into question cooperation with Sabena) to consider the option of legal composition.
- In April 2001, at a time when Sabena was in crisis, the government replaced all the Belgian administrators. This replacement created a risk of discontinuity.
- The government only sued Swissair after it had become clear that the internal disputes among the shareholders concerning the performance of the agreements of April 2000 and January 2001 could not be settled due to the refusal of the Swiss to honour their commitments.
- An administrator who had informal contacts with the Swiss business community sought a compromise with Swissair. He obtained the consent of the members of the government. These contacts resulted in the 'hotel agreement'.
- The negotiators of the 'hotel agreement' agreed to deferred and staggered payments. They concluded an agreement that provided for an initial payment on the last day that Sabena would still have liquidities to allow it to function. The non-payment, on 1 October 2001, therefore made Sabena's request for legal composition unavoidable. No bank guarantee was requested. Swissair used this delay to avoid fulfilling its obligations.
- During September and October 2001, a lack of coordination within the government among the ministers in charge of the dossier hampered proper management of the Sabena dossier.
- Since by 1 October 2001 the capital promised under the terms of the agreement of shareholders of 2 August 2001 had not been paid, the Swiss shareholder was directly and immediately responsible for the bankruptcy of Sabena.
- Two days after the declaration of bankruptcy of SAirGroup, it was found that it had sufficient means to finance a relaunch operation via Crossair and to set up a new company under the name 'Swiss'.
- Based on extracts of the Ernst & Young report, it can be concluded that there was bad faith and deceit on the part of SAirGroup to the detriment of Sabena. A more in-depth legal investigation should be carried out.

The Board of Directors

- Certain administrators who were involved in the initiatives to find a compromise with the Swiss were not informed, neither were the other administrators nor the chairman. This breaches the rule of collegiality within the supreme management body.
- The Board of Directors gave its approval to the 'hotel agreement' without asking any questions concerning the granting of a deferral of payment or the absence of a bank guarantee.

- The chairman of the Board of Directors did not communicate correctly with the personnel on the announcement of bankruptcy and the social consequences thereof.

The Management Committee

- The management spoke, during the final phase, with many potential new owners, but did not do so in a sufficiently proactive manner. The management should have taken the initiative itself vis-a-vis the commercial court. When the threat of bankruptcy was taken seriously it was too late; it was the president of the commercial court who, during the *dépistage* procedure, had to make Sabena realize the seriousness of its situation. The commercial court felt that the recovery plan presented by Sabena was inadequate and granted a period of legal composition not exceeding fifty-five days. When Sabena filed for bankruptcy, the court judged that the provisional deferral granted to Sabena had not been used to draw up a recovery plan, or for that matter to transfer activities, but had been used to allow Sabena to organize its bankruptcy under the cover of the legal composition.

- The management failed in its task to communicate correctly with the personnel on the announcement of the bankruptcy and the social consequences thereof.

4. Recommendations

1. POLICY OF THE PUBLIC AUTHORITIES

- a. The participation of the government in economic life can take on different forms:
 - i. Purely public company
 - ii. Commercial company in which it holds the majority
 - iii. Commercial company in which it holds a blocking minority
 - iv. Commercial company in which it holds a minority interest.
- b. In each of these cases, the public authorities must clearly state the social aim and how they intend to achieve it. When a minimal public service is defined, the government must guarantee it and make available the financial resources required to provide this service.
- c. In the event of the disposal of a participation by the public authorities, the agreement with the new owner must clearly specify the rights and obligations of each party.
- d. As the public authorities hold stakes in both autonomous public companies and in commercial companies, a central unit must be set up, which is a specific public institution (knowledge centre). This central unit must have knowledge concerning all the sectors in which the public authorities hold stakes, develop and maintain this knowledge, actively monitor these stakes as the shareholder and keep the competent minister informed. The commission requests that an urgent examination be carried out on the extent to which the mission of the current Federal Participation Company could be extended to allow it to fulfil this role.
- e. The federal public authorities must be entrusted with presenting an annual report on all their participations to the government and to parliament, where necessary through the central unit.
- f. The form of supervision, which is adapted to the nature of the company, must be analyzed (inspection by the Audit Office, via an auditor of the government, company auditor, etc.). This inspection must be carried out without hindering the functioning of the company and must respect the confidential nature of the data.

2. EUROPEAN REGULATIONS WITH REGARD TO THE PARTICIPATION OF PUBLIC AUTHORITIES IN PRIVATE COMPANIES

It is urgent to clarify the European regulations on the possible financial participation of public authorities in the private sector. Given that there is an excessively wide margin of interpretation which frequently favours the large Member States, Belgium should take the initiative in this field, in consultation with other small European countries.

3. CORPORATE GOVERNANCE

In 1998, the principles of corporate governance were defined in a code drawn up by the Banking and Finance Commission, the Securities and Exchange Commission, the FEB/VBO and other authorities. The law of 2 August 2002 enshrined some of the elements of this code in the Belgian Company Code.

Although these regulations apply only to companies listed on the stock exchange, the commission recommends that the principles of corporate governance be applied in all public or commercial companies in which the State holds a stake. These regulations can be derogated from only on certain specific points and provided that these derogations are justified on the basis of the specific nature of the company concerned. These derogations must be

the subject of an annual report.

The basic principles of the law on corporate governance should be applied to public or commercial companies in which the public authorities hold a stake. These principles are based on the transparency of management, the possibility of separating the role of the Board of Directors from that of the Management Committee, the guarantee that the administrator is represented by a natural person, the strengthening of the position of the auditor and the improvement in the functioning of the general meeting.

