JUDGMENT OF THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)

22 February 2006 *

In Case T-34/02,

EURL *Le Levant* 001, established in Paris (France), and the other applicants whose names are listed in the annex to this judgment, represented by P. Kirch and N. Chahid-Nouraï, lawyers, with an address for service in Luxembourg,

applicants,

v

Commission of the European Communities, represented by G. Rozet, acting as Agent, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of Commission Decision 2001/882/EC of 25 July 2001 on the State aid implemented by France in the form of development assistance for the cruise vessel *Le Levant*, built by Alstom Leroux Naval for operation in Saint-Pierre-et-Miquelon (OJ 2001 L 327, p. 37),

* Language of the case: French.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (First Chamber, Extended Composition),

composed of B. Vesterdorf, President, J.D. Cooke, R. García-Valdecasas, I. Labucka and V. Trstenjak, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 27 September 2005,

gives the following

Judgment

Legal context

The 'Loi Pons' and the Commission's decision not to raise objections under Articles 87 EC and 88 EC

1 The aid in question in this case relates to tax deduction measures for certain overseas investments, introduced initially by the French Law of 11 July 1986 (rectifying Finance Law No 86-824 for 1986, published in JORF (*Official Journal of the French Republic*) of 12 July 1986, p. 8688), known as the 'Loi Pons'.

2 On 13 August 1992, the French authorities notified those measures to the Commission for a decision on their compatibility with the rules applicable to State aid.

3 By letter of 27 January 1993, the Commission informed the French Government of its decision not to raise objections under Article 92 of the EC Treaty (now, after amendment, Article 87 EC) and Article 93 of the EC Treaty (now Article 88 EC) to the tax measures provided for in the Loi Pons.

Council Directive 90/684/EEC on aid to shipbuilding

4 Council Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding (OJ 1990 L 380, p. 27; 'the Seventh Directive') lays down specific rules applicable to aid to that sector, which are an exception to the general prohibition in Article 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC). The application of the relevant provisions of the Seventh Directive was extended by Council Regulation (EC) No 3094/95 of 22 December 1995 (OJ 1995 L 332, p. 1) and Council Regulation No 1904/96 of 27 September 1996 (OJ 1996 L 251, p. 5), both on aid to shipbuilding.

5 In Chapter II, entitled 'Operating aid', Article 4(1) of the Seventh Directive provides that '[p]roduction aid in favour of shipbuilding and ship conversion may be considered compatible with the common market provided that the total amount of aid granted in support of any individual contract does not exceed, in grant equivalent, a common maximum ceiling expressed as a percentage of the contract value before aid, hereinafter referred to as the ceiling'.

6 Article 4(7) of the Seventh Directive provides:

'Aid related to shipbuilding and ship conversion granted as development assistance to a developing country shall not be subject to the ceiling. It may be deemed compatible with the common market if it complies with the terms laid down for that purpose by OECD Working Party No 6 in its Agreement concerning the interpretation of Articles 6 to 8 of the Understanding [on Export Credits for Ships of 3 August 1981] or with any later addendum or corrigendum to the said Agreement.

The Commission must be given prior notification of any such individual aid proposal. It shall verify the particular development content of the proposed aid and satisfy itself that it falls within the scope of the Agreement referred to in the first subparagraph.'

Provisions relating to the administrative procedure

7 Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty (OJ 1999 L 83, p. 1) entered into force on 16 April 1999.

8 Article 1(h) of that regulation defines 'interested party' as 'any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations'.

9 Article 4(4) of Regulation No 659/1999 provides that where, after a preliminary examination, the Commission finds that doubts are raised as to the compatibility of a notified measure with the common market, it is obliged to initiate the formal investigation procedure. According to Article 26(2) of that regulation, '[t]he Commission shall publish in the Official Journal ... the decisions which it takes pursuant to Article 4(4) in their authentic language version'.

10 Article 6(1) of Regulation No 659/1999 provides as follows with respect to the formal investigation procedure:

'The decision to initiate the formal investigation procedure shall summarise the relevant issues of fact and law, shall include a preliminary assessment of the Commission as to the aid character of the proposed measure and shall set out the doubts as to its compatibility with the common market. The decision shall call upon the Member State concerned and upon other interested parties to submit comments within a prescribed period which shall normally not exceed one month. In duly justified cases, the Commission may extend the prescribed period.'

