



## INCIDENTS INVOLVING THE 1992 FUND

### ERIKA - CLAIM SUBMITTED TO THE EXECUTIVE COMMITTEE FOR CONSIDERATION

#### Note by the Director

**Summary:** A French company (BAI Brittany Ferries SA) providing ferry services from England to different destinations in France has submitted a claim for FFr69 335 000 (€10 570 000 or £6.8 million) for losses suffered in 2000 allegedly as a result of the *Erika* incident causing a significant reduction in the number of passengers and cars using its ferry services. The question has arisen as to whether the claim is admissible for compensation under the criteria adopted by the IOPC Funds' governing bodies.

**Action to be taken:** To consider the admissibility of the claim by Brittany Ferries.

### 1 Introduction

- 1.1 A company, BAI Brittany Ferries SA (Brittany Ferries), providing ferry services between England and France (Brittany and Normandy), between England and Spain (Santander) and between Ireland and France (Brittany), has submitted a claim for compensation totalling FFr69 335 000 (€10.6 million or £6.8 million) for economic loss and mitigating marketing costs as set out in the table below.

| Item                                | Claim amount                                |
|-------------------------------------|---|
| Ticket sales                        | 36 004 000 FFr                              |
| Extra income linked to ticket sales | 18 102 000 FFr                              |
| Onboard sales                       | 6 957 000 FFr                               |
| Package holidays                    | 4 300 000 FFr                               |
| Marketing costs                     | 3 972 000 FFr                               |
| <b>Total</b>                        | <b>69 335 000 FFr</b><br><b>€10 570 000</b> |

- 1.2 The company has alleged that, due to the *Erika* incident, there was a significant reduction in the number of passengers using the company's ferry service as well as a reduction in the number of cars transported to the French destinations, resulting in a significant economic loss.

1.3 The question has arisen as to whether the claim by Brittany Ferries, which is a claim for pure economic loss, fulfils the criteria for admissibility laid down by the governing bodies of the IOPC Funds. The document contains an analysis of the issue.

**2 Criteria for the admissibility of claims for pure economic loss adopted by the IOPC Funds**

2.1 The criteria for the admissibility of claims for pure economic loss (ie loss of earnings sustained by persons whose property has not been polluted) were considered in 1994 by the 7th Intersessional Working Group of the 1971 Fund. The Working Group's Report (document FUND/A.17/23) was considered by the 1971 Fund Assembly at its 17th session, held in October 1994. The Assembly endorsed the Working Group's Report and thereby laid down certain criteria for the admissibility of claims for pure economic loss (document FUND/A.17/35, paragraph 26.8).

2.2 At its 1st session, the 1992 Fund Assembly adopted a Resolution (Resolution N°3) in which the Assembly resolved that the report of the 7th Intersessional Working Group of the 1971 Fund should form the basis of the policy of the 1992 Fund on the criteria for the admissibility of claims (document 92FUND/A.1/34, Annex III).

2.3 As regards claims for pure economic loss, the criteria laid down by the Assemblies can be summarised as follows:

To qualify for compensation for pure economic loss, there must be a reasonable degree of proximity between the contamination and the loss or damage sustained by the claimant. A claim is not admissible for the sole reason that the loss or damage would not have occurred had the oil spill not happened. When considering whether the criterion of reasonable proximity is fulfilled, the following elements are taken into account:

- the geographic proximity between the claimant's activity and the contamination
- the degree to which a claimant was economically dependent on an affected resource
- the extent to which a claimant had alternative sources of supply or business opportunities
- the extent to which a claimant's business formed an integral part of the economic activity within the area affected by the spill.

The 1992 Fund also takes into account the extent to which a claimant was able to mitigate his loss.

The assessment of a claim for pure economic loss is based on the actual financial results of the individual claimant for appropriate periods during the years before the incident. The assessment is not based on budgeted figures. The 1992 Fund takes into account the particular circumstances of the claimant and considers any evidence presented. The criterion is whether the claimant's business as a whole has suffered economic loss as a result of the contamination.