Whenever they act as shareholder, the public authorities must determine:

- i. the percentage of representation of the following groups, which must have seats on the Board of Directors: members of the Board of Directors who represent the shareholders, members of the Board of Directors associated with the management and members of the Board of Directors who are not connected either with the shareholder or with the management (within the framework of this quorum, the requirement of point ii must then be met);
- ii. the general and specific profile that the administrators must have. As regards the specific profile, all the fields of expertise must be represented as well as possible within the Board of Directors, the emphasis being on matters of strategy (along with other fields such as marketing, finance, etc.), to be able to act in the company's best interests. As regards the personnel profile (general), the administrators must at least possess the following qualities: integrity, discretion, a critical mind, autonomy of judgment, a willingness to uphold the interests of the public authorities and availability to exercise the mandate;
- iii. the choice that they make between two models (on the one hand, the model in which the functions of chairman of the Board of Directors and of chairman of the Management Committee (CEO) are split and, on the other hand, the model in which these posts are filled by one single person). In this way, they also determine the nature of the tasks of the Board of Directors and, where appropriate, the nature of the tasks of the Management Committee. They must give reasons for their choice of model;
- iv. the special committees which must be set up within the Board of Directors, such as the remuneration committee, the audit committee, etc.;
- v. the remuneration which the administrators should receive, given that their mission requires that they fully devote their time and energies. This remuneration must be proportionate to the importance of the mission. The public authorities must be able to attract highly qualified administrators;
- vi. how efficient and coherent communication among all the parts of the company (shareholders, Board of Directors, management, personnel) can be achieved;
- vii. what (clear) appointment procedure they follow when as a shareholder they are entitled to appoint administrators;
- viii. how they cooperate with their administrators. These specific cooperation arrangements must be laid down in a charter.

4. SOCIAL LEGISLATION

4.1. *Increase in the maximum amounts with regard to the intervention of the company closure fund and increase in the reserves of the fund*

The commission requests that the salary ceilings of this intervention be raised and linked to the standard of living. The reserves of the company closure fund should also be increased.

4.2. *The granting of shutdown bonuses to workers employed in companies with fewer than twenty workers*

The commission requests that the government urge the social partners (within the National Labour Council) to resolve this problem, taking account of the increase in contributions that this may lead to.

4.3. *Priority treatment by the receiver of the declarations of outstanding payments for workers*

The commission requests that the courts urge the receivers who have the personnel file to cooperate actively and as a matter of priority in drawing up declarations of outstanding payments for the former workers of the bankrupt company. The law on bankruptcy will be adapted if necessary.

4.4. *Payment of the additional indemnities for early retirement among privileged claims*

The commission requests that the legislation on privileges be changed to include additional early retirement payments on the list of the privileged claims of personnel.

4.5. *Tax deductibility of pilot license renewal costs*

The commission proposes to make the costs for the renewal of pilot licenses tax deductible to allow pilots to retain their professional qualification.

5. LEGAL PROCESS

5.1. *New system concerning the support of public companies in difficulty*

The commission is of the opinion that the financial results of these companies should be monitored more closely. To this end, after consultation with the Institute of Auditors and the Federal *Bureau du Plan*, an ‘indicator system’ could be set in place (by creating a monitoring committee), which would be the subject of a regular report to be submitted to parliament.

The management letter system (1) could be made compulsory.

5.2. *Modification of the legislation on legal composition*

The commission requests that the Minister of Justice organize consultation with all the parties concerned to examine the way in which legal composition could play more efficiently its role as a ‘second chance’ for companies in difficulty.

6. PARLIAMENTARY SUPERVISION OF PUBLIC COMPANIES

The commission is of the opinion that all companies with public participation should submit an annual report to parliament. This report could lead to a parliamentary debate which would be held in the presence of the competent minister and would cover the following:

- the minimal public service;
- the financial means required for this purpose;
- compliance with the rules of corporate governance.

Every year, the minister should submit to the parliament a *tableau de bord* (management report) of all public participations.

In this context, the commission requests that the president of the Chamber of Representatives invite the Audit Office to participate in an exchange of views to determine how parliamentary supervision of public companies could be organized in future. The supervision of the executive (for example, by the auditors of the government) must also be reviewed.

(1) A management letter is a letter or note from the company auditor with recommendations to the management.

7. MANAGEMENT OF DOCUMENTATION BY THE PUBLIC AUTHORITIES

7.1. The commission is of the opinion that measures must be taken to guarantee the long-term preservation of the archives of the cabinets of all federal ministers.

7.2. The commission desires that these documents be preserved by public archive institutions for two reasons: firstly, to guarantee the efficient functioning of the public authorities (in particular, by ensuring continuity of policy during the transfer of powers from one government to another) and, secondly, to safeguard the historic heritage contained in such documents.

8. INFRASTRUCTURE

The commission wishes to stress the importance of improving the links between Zaventem Airport and the national railway network and of creating a TGV link.

9. MISCELLANEOUS RECOMMENDATIONS

9.1. The commission wishes to stress the importance of the communities developing curricula on public management.

9.2. The commission requests that the communities reflect on the issue of the equivalency of the training of airline pilots with the recognized diplomas.

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The present report was approved by 11 votes to 2 with one abstention.

The rapporteurs,
Jacques CHABOT,
Lode VANOOST,
Servais VERHERSTRAETEN

The Chairman,
Raymond LANGENDRIES