11 Article 14(1), concerning recovery of aid, provides:

'Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary ... The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law.'

Facts and procedures

Description of the Le Levant *operation*

12 According to the description provided by the French authorities to the Commission during the administrative procedure, the operation in question ('the *Le Levant* operation') consisted of ensuring under the Loi Pons the financing and operation of the cruise vessel *Le Levant*, for a period of approximately seven years, by investors who were natural persons through one-person limited liability undertakings (EURLs), constituted solely for that purpose and brought together in a maritime co-ownership.

13 The investors' interest in joining that operation lay in the opportunity they were given under the Loi Pons system of deducting from their taxable income the cost of their investment and the expenses related to its purchase (financial interest) and to its possession (depreciation) and also any losses incurred in operating the vessel.

14 The legal and financial outline of the *Le Levant* operation has been summarised as follows by the French authorities. On 9 December 1996, a major French bank ('the Bank') set up the co-ownership of the vessel *Le Levant*, divided into 740 co-ownership shares, or 'quirats'. The management of the co-ownership was entrusted to Compagnie des îles du Levant ('CIL'), which was given authority inter alia to sign a shipbuilding contract with the shipyard Alstom Leroux Naval and to manage the operation of the vessel. In 1997, natural persons each set up an EURL to which the quirats were sold by the Bank by means of a public offer. CIL was to take care of the operation, maintenance and technical and commercial management of the vessel on behalf of the maritime joint ownership for a period of seven years. CIL also undertook to ensure the investors a minimum gross operating result and to make

good any losses which exceeded the estimates. As payment for its services, CIL was to receive annually a percentage of the joint ownership's gross income in return for the management of the vessel, a percentage of the positive gross operating results in return for the operating guarantee, and a lump sum in return for the management of the co-ownership.

15 The Bank undertook to acquire the shares in the EURLs from the investors before 15 December 2003. Each EURL, moreover, undertook to transfer its quirats to the Bank before 29 February 2004. At the same time, CIL undertook to repurchase all of the quirats from the Bank before 31 January 2004, and the Bank undertook to transfer them to it before 29 February 2004.

Administrative procedure

16 At the end of 1998, the Commission learned through the media that the cruise vessel *Le Levant*, built in France by Alstom Leroux Naval for the contract price of FRF 228.55 million, had been financed through tax concessions granted for investments in the French overseas territories.

17 Following a preliminary investigation, during which the Commission received comments from the French authorities given, inter alia, by letter of 12 May 1999, the Commission, by letter of 2 December 1999, informed them of its intention to open the procedure provided for in Article 88(2) EC in respect of unnotified State aid C 74/99 (ex NN 65/99) relating to development aid granted by France to Saint-Pierre-et-Miquelon (shipbuilding). That decision was published in the *Official Journal of the European Communities* of 5 February 2000 (OJ 2000 C 33, p. 6; 'the decision to open the procedure'). The Commission stated that, in the light of Article 4(7) of the Seventh Directive, it had doubts as to the significance of the

development component of the project in question. The decision to open the procedure also called on the interested parties to submit their comments within one month of the date of publication.

18 The French authorities submitted their comments by letters of 12 January and 14 June 2000 and 27 April and 11 June 2001. CIL also submitted its comments during the administrative procedure by letters of 18 November 1999 and 3 March 2000.

19 By letter of 13 July 2001, EURL *Le Levant* 114, one of the EURLs involved in the *Le Levant* operation, asked the Commission for clarification on its position concerning the identification of the beneficiaries of the aid under investigation. It asked the Commission, inter alia, to confirm that it was not an interested party for the purposes of the administrative procedure under way.

20 When it did not receive a written reply from the Commission, EURL *Le Levant* 114 repeated its request by letter of 19 July 2001. In that letter, it also stated that it had been informed that the Commission was preparing to examine the file on 25 July 2001 and asked the Commission to grant it a reasonable time in which to submit its comments on the procedure. It put forward several reasons in support of its request, referring to the last sentence of Article 6(1) of Regulation No 659/1999, and stated inter alia that it had been justified in considering that it was not concerned by that procedure in the light of the statements contained in the decision to open the procedure.

21 By letter of 24 July 2001, the Commission replied to the two letters from EURL *Le Levant* 114, stating merely that the time-limit allowed for the interested parties to submit comments had long since lapsed.