Any saved overheads or other normal expenses not incurred as a result of the incident should be subtracted from the loss suffered by the claimant.

### **3 Claim by Brittany Ferries**

#### **3.1 Background information**

- 3.1.1 The claimant company, Brittany Ferries, was established in 1972 to export agriculture produce from France to the United Kingdom and Ireland. The company later became the main ferry operator for holidaymakers going from the United Kingdom to western France.
- 3.1.2 Brittany Ferries operates ferry routes from Portsmouth, Poole and Plymouth in the United Kingdom to Caen and Cherbourg in Normandy and to Saint Malo and Roscoff in Brittany. The French destinations on these routes are located north of the area affected by the *Erika* oil spill as shown on the map appended to the document. The company also runs ferry services between Cork in Ireland and Roscoff and between Plymouth and Santander in Spain.
- 3.1.3 Brittany Ferries, which is located in Roscoff, Brittany, is the parent company of a group of eight subsidiary companies. The group receives three-quarters of its turnover from ticket sales, tour operations and, since 1 January 2000, freight activity. Five of the group companies are 99.9% owned by Brittany Ferries: Serestel SA manages on board cabins and catering for the parent company; Truckline Ferries SA is the freight arm of the business; BAI UK Ltd, BAI Ireland Ltd and Brittany Ferries SL España act as agents and manage ticket sales and holiday bookings. Three further companies in the group, Senecal SEM, Sabemen SEM and Senamanche SEM lease five vessels to Brittany Ferries, which are dedicated to the cross channel routes referred to in paragraph 3.1.2. Each of these three companies is one-third owned by Brittany Ferries with the majority of the remaining shares being held by the French public sector.
- 3.1.4 Brittany Ferries has its own tour operating activity selling holidays, ferry accommodation and leisure activities such as golf, and has close links with other companies which market holiday accommodation (eg Eurocamp and Keycamp in the United Kingdom and Gîtes de France in France), largely in Brittany, Pays de la Loire and Poitou-Charente, the three regions that were affected by the oil spill.

#### **3.2 Arguments raised by Brittany Ferries in support of its claim**

- 3.2.1 Brittany Ferries has maintained that the pollution on the coast of Brittany, Pays de la Loire and to a lesser extent Poitou-Charente arising out of the *Erika* incident, and the considerable time required to clean up the affected beaches, caused many British holiday makers to choose holiday destinations not served by the company, and that this led to a reduction in passenger numbers, ferry ticket revenue and on board sales. The company has further claimed for losses in anticipated profits from price rises and anticipated gains in currency conversion from pounds sterling to euros. The company has also claimed for a reduction in the number of package holidays sold by its tour operating arm. Additionally, the company has alleged that as a result of the incident it incurred extra marketing costs immediately after the *Erika* incident in an attempt to redress the fall in reservations.
- 3.2.2 Brittany Ferries has stated that it is the main transporter of tourists to the Brittany, Pays de la Loire and Poitou-Charente regions and has argued that most passengers on its ferries travel by car and continue to destinations within the area affected by the *Erika* oil spill. The company has contended that traditionally holiday companies publish their brochures in November/December, that the *Erika* incident occurred at a time immediately prior to the normal booking period, which starts in January, and that as a result many British holiday makers decided not to visit Brittany in 2000. It has also been alleged that the negative media coverage of the pollution damage in Brittany had a harmful effect on the claimant's business, not least because of the name of the company. Brittany Ferries has stated that the media in the United Kingdom and other European countries reported the contamination of the coast and that since a main motivation for family summer holidays in Brittany is to use the beaches, the Brittany tourist markets are particularly sensitive to coastal pollution. Brittany Ferries has argued that the reduction in reservations was unrecoverable, since by the time the situation

had improved in Brittany potential visitors had selected other destinations for their main summer holidays. The company has emphasised that in its attempts to mitigate the effects of the *Erika* incident, every effort was made by the company to inform its potential customers of the actual state of the beaches in Brittany and western France in general in response to customer enquiries.

