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INCIDENTS INVOLVING THE 1992 FUND

ERIKA - LEVEL OF PAYMENTS

Note by the Director

Summary: A new study has been carried out within the French Ministry of Economy, Finance and Industry on the likely level of claims from the tourism industry. The 1992 Fund's experts have examined the results of the study. On the basis of the study and the Fund's experts' comments, the Director has reconsidered the likely total amount of all admissible claims arising from this incident. He proposes an increase in the level of the 1992 Fund's payments from 60% to 80% of the loss or damage suffered by the respective claimants.

Action to be taken: To review the level of the 1992 Fund's payments.

1 Introduction

- 1.1 An extensive study was carried out within the French Ministry of Economy, Finance and Industry before the Executive Committee's 8th session in July 2000 on the extent of the damage caused by the *Erika* incident in respect of the tourism industry. In the study ('the June 2000 study') the estimated total amount of the admissible claims in the tourism industry fell within the range of FFfr800 – 1 500 million (£70 – 144 million).
- 1.2 A further study was carried out within the Ministry of Economy, Finance and Industry in October 2000. This study ('the October 2000 study') found that the total amount of the losses in the tourism sector admissible for compensation could be estimated at FFfr1 096 million (£103 million).
- 1.3 At its 9th session held in October 2000 the Executive Committee decided that, in view of the continuing uncertainty as to the total amount of the claims arising from the *Erika* incident, the

level of payments should be maintained at 50% of the amount of the loss or damage actually suffered by the respective claimants (document 92FUND/EXC.9/12, paragraph 3.6.20).

- 1.4 A further study was carried out within the Ministry of Economy, Finance and Industry in January 2001 ('the January 2001 study'). In that study the maximum amount of admissible claims in the tourism sector was assessed at between FFr1 100 million (£103 million) and FFr1 200 million (£112 million).
- 1.5 In the light of the January 2001 study and the opinion of the 1992 Fund's experts, the Executive Committee decided, at its 11th session held in January 2001, to increase the level of the 1992 Fund's payments from 50% to 60% of the amount of the damage actually suffered by the respective claimants (document 92FUND/EXC.11/6, paragraph 3.58).
- 1.6 The Executive Committee decided at its 12th session to maintain the level of payments at 60% (document 92FUND/EXC.12/4, paragraph 3.57).
- 1.7 A new study has been carried out within the Ministry of Economy, Finance and Industry in June 2001 ('the June 2001 study'). In this study the total amount of the losses admissible for compensation in the tourism industry is estimated at between FFr363 million (£34 million) and FFr503 million (£47 million).

2 Summary of the June 2001 study

- 2.1 The June 2001 study is based on declarations for VAT for businesses and on the claims actually submitted so far in respect of holiday rentals, in particular self-catering apartments.
- 2.2 In the June 2001 study it is recalled that the previous studies, and in particular the January 2001 study, were based on two methods, the demand approach^{<1>} and the supply approach^{<2>}. It is submitted in the June 2001 study that the only method which can provide an estimate close to reality is the one based on the declarations by the businesses themselves.
- 2.3 In the June 2001 study a comparison has been made between the VAT declarations for the calendar years 1999 and 2000 for businesses in the tourism sector in the five departments concerned which made it possible to compare the development of the turnover of these businesses. However, although in the case of small businesses which are liable to pay VAT the VAT declarations are incomplete, it is considered that the declarations submitted from this group of businesses are sufficiently representative.
- 2.4 As regards self-catering apartments which are not subject to VAT, it is stated in the June 2001 study that - contrary to the approach taken in the January 2001 study - it is unlikely that all those who suffered losses due to a reduction in tourists visiting the area will claim compensation. It is pointed out that this sector comprises mainly individuals who are not obliged to keep accounts and had no reason to delay the submission of claims once the tourism season was finished. For this reason, it has been assumed that the great majority of the potential claimants in this group would have presented their claims by mid-June 2001 and that those who will submit claims in the future will represent only a small part of the potential claimants in this group. In the study it is pointed out that by 15 June 2001 less than 500 claims for a total of FFr13.2 million (£1.2 million) had been received from this group of claimants. The study gives the following reasons for the low number of claims from this sector:

<1> A macro economic analysis based on an analysis of tourism consumption statistics by market segment and the results of relevant research on average tourist spending.