The contested decision

22 On 25 July 2001, the Commission adopted Commission Decision 2001/882/EC on the State aid implemented by France in the form of development assistance for the cruise vessel *Le Levant*, built by Alstom Leroux Naval for operation in Saint-Pierre-et-Miquelon ('the contested decision'). That decision was published in the Official Journal on 12 December 2001 (OJ 2001 L 327, p. 37).

23 According to the contested decision, the aid was granted in 1996 when the cruise vessel *Le Levant* was acquired by a group of private investors who had set up a maritime joint ownership structure on the Bank's initiative. The vessel was subsequently leased to CIL, a subsidiary of a French company registered in Wallis-et-Futuna, a French overseas territory. The investors were allowed to deduct their investment from their taxable income pursuant to the Loi Pons, which introduced a tax scheme that was approved by the Commission in 1992. Those tax concessions enabled CIL to operate the vessel on favourable terms (recitals 5 and 6). The aid derived from the tax concessions amounted to FRF 78 million (EUR 11.9 million) (recital 7). The investors had the right and obligation to resell their shares after five years, that is, at the beginning of 2004. CIL also had the right and obligation to repurchase those shares at a price which allowed the value of the aid to be passed on to it. As a condition of the aid, CIL was required to operate the vessel for a minimum of five years, mostly to and from Saint-Pierre-et-Miquelon, for 160 days a year (recital 5).

24 The contested decision assesses the aid in question in the light of Article 4(7) of the Seventh Directive, 'given that it concerns aid for shipbuilding granted as development assistance in 1996 under an aid scheme (the Loi Pons) approved in 1992' (recital 16).

25 According to that decision, that assessment showed that the *Le Levant* operation met the OECD development criteria, as communicated to the Member States by the Commission's letter of 3 January 1989 (recitals 18, 19 and 21).

26 However, under the principle laid down by the Court of Justice in Case C-400/92 *Germany* v *Commission* [1994] ECR I-4701, according to which the Commission is obliged to verify the development content of the project separately from the OECD criteria, the contested decision finds that the *Le Levant* operation did not have a genuine development component as contemplated in that judgment, given the insufficient economic and social benefits for Saint-Pierre-et-Miquelon (recitals 20 and 22 to 33).

27 Consequently, Article 1 of the contested decision declares that '[t]he State aid which France has implemented in the form of tax concessions and as development assistance for the cruise vessel *Le Levant* ... cannot be regarded as genuine development assistance within the meaning of Article 4(7) of [the Seventh Directive] and is therefore incompatible with the common market'.

28 At the stage of determining the beneficiary from whom the incompatible aid must be recovered, the contested decision reviews one by one the situations of the investors, the operator of the vessel (CIL) and the shipyard.

29 According to the contested decision, the immediate beneficiaries of the aid are the investors, who benefited from the tax concessions (recital 35). On that point, the decision reproduces the arguments put forward by the French authorities, which indicate that the investors obtained advantages from the tax concessions and were the owners of the vessel under the terms of the joint ownership (recital 36). Thus, 'there is no doubt that it is the investors, as the direct beneficiaries and current owners of the vessel, which should repay the aid'.

30 Regarding the operator of the vessel (CIL), the contested decision notes that the investors will continue to enjoy the advantages of the tax concessions until the vessel is sold to CIL, that is, until the beginning of 2004, and that, according to the information available, the price of that sale will transfer the aid to the operator CIL. Thus CIL will be the principal beneficiary of the aid once the vessel has been sold to it at an advantageous price (recital 36). The contested decision also states that '[i]f the ship had been sold to CIL at below the market price and if the aid had thus been transferred to it, it would be CIL that would have to repay the aid' and that '[s]ince this transfer will not take place before mid-2003, the operator CIL cannot be considered liable to repay the aid at this stage' (recital 40).

31 As to the shipyard, the contested decision observes that it benefited indirectly from the aid in that the aid enabled it to obtain an order that it might not otherwise have won (recital 37). However, the decision finds that the aid should not be recovered from the shipyard, since it cannot be held responsible for the operation of the ship after delivery and the rules applied in the present case are not directed at the shipyard (recital 41).

32 Accordingly, Article 2 of the contested decision requests the French Republic to take all necessary measures to 'discontinue and recover from the investors, as the direct beneficiaries and current owners of the cruise vessel, the aid referred to in Article 1 and unlawfully made available to the beneficiary'.