- 3.2.3 Brittany Ferries has stated that 82% of its passenger traffic is from the United Kingdom. According to the company's own passenger survey in 1999, as many as 69% of its United Kingdom passengers indicated Brittany, Pays de la Loire or Poitou-Charente as their holiday destinations. The company has estimated that in 1999 45% of these passengers stayed in the areas that were subsequently affected by pollution from the *Erika*.
- 3.2.4 Brittany Ferries has stated that the company's marketing strategy is largely oriented towards the promotion of Brittany and western France as an attractive destination for British holiday makers, that much of its promotional activity is made in partnership with the Brittany and the Pays de la Loire regional tourist boards, and that it has preferential commercial arrangements with Gîtes de France (a major agency for letting self-catering accommodation in France) for the promotion in the United Kingdom of self-catering holiday cottages in France.
- 3.2.5 Brittany Ferries has maintained that its business is dependent on the condition of the beaches in the area affected by the *Erika* oil spill, that the company's integration with the economic activity of the area is demonstrated by the marketing partnership with Brittany and Pays de la Loire tourist boards and that in practical terms the company had little opportunity to diversify its business activities for the 2000 season.

### 3.3 Director's considerations

- 3.3.1 Serious pollution resulting from the *Erika* incident remained on a substantial part of the French Atlantic coast during the main reservation period for British holiday makers (January to April 2000). The contaminated state of the beaches was reported widely in the media in the United Kingdom and other European countries as well as in France. In the Director's view, it is likely that this caused many British holiday makers to reconsider any plans about going on holiday to Brittany or other parts of the French Atlantic coast in 2000.
- 3.3.2 Brittany Ferries has provided details of the numbers of passengers transported between England and France, Ireland and France and England and Spain in the period 1997-2001. The 1992 Fund's experts have also obtained records of the number of passengers transported by Brittany Ferries' competitors on routes between England and Brittany and England and Normandy.
- 3.3.3 With the exception of the Cork – Roscoff route, all western channel routes to France operated by Brittany Ferries (ie those to Saint Malo and Roscoff) suffered a reduction of between 7.02% and 8.6% in the number of passengers carried in the summer of 2000 compared with the summer of 1999. In contrast, the Cork – Roscoff route, which is the only ferry service between south-west Ireland and France, showed an increase of 7.14% in the number of passengers in the summer of 2000 compared with 1999, but this service represents only 2.75% of Brittany Ferries total passenger traffic and is therefore a marginal activity.
- 3.3.4 The route between England and Santander operated by Brittany Ferries' suffered a reduction of 6.38% in the number of passengers carried in the summer of 2000 compared with the summer of 1999. In the Director's view, this reduction cannot be considered to have been caused by the *Erika* incident, but must have been due to other factors. However, Brittany Ferries is not claiming for losses on this route.
- 3.3.5 Brittany Ferries has only one direct competitor on the west channel crossing (Condor), which operates a fast ferry between Weymouth and Saint Malo via Guernsey in the Channel Islands. This service was first introduced by Condor in 1998 and may have contributed to the fall in

passenger numbers on Brittany Ferries' Portsmouth – Saint Malo routes in the years 1998 to 2000.