<2> A micro economic approach based on an estimation of the turnover of tourism businesses obtained by a detailed analysis of declarations for tax purposes from businesses of all types in the tourism sector.

- there are significant variations in the letting of the apartments from year to year which makes it difficult to present claims with comparative data for previous years;
- since the individuals in question are not subject to VAT, they have no documents to support the alleged losses;
- many individuals have only let their apartments occasionally which makes it difficult to prove an actual loss;
- many individuals in this group may be reluctant to present claims for a few thousand francs.

It is suggested in the study that the total amount of the claims in this group will not exceed FFr30 million (£2.8 million).

- 2.5 As in the previous studies, the June 2001 study is based on the IOPC Fund's criteria for the admissibility of claims, in particular as regards the geographical location of the businesses in question. It is pointed out that in the five departments affected by the *Erika* incident the major part of the businesses are located in the interior. It is assumed that the major part of the losses admissible for compensation relate to businesses in the coastal areas. The turnover figures of the businesses whose claims under the Fund's criteria would be admissible have been adjusted to obtain the reduction in profit which is the basis for the calculation of compensation.
- 2.6 The June 2001 study estimates the total amount of the losses admissible for compensation in the tourism sector at between FFr363 million (£34 million) and FFr503 million (£47 million).
- 2.7 It is pointed out in the study that the number of claims from the tourism sector has been falling in recent months, that the claims submitted so far only total FFr520 million (£49 million) and that claims are rarely accepted at 100% of the claimed amounts.
- 2.8 The study also considers the likelihood of claims being submitted for losses incurred in the tourism sector during 2001. It is stated that, although in the IOPC Funds' experience it is unusual that losses in the tourism sector relate to more than one year, such losses are possible if the contamination continues. It is mentioned that some claims have already been submitted for losses suffered in 2001. However, it is stated that the Observatoire national du tourisme has predicted that the tourist season along the Atlantic coast will be good in the year 2001 and it is suggested that there is no risk of any significant impact of the *Erika* incident in 2001.

3 Opinion of the 1992 Fund's experts on the June 2001 study

- 3.1 As the results of the June 2001 study were received only on 18 June 2001, the 1992 Fund's experts have had only very limited time to examine them. The experts' observations can be summarised as follows:
- 3.2 The Ministry of Economy, Finance and Industry has had access to detailed information outside the public domain, such as complete VAT returns for 1999 and 2000, and this has made it possible to undertake exhaustive research. In the view of the 1992 Fund's experts the data provided not only helps to assess the impact of the *Erika* incident on tourism, but also provides valuable comparative information to assist assessment of individual tourism claims for economic loss.
- 3.3 The 1992 Fund's experts broadly agree with the overall estimate of the maximum total tourism losses admissible for compensation at around FFr500 million (£47 million) and also agree that the number of assumptions that have been made in the June 2001 study are minimal. For the first time it is possible to make a direct comparison between the declared turnover levels of tourism businesses with claims actually received. A full tourist season has passed, and tourism businesses have been able to assess the impact of the *Erika* incident on their trading. In the view of the

Fund's experts it can be assumed that the majority of the businesses that have suffered significant economic loss and intend to claim compensation have already done so.