Legal proceedings

33 On 8 October 2001, France brought an action before the Court of Justice for annulment of the contested decision, by which it contested the Commission's assessment that the disputed aid was not development aid.

34 On 20 February 2002, EURL *Le Levant* 001 and the other applicants, natural and legal persons whose names are listed in the annex, brought the present action before the Court of First Instance.

35 By separate document lodged on 23 April 2002, B and 255 other applicants submitted an application for interim measures, asking for suspension of operation of the contested decision until a ruling was given on the substance of the action for annulment and suspension of operation of the contested decision until the Court of First Instance had given a ruling on the application for interim measures.

36 By order of the President of the Court of First Instance of 25 June 2002 in Case T-34/02 R *B* v *Commission* [2002] ECR II-2803, the application for interim measures was dismissed.

37 By order of the President of the Fifth Chamber (Extended Composition) of the Court of First Instance of 30 April 2002, the proceedings in Case T-34/02 were suspended pending final judgment of the Court of Justice in Case C-394/01.

38 By judgment of 3 October 2002 in Case C-394/01 *France* v *Commission* [2002] ECR I-8245, the Court of Justice dismissed the action, stating that the various arguments put forward by the French Republic criticising the Commission's assessments of job creation and economic benefits were not well founded or had not been put forward during the administrative procedure. The suspension of proceedings in the present case was lifted as a result of that judgment.

39 By way of measures of organisation of procedure, on 22 October 2004 the Court of First Instance called upon the parties to submit their comments on two questions, to which the applicants replied by letter of 19 November 2004 and the Commission by letter of 18 November 2004.

40 By its first question, the Court of First Instance asked the parties to state whether the sale of the cruise vessel to CIL had taken place, at what price, and whether the price had enabled the value of the aid to be passed on.

41 In reply, the applicants stated that the cruise vessel *Le Levant* had been sold to CIL on 2 January 2004. On that date, CIL purchased the 738 quirats of the vessel which were not in its possession for the amount of EUR 17 731 821. According to the applicants, that amount was determined in accordance with the promises of purchase and sale made at the beginning of the operation and corresponds to approximately 50% of the initial value of the shares in the joint ownership, which had been purchased for a total amount of EUR 35 789 508. As of 2 January 2004, then, CIL was the sole owner of the 740 quirats which made up the joint ownership of the cruise vessel *Le Levant* examined in the contested decision, and the joint ownership was dissolved.

42 The Commission, for its part, stated that it did not have any information on the sale price and whether it had enabled the value of the aid to be passed on.

43 By its second question, the Court of First Instance asked the parties, if it emerged that the investors were no longer the current owners of the cruise vessel *Le Levant* and the sale price of the cruise vessel had passed the value of the aid on to CIL, to state whether the aid in question could be recovered from the investors.

44 In reply, the applicants stated that they were of the view that the aid in question could no longer be recovered from them, since CIL had been the owner of the vessel *Le Levant* since 2 January 2004 and CIL was the real beneficiary of the aid in question here because it had benefited, in its capacity as owner of the vessel and active undertaking on the market, from an economic advantage obtained outside normal market conditions because of the intervention of the French authorities. Consequently, the applicants queried whether Article 2 of the contested decision,

according to which France was to take all necessary measures to recover the aid from the investors, had become devoid of purpose. As suggested by the contested decision itself in recitals 36 and 40, the applicants stated that Article 2 would become devoid of purpose on the day on which the value of the aid was transferred to CIL, the operator of the vessel. The applicants then stated that, if they maintained their action for annulment, the Court of First Instance could in any event find that, regardless of the grounds for annulment, the aid in question could not be recovered from the private investors according to the contested decision itself.

45 The Commission submitted that the Court's second question is not related to the present case, which concerns the lawfulness of the contested decision and must therefore be considered solely on the basis of the information it had during the administrative procedure. The Court of First Instance's second question in fact relates to the implementation of the contested decision, under which it is for the Member State concerned to communicate with the Commission, by way of administrative cooperation, to inform it of any questions or difficulties to which the implementation might give rise.

46 On 16 December 2004, the parties were called upon by the Court to attend an informal meeting before the President of the First Chamber (Extended Composition) and the Judge-Rapporteur. That meeting was held at the Court on 24 January 2005.