- 3.3.6 All mid-channel routes operated by Brittany Ferries (ie those to Cherbourg and Caen) suffered reductions of between 7.23% and 10.41% in passenger numbers in the summer of 2000 compared with the summer of 1999. However, all mid-channel routes operated by Brittany Ferries' competitors also suffered similar reductions in passenger numbers over the same period.
- 3.3.7 A passenger survey carried out by Brittany Ferries in 1999, ie prior to the *Erika* incident, indicated that Brittany, Pays de la Loire and Poitou-Charente, ie regions that were subsequently affected by contamination from the *Erika*, were the final destinations of between 85% and 90% of passengers using the west channel crossings (those to Roscoff and Saint Malo) and of between 50% and 60% of passengers using the mid-channel crossings (those to Caen and Cherbourg).
- 3.3.8 The Director takes the view that there were probably a number of factors other than the *Erika* incident that may have contributed to the reduction in the number of passengers in 2000 on the routes operated by Brittany Ferries between the United Kingdom and France, such as increased competition from low price airlines, competition from other holiday destinations and increased use of the internet as a sales channel making price comparison easier and wider choice of holiday destinations available. It is nevertheless in his view likely that the *Erika* incident was a significant cause of the decrease in the numbers of passengers using Brittany Ferries' routes to France in the summer of 2000.
- 3.3.9 It will be recalled that, in the context of the *Braer* incident, the 1971 Fund Executive Committee considered in 1995 a claim submitted by P & O Scottish Ferries Ltd (P&O Ferries) for alleged loss of income from its ferry service from Aberdeen to Shetland as a result of a reduction in the number of tourists visiting the Shetland Islands and a reduction in the volume of freight. The claimant, which had its main office in Aberdeen, operated the only passenger ferry line between Shetland and the United Kingdom mainland. The Executive Committee took the view that the criterion of reasonable proximity was not fulfilled. It was also considered that the claimant's business did not form an integral part of the economic activity of Shetland. For these reasons, the claim was rejected (document FUND/EXC.44/17, paragraph 3.4.25).
- 3.3.10 P&O Ferries took legal action against the 1971 Fund, the shipowner and his insurer. The Scottish Court of first instance rejected the claim on the grounds that the losses sustained by the claimant were not a direct consequence of the oil pollution but rather an indirect consequence of the negative publicity that had marked the image of the Shetland Islands as a source for first products and a holiday destination, this negative publicity being brought about by contamination of property belonging to a third party. The claimant appealed against the judgement but later withdrew the appeal.
- 3.3.11 The destinations in France of Brittany Ferries' routes (Saint Malo, Roscoff, Caen and Cherbourg) are all situated north of the area affected by the spill. However, they are the only ports serving the affected area from the United Kingdom from which there is quick and easy access by road to that area. In the Director's view, it is doubtful, nevertheless, whether the claim would fulfil the criterion of geographic proximity on a strict interpretation.
- 3.3.12 As indicated in paragraph 3.3.7, the great majority of passengers using the western channel crossings to Saint Malo and Roscoff and around 50% of those using the mid channel crossings proceeded to destinations which are in or close to the area affected by the *Erika* oil spill. Brittany Ferries has emphasised that both the ferry company and its tour operating arm have contractual relationships with a number of tour operators in the area affected by the spill, who have also made admissible claims for compensation (Eurocamp and Keycamp). It appears, therefore, in the Director's view, that the claimant is dependant on the affected area.