- 3.4 The Ministry of Economy, Finance and Industry has been able to make, for the first time, a practical estimate of the likely level of tourism claims. Whereas in previous studies the objective was to estimate a theoretical maximum level of exposure, the June 2001 report, with the benefit of real data supplied directly by tourism businesses, provides with greater confidence a practical estimate of the likely value of the tourism claims.
- 3.5 In previous reports a high level of uncertainty remained regarding the level of possible losses incurred in the self-catering accommodation sector. The estimate in the June 2001 report is based on the knowledge of claims relating to this sector received by the 1992 Fund (currently at around FFr15 million or £1.4 million). The 1992 Fund's experts agree with the reasons given in the June 2001 study for the relatively low level of claims from this sector.
- 3.6 On the assumption that nine months after the end of the 2000 summer season most potential claimants in the self catering accommodation sector would have presented claims, in the June 2001 study the estimate of economic losses in this sector has been revised down substantially in comparison with previous studies to FFr30 million (£2.8 million).
- 3.7 The Observatoire national du tourisme has carried out research which is more comprehensive than the 1992 Fund's experts' own collection of anecdotal evidence from the tourist offices at local, departmental and regional level. The information provided confirms the Fund's experts' assessment that the prospects are that the 2001 tourism season will be as good as or even better than the 1999 season and that it is only in an isolated number of cases, at locations where there is continued contamination of the shoreline, that claims for the 2001 season are likely to be considered admissible.
- 3.8 However, the 1992 Fund's experts point out that the June 2001 study carried out within the Ministry does not take into consideration a number of other factors.
 - The study has not made any assumptions as to the approach of the French courts and their interpretation of the concept of pollution damage.
 - The study does not take into consideration potential claims from tourism businesses that increased their turnover in 2000 compared with 1999, but not up to the levels they had anticipated. A number of claims of this nature have been received and have been considered admissible where the claimant has proven the negative impact of the *Erika* incident on a previous consistent growth trend in business.
 - The study does not take into consideration the additional sums spent by tourism institutions or individual businesses on promotional activity or other efforts to mitigate the impact of the incident. Claims from the Department of Vendée tourist board and the Brittany regional tourist board for expenses for such purposes have been received and approved. Further claims have recently been submitted by the Region Pays de la Loire and the Department of Charente Maritime. The 1992 Fund's experts have previously estimated that exceptional expenses relating to mitigation campaigns by tourism institutions could amount to some FFr57 million (£5.3 million).
 - In addition, it has been reported that some departmental and regional agencies are increasing their 2001 marketing programmes in an effort to restore the tourist image of the area and reinstate visiting levels from both domestic and overseas visitors. It is possible that claims for such increased promotional activity in 2001 will be presented.

- The study does not take into consideration claims from businesses outside France, for example specialist overseas tour operators relying on sales of holidays to the affected area and potentially able to demonstrate dependency on the affected resource. Two claims have been received from United Kingdom operators and a third such claim is expected. However, for such claims the question of admissibility will remain an issue.

3.9 In the view of the 1992 Fund's experts these factors may have led the study to underestimate the overall level of claims, but this underestimation may well be offset if a significant proportion of potential claimants decide not to present claims.

4 Other assessment of the total amount of the damage arising from the *Erika* incident

4.1 Shortly before the Executive Committee's 11th session in January 2001 the French media reported a study of the damage resulting from the *Erika* incident carried out by a French consulting firm specialising in accounting (Mazars et Guérard) assisted by various groups of experts. The study had been commissioned by l'Association Ouest Littoral Solidaire (a group of three administrative regions: Bretagne, Pays de La Loire and Poitou-Charentes). According to the study the total amount of the damage can be estimated to be in the range of FFr5 460–6 340 million (£528 – 594 million).

4.2 The Director has recently obtained the documentation provided to the media on this study. The study leads to the following estimates of the losses:

| | FFr (million) | FFr (million) |
|---|------------------|---------------|
| 1. TotalFina | | |
| Oil removal from the wreck | 500 | |
| Disposal of oily waste | 200 | |
| Clean-up operations | 220 | |
| Reinstatement of image of the affected area | 30 | |
| Action fund | <u>50</u> | 1 000 |
| 2. Plan Polmar | | 900 |
| 3. Regional and local authorities | | 190 |
| 4. Tourism industry (out of which FFr610-690 million (£57-65 million) is for losses in 2001 and 2002) | | 2 650 - 3 220 |
| 5. Maritime sector | | 340 - 480 |
| 6. Reinstatement of image | | 150 - 200 |
| 7. Environmental damage | | |
| Damage to fauna | 50 | |
| Reinstatement of polluted areas | 40 – 110 | |
| Various studies | <u>140 – 190</u> | 230 - 350 |

FFr5 460 - 6 340

4.3 The documentation available does not give any detailed information of the methods used for this assessment. It appears, however, that as regards the losses in the tourism sector (item 4) the assessment is based on a reduction in turnover and not on the loss of profit, the latter being the

basis of the assessment of compensation. As regards the maritime sector (item 5), the Director believes that the amount indicated is exaggerated (cf paragraph 5.3 below). It also appears that the amounts referred to in item 7 would fall outside the definition of 'pollution damage' laid down in the 1992 Conventions. It should be noted that items 1 and 2 in the table can be disregarded for the purpose of the Executive Committee's consideration of the 1992 Fund's level of payments, since these items relate to costs incurred by Total Fina and the French State (cf paragraph 5.2 below).