47 On hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber, Extended Composition) decided to open the oral procedure and, by way of measures of organisation of procedure, asked the applicants and the Commission to produce certain documents.

48 By letter from the applicants of 9 August 2005 and by letter from the Commission of 28 July 2005, the parties produced the documents requested by the Court.

49 The parties presented oral argument and answered the questions put by the Court at the hearing on 27 September 2005.

Forms of order sought

50 The applicants claim that the Court should:

— annul the contested decision;

— in the alternative, rule that the aid in question cannot be recovered from the private investors on the basis of Article 2 of the contested decision;

— order the Commission to pay the costs.

51 The Commission contends that the Court should:

— dismiss the action as unfounded;

— order the applicants to pay the costs, including those relating to the interim proceedings.

Law

The admissibility of the action with respect to certain applicants

1. The authorities granted on behalf of certain EURLs

— Arguments of the parties

52 The Commission observes that the lawyer for the applicants is acting in the present case under the authorities conferred on him, first, by the managers of the various applicant EURLs and, second, by the sole shareholders of each of those EURLs. In that context, it states that the authorities granted to the lawyer by the managers of the various EURLs are 'signed' by a stamp and are not dated. The Commission further notes that the authorities given by the sole shareholders of 10 of the EURLs — *Le Levant* 3, *Le Levant* 4, *Le Levant* 73, *Le Levant* 96, *Le Levant* 150, *Le Levant* 153, *Le Levant* 182, *Le Levant* 209, *Le Levant* 272 and *Le Levant* 273 — are not dated. It also notes that no authority was given to the lawyer by the sole shareholders of eight of the EURLs — *Le Levant* 15, *Le Levant* 20, *Le Levant* 46, *Le Levant* 144, *Le Levant* 203, *Le Levant* 250, *Le Levant* 251 and *Le Levant* 269. The Commission leaves it to the Court to rule on the validity of the authorities.

53 The applicants submit that Article 44 of the Rules of Procedure of the Court of First Instance requires only that proof be provided that the authority to act has been conferred on the lawyer by someone authorised for that purpose, without imposing any specific formal conditions. In the present case, moreover, the Commission does not deny that the manager of an EURL is fully empowered to bring legal proceedings on behalf of the company he or she manages. The applicants add that, if the Court were to find it necessary, they could always be called upon to put the application in order pursuant to Article 44(6) of the Rules of Procedure.

— Findings of the Court

54 Article 44(5) of the Rules of Procedure provides:

'An application made by a legal person governed by private law shall be accompanied by:

(a) the instrument or instruments constituting and regulating that legal person or a recent extract from the register of companies, firms or associations or any other proof of its existence in law;

(b) proof that the authority granted to the applicant's lawyer has been properly conferred on him by someone authorised for the purpose.'

55 First, as to the fact that the documents conferring authority on the lawyer by the managers of the various EURLs are not dated, the Court notes that they were necessarily drawn up before the action was brought, because they are one of the annexes thereto. Accordingly, the fact that there is no date on them does not make the EURLs' action inadmissible. The same holds true for the argument that the authorities conferred on the lawyer by the sole shareholders of 10 of the EURLs — *Le Levant* 3, *Le Levant* 4, *Le Levant* 73, *Le Levant* 96, *Le Levant* 150, *Le Levant* 153, *Le Levant* 182, *Le Levant* 209, *Le Levant* 272 and *Le Levant* 273 — are not dated.

56 Second, regarding the fact that the authorities conferred on the lawyer by the managers of the various EURLs were signed using a stamp of the signature, name and title of the manager, the Court notes that the use of such a stamp can be explained by the fact that the various EURLs all have the same manager as signatory

who, rather than having to sign each application by hand, showed his consent through the use of a stamp. Accordingly, the signature of those authority documents through the use of a stamp does not lead to the EURLs' action being inadmissible, in the absence of other factors which cast doubt on the manager's consent.

57 Third, regarding the fact that no authority was conferred on the lawyer by the sole shareholders of eight of the EURLs — *Le Levant* 15, *Le Levant* 20, *Le Levant* 46, *Le Levant* 144, *Le Levant* 203, *Le Levant* 250, *Le Levant* 251 and *Le Levant* 269 — it suffices to state that the authority conferred on the lawyer by the manager is sufficient to allow that lawyer to represent the interests of those companies, all the more so as the Commission's observations do not call into question the authority conferred by the manager, but merely criticise certain formal aspects of the conferral of that authority, namely the lack of a date and the use of a stamp for the signature.