- 3.3.13 Camp sites form a large part of the tourist accommodation base in Brittany, Pays de la Loire and Poitou-Charente. For ease of travel and transportation of camping equipment many visitors to these sites use their own cars. The only alternatives to the west and mid channel routes as a means of getting from England to France by car are the east channel crossings, including the channel tunnel, which require a long drive across northern France to reach these sites.
- 3.3.14 Brittany Ferries' services are concentrated on western and mid English Channel crossings, and the services offer easy access to Brittany, Normandy and Pays de la Loire and to other parts of western France. The company offers holidays across the whole of France but its product offer and promotions are strongly focused on Brittany, Normandy, Pays de la Loire and Poitou-Charente. The nature of the ferry business, the concentration of its ferry services on western Channel routes, and its established promotional policy are factors which in the Director's view limited the company's possibilities to displace customers to other destinations, and the claimant had, therefore, only limited alternative business opportunities.
- 3.3.15 Although the company's headquarters and the destination ports are located at some distance outside the affected area, in the Director's view, the company's business formed to some extent an integral part of the economic activity of the area affected by the oil spill, since a substantial proportion of the tourists using the company's ferries visit the area and make an important contribution to the local economy.
- 3.3.16 It will be recalled that at its 16th session, held in April/May 2002, the Executive Committee considered the admissibility of claims which had been submitted by businesses within the tourism industry (campsites, hotels, restaurants, historical buildings, museums and other tourist attractions) which alleged losses as a result of the *Erika* incident but which were located at some distance inland.
- 3.3.17 The Director took the view that the question under consideration was one of causation rather than one of a particular distance from the coast. He considered that the most equitable method would be to examine each claim in detail in order to establish whether there was a link of causation between the reduction in the number of tourists to the coastal areas affected by the pollution and the economic losses allegedly suffered by businesses located somewhat further away from the polluted coast. He expressed the view that, when considering the admissibility of these claims, the geographic criterion should not be the primary one and that the other criteria laid down by the Assemblies would also have to be taken into account.
- 3.3.18 The Director expressed the view that, if the Committee were to agree with the proposed approach set out in paragraph 3.3.17 above, each claim in this category would have to be examined on its own merits, normally after a visit by the 1992 Fund's experts to the claimant's business, in order to establish whether there was such a link of causation.
- 3.3.19 The Executive Committee decided that claims by businesses located at some distance from the coast should be assessed on a case-by-case basis in order to establish whether there was a link of causation between the alleged loss or damage and the contamination in accordance with the Fund's normal practice (document 92FUND/EXC.16/6, paragraph 3.2.53).
- 3.3.20 The Director considers that the approach taken by the Executive Committee at its April/May 2002 session in respect of claims from businesses located at some distance from the coast would be appropriate also as regards the claim by Brittany Ferries. He takes the view that the claim for losses resulting from a reduction in the number of passengers in 2000, although probably not fulfilling the criterion of geographic proximity on a strict interpretation, does fulfil the criterion of dependency on the affected resource and to some extent the criterion of forming an integral part of the economic activity of the area affected by the spill. He also takes the view that the claimant had only limited possibilities to displace its customers to other destinations. He therefore considers that there is a sufficient link of causation between the contamination of the French Atlantic coast resulting from the *Erika* incident and the reduction in the number of passengers transported by the company in 2000.

- 3.3.21 For the reasons mentioned above the Director considers that the part of the claim relating to losses resulting from a reduction in passenger numbers in 2000 is admissible in principle. He also considers that in quantifying any losses attributable to the *Erika* incident account should be taken of other factors affecting passenger numbers, including those referred to in paragraphs 3.3.5 and 3.3.8.
- 3.3.22 For the same reasons, the Director also takes the view that the significant decrease in Brittany Ferries' sales of package holidays to the region in 2000 (a major element of which is travel on Brittany Ferries) was as a result of the *Erika* oil spill and that this item of the claim is admissible in principle.
- 3.3.23 The item of Brittany Ferries' claim relating to additional marketing costs is a claim for the costs of measures to prevent pure economic loss. The IOPC Funds' Assemblies have decided that such costs may be admissible if they fulfil the following requirements:
- the cost of the proposed measures was reasonable
  - the cost of the measures was not disproportionate to the further damage or loss which they were intended to mitigate
  - the measures were appropriate and offered a reasonable prospect of being successful
  - in the case of a marketing campaign, the measures related to actual targeted markets.
- 3.3.24 The Assemblies have also decided that to be admissible, the costs should relate to measures to prevent or minimise losses which, if sustained, would qualify for compensation under the 1992 Conventions and that claims for the cost of marketing campaigns or similar activities are accepted only if the activities undertaken are in addition to measures normally carried out for this purpose. In other words, compensation is granted only for the additional costs resulting from the need to counteract the negative effects of the pollution.
- 3.3.25 If the Executive Committee were to accept that the item in Brittany Ferries' claim for losses resulting from reduction in passenger numbers is admissible in principle, the item relating to marketing costs would have to be assessed on the basis of the criteria set out in paragraphs 3.3.23 and 3.3.24, in particular to establish whether the measures taken were or could have been expected to be effective.

#### **4 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 consider whether the claim by Brittany Ferries is in principle admissible for compensation.



**Coastline affected by the Erika oil spill**