5 The Director's considerations as regards the level of the 1992 Fund's payments

- 5.1 The Executive Committee will again have to consider how to strike a balance between the importance of the 1992 Fund's paying compensation as promptly as possible to victims of oil pollution damage and the need to avoid an over-payment situation. In the Committee's consideration of how to strike this balance the following elements may be of assistance.
- 5.2 It should be recalled that the claims by Total Fina and the French Government can be disregarded for the purpose of the Executive Committee's consideration of the level of payments, since these claims will be pursued only if and to the extent that all other claims have been paid in full.
- 5.3 The figures for the clean-up operation claims and the claims in the fishery and mariculture sectors have been estimated by the 1992 Fund at FFr150 - 200 million (£14 - 19 million) and FFr125 million (£12 million), respectively, ie at a total of FFr275 - 325 million (£26 - 30 million). The June 2001 study carried out within the Ministry of Economy, Finance and Industry estimates the total amount of the admissible claims in the tourism sector at some FFr500 million (£47 million). If this estimate is correct, the total admissible claims would be in the region of FFr 800 million (£75 million). Should this figure be correct, it would be possible to fix the level of the 1992 Fund's payment at 100% of the proven loss or damage suffered by the individual claimants.
- 5.4 It should be noted, however, that there remain some significant uncertainties in the estimates made in the June 2001 study, as indicated by the 1992 Fund's experts. No allowance has been made in the study for publicity campaigns. The June 2001 study is based on the criteria for admissibility applied by the 1992 Fund. The Director has been advised, however, that the French courts might adopt a more extensive approach in their interpretation of the notion of 'pollution damage', and it is not possible to predict the consequences of such an approach. There is also a risk that re-oiling of the coastline will take place, which could cause further losses in particular in the fishery and mariculture sectors, but in the Director's view this risk has decreased considerably, and it is in any event highly unlikely that there would be any major re-oiling.
- 5.5 An important element is, in the Director's view, the claims actually submitted so far. In this regard reference is made to document 92FUND/EXC.13/3/Add.1. The total amount of all claims received in the Claims Handling Office as at 20 June 2001 is FFr765 million (£72 million), of which FFr525 million (£49 million) relates to tourism. Experience shows that claims are normally not approved at 100% of the claimed amount. However, there are also some significant claims from ferry companies and tourism operators outside the affected area which have not been taken into account in the June 2001 study. It is doubtful in the Director's view whether such claims are admissible, but some allowance will nevertheless have to be made for claims of this type. Although generally the 2001 tourism season is unlikely to be affected by the *Erika* incident to any significant degree, there may be admissible claims relating to that season from areas where clean-up is still being carried out. It should be noted that claims can be brought against the 1992 Fund up to the end of the time bar period, ie within three years of the date when the damage occurred or within six years of the date of the incident.
- 5.6 As mentioned above the claims in the sectors other than tourism have been estimated at some FFr300 million (£29 million). The Director believes that the estimate in the June 2001 study for the tourism claims of FFr500 million (£47 million) may be on the low side and would consider

that a figure of FFr700 million (£66 million) would be prudent. He considers that it is also necessary to take into account costs for marketing campaigns of some FFr100 million (£9.4 million). He also takes the view that it is advisable to include an amount of FFr100 million (£9.4 million) for losses in the tourism sector during 2001. Furthermore, the Director submits that it would be prudent to add a general safety margin of FFr200 million (£18.8 million). The estimated total admissible claims would then be in the region of FFr1 400 million (£131 million). The Director believes, therefore, that the level of the 1992 Fund's payments could be increased to 80% of the proven loss or damage suffered by the individual claimants, as assessed by the 1992 Fund, and proposes that the Executive Committee takes a decision to this effect.

6 Action to be taken by the Executive Committee

The Executive Committee is invited:

- a) to take note of the information contained in this document; and
 - b) to decide on the level of the 1992 Fund's payments.
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