58 It follows from the foregoing that none of the arguments put forward by the Commission affects the admissibility of the action in respect of the various EURLs.

2. The authorities granted by certain natural persons on their own behalf

— Arguments of the parties

59 The Commission states that the authorities signed by 4 of the 256 natural persons who brought the action do not contain the place and date of their signature. It leaves it to the Court to rule on the validity of those authorities.

60 The applicants maintain that the Rules of Procedure do not provide that the lodging of a document attesting to the authority conferred on a lawyer is a condition of admissibility of the action. The lawyer acting for a party is required only to establish his professional status and is not required to produce a duly executed authority to act, subject to proof, if challenged, that he is so authorised (Case 14/64 *Gualco* v *High Authority* [1965] ECR 51 and Case T-139/89 *Virgili-Schettini* v *Parliament* [1990] ECR II-535).

— Findings of the Court

61 The investors, private individuals, are involved in the present case in a dual capacity. The first is that of sole shareholder in the applicant EURLs and it is in that capacity that the investors provided the authorities to act examined above in order to enable the lawyer designated therein to represent those EURLs before the Court. The investors are also involved as natural persons and it is in that capacity that they conferred authority on the lawyer to represent them in the present case.

62 Article 44(3) of the Rules of Procedure provides:

'The lawyer acting for a party must lodge at the Registry a certificate that he is authorised to practise before a Court of a Member State or of another State which is a party to the EEA Agreement.'

63 It follows from that provision that the lawyer acting for a party is not required to produce a duly executed authority to act in the lodging of an application, subject to proof if challenged that he is so authorised (*Gualco* v *High Authority*, at p. 57).

64 Thus the Rules of Procedure allow natural persons to be represented by a lawyer without that lawyer having to produce a document of authority to act, whereas that is a requirement for representing a legal person. It is, in principle, sufficient that the lawyer produce a document attesting to his professional status as a lawyer in a Member State. That formality is sufficient and was complied with in the present case.

65 The Commission's observations in any event relate to the fact that the documents conferring authority to act lodged by 4 of the 256 natural persons who brought the action do not contain the place and date of their signature. Those documents were, however, prepared before the action was brought, since they make up one of the annexes to the application; the question of the place and date of their signature is irrelevant for the purposes of this case. It follows that the lack of date and place on the documents conferring authority to act does not give rise to an issue which calls for the application to be put in order.

66 It follows from the foregoing that none of the arguments put forward by the Commission affects the admissibility of the action with respect to the applicant natural persons.

67 Consequently, the pleas of inadmissibility put forward by the Commission must be rejected.

Substance

68 The applicants put forward 11 pleas in law in support of their action. The first plea alleges lack of competence on the part of the Commission and infringement of Article 3(1)(g) EC, Article 5 EC, Article 87 EC and Article 211 EC and also violation of Article 1 of Protocol No 1 to the European Convention on Human Rights and Fundamental Freedoms ('the ECHR'). The second plea alleges violation of the

procedural guarantees provided for in Article 88(2) EC, Article 6 of Regulation No 659/1999 and Article 6 of the ECHR. The third plea alleges infringement of Article 87(1) EC. The fourth plea alleges infringement of Article 4(7) of the Seventh Directive. The fifth plea alleges violation of the principle of the protection of legitimate expectations. The sixth plea alleges violation of the principle of legal certainty. The seventh plea alleges infringement of Article 14 of Regulation No 659/1999. The eighth plea alleges material inaccuracies and manifest errors of assessment of fact. The ninth plea alleges violation of the obligation to state reasons. The tenth plea alleges infringement of Article 153(2) EC. The eleventh plea alleges infringement of Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to de minimis aid (OJ 2001 L 10, p. 30).

69 It is appropriate to begin by considering the second plea, before considering the arguments put forward under the third and ninth pleas.

1. The second plea

— Arguments of the parties

70 The applicants criticise the Commission for infringing the right to be heard provided for in Article 88(2) EC and in Article 6 of Regulation No 659/1999, taken for the application of that provision, and also the principles laid down in Article 6 of the ECHR. They maintain that the contested decision is injurious to them in designating them as direct beneficiaries of illegal State aid which they are required to reimburse, and submit that at no time have they been properly called upon or allowed to present their observations on the matter.

71 The applicants maintain, first, that the decision to open the procedure did not enable them to consider the possibility that they might be named as beneficiaries of the aid, because it implied that that aid had been granted to the shipyard or to CIL, the operator of the vessel. Accordingly, once it had changed its assessment of the beneficiaries following publication of the decision to open the procedure, the Commission should have published a fresh decision to open the procedure, given the applicants a period in which to enable them to submit their comments, or taken any appropriate measures in order to draw their attention to the hitherto unknown status which was to be conferred on them in the final decision, which differed significantly from the status contemplated in the decision to open the procedure. Such comments were all the more necessary in the light of the fact that the contested decision modifies previous Commission practice relating to the concept of 'beneficiary undertaking' by applying it to private investors involved in a financial investment, that that decision does not take account of the earlier approval of the Loi Pons by the Commission and that it does not take account, either, of the conduct of the French authorities, which did not communicate the decision to open the procedure to the applicants — taken as beneficiaries of the aid — as it was asked to do in the decision to open the procedure.

72 The Commission states that, according to the case-law, Article 88(2) EC does not require individual notice to be served but only that all persons who may be concerned be made aware that a procedure has been initiated and given an opportunity to submit their comments in this regard. That being so, the publication of a notice in the Official Journal is an adequate and sufficient means of informing all the parties concerned that a formal procedure has been initiated (Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 17, and Joined Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke and Lech-Stahlwerke* v *Commission* [1999] ECR II-17, paragraph 232). In the present case, the decision to open the procedure, published in the Official Journal on 5 February 2000, meets those requirements because that publication provided the parties concerned with general information on the essential aspects of the aid project and set out the points of the case about which the Commission had doubts.

73 The Commission adds that, although the applicants may have believed that they were not beneficiaries of the aid measure, they cannot maintain that they were not concerned by that procedure, because it is settled case-law that 'parties concerned' within the meaning of Article 88(2) EC include not only the undertaking or undertakings benefiting from the aid, but those persons, undertakings or associations whose interests might be affected by the grant of the aid, in particular competing undertakings (*Intermills* v *Commission*, paragraph 16, and Case T-69/96 *Hamburger Hafen- und Lagerhaus and Others* v *Commission* [2001] ECR II-1037, paragraph 40).

74 Moreover, in response to the applicants' argument that it changed its assessment of the beneficiaries of the aid after publication of the decision to open the procedure, which should have led to the publication of a fresh decision to open the procedure in order to ensure that their procedural guarantees were upheld, the Commission maintains that its complaints against the French Republic were not changed during the formal investigation procedure. Thus, the decision to open the procedure sets out the Commission's doubts as to the compatibility of the aid in the light of the Seventh Directive and the final decision assesses the aid in relation to the conditions laid down in Article 4(7) of that directive and finds that the aid is incompatible with the common market.

75 Second, the applicants maintain that the Commission infringed the third sentence of Article 6(1) of Regulation No 659/1999 by refusing to grant the extension of the one-month time-limit for submitting comments requested by EURL *Le Levant* 114 in its letter of 19 July 2001. That request for an extension was duly justified, given that the investors could legitimately consider that they were not concerned by the decision to open the procedure and that the Commission is not required to take a decision on State aid within any specific time period.

76 The Commission states that it is apparent from the letter of 13 July 2001 from EURL *Le Levant* 114 that it had learned too late of the decision to open the procedure, published on 5 February 2000. That belated discovery also affects the other EURL *Le Levant* undertakings, because they are all managed by an employee of the Bank and it was the manager of EURL *Le Levant* 114 who gave the legal representative of that company the authority to intervene before the Commission in the administrative procedure. Accordingly, the failure of EURL *Le Levant* 114 to intervene in the procedure which led to the adoption of the contested decision was not attributable to the content of the decision to open the procedure but only to that company's learning too late of the decision to open the procedure and of the existence of the formal investigation procedure. The applicants cannot therefore allege that the content of the decision to open the procedure led them to believe that they were not concerned by that procedure and that they thereby suffered an infringement of their procedural guarantees. Moreover, the Commission states that the usual period of one month allowed following publication of the decision to open the procedure had been largely exceeded, as it stated in its letter of 24 July 2001 in reply to the two letters from EURL *Le Levant* 114.

— Findings of the Court

77 The first subparagraph of Article 88(2) EC provides:

'If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 87, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.'

78 It follows from that provision that, before finding that a State aid measure is incompatible with the common market, the Commission must have called on the interested parties to submit their comments.

79 The scope of that obligation is specified by Article 1(h) of Regulation No 659/1999, which defines 'interested party' as 'any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations'.

80 Where, as in the present case, the formal investigation procedure concerns illegal aid which has been implemented, the question of identifying the beneficiary takes on major importance, since Article 14(1) of Regulation No 659/1999 provides that, in the event of a 'negative decision', finding that such aid is incompatible with the common market, 'the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary'.

81 Accordingly, the applicants in the present case, that is, the investors who were allowed to deduct their investment from their taxable income, had to be called on to submit their comments in the administrative procedure, because they are named in the contested decision as direct beneficiaries of the aid (recital 35) and they are 'interested parties' within the meaning of the above definition.

82 The identification of the beneficiary of the aid is necessarily one of the 'relevant issues of fact and law' within the meaning of the first sentence of Article 6(1) of

Regulation No 659/1999 which must, under that provision, be contained in the decision to open the procedure if that is possible at that stage of the procedure, since it is on the basis of that identification that the Commission will be able to adopt the recovery decision.

83 In the absence of an indication that a party is a beneficiary of the aid in dispute, either in the decision to open the procedure or at a later stage in the formal investigation procedure prior to adoption of the final decision finding that the aid is incompatible with the common market, that type of interested party cannot be regarded as having been duly called on to submit his comments, because he may legitimately believe that such comments are not necessary, since he is not named as the beneficiary of the aid to be recovered.

84 In that context, that is, with a view to determining whether the beneficiaries of the aid to be recovered could in fact be considered as having been called on to submit their comments in the administrative procedure, the decision to open the procedure published in the Official Journal on 5 February 2000 should be examined first.

85 In that decision, the Commission expressed doubts as to whether the conditions laid down in Article 4(7) of the Seventh Directive had been complied with. It also invited the interested parties to submit their comments within one month of the date of publication. The Court finds, however, that the decision to open the procedure made no reference to the investors as potential beneficiaries of the alleged aid but, on the contrary, gave the impression that that beneficiary was CIL, which was referred to as the operator and ultimate owner of the vessel.

86 Thus, with respect to the private investors, the decision to open the procedure stated in the third paragraph of the part entitled 'Summary':

'The vessel was financed by private investors who subsequently leased the vessel to CIL. The investors were entitled to deduct their investment costs from their taxable income in accordance with a fiscal scheme approved by the Commission ...'

87 With respect to CIL, however, that decision stated at the same place:

'The tax breaks had an estimated aid intensity equivalent to 34% net and enabled CIL to hire the vessel at a very low price. CIL is the operator (and eventual owner) of the vessel. ... It is obliged to exploit the vessel for a minimum of five years mainly to and from Saint-Pierre-et-Miquelon. Furthermore, after the five years CIL is obliged to buy the vessel from the investors.'

88 The investors were thus legitimately able to believe that they were not targeted by the decision to open the procedure, given that it stated that the tax scheme under which they had been allowed to deduct their investment from their taxable income — the Loi Pons — had been approved by the Commission.

89 Moreover, it is apparent from the content of the discussions which took place between the French authorities and the Commission during the preliminary

investigation procedure that the only beneficiary of the aid mentioned at that stage of the procedure was CIL, 'the owner-operator' of the vessel, and not the private investors (see the letter of 12 May 1999 from the French authorities to the Commission). It is, moreover, in that context that CIL — and not the private investors — was able to participate in the administrative procedure (see recitals 10 and 11 of the contested decision).

90 The initial designation of CIL as the beneficiary of the alleged aid is, moreover, supported by the fact that the decision to open the procedure refers to the beneficiary of the aid in the singular, not in the plural as in the contested decision. In the decision to open the procedure, the Commission asked the French authorities (penultimate paragraph in the part entitled 'Letter') to send promptly a copy of that decision to 'the beneficiary of the aid'.

91 Accordingly, as they were not identified as beneficiaries of the aid in the decision to open the procedure, the private investors were not, at that stage, given notice to submit their comments pursuant to Article 88(2) EC or called upon to submit comments within a prescribed period within the meaning of Article 6(1) of Regulation No 659/1999.

92 In those circumstances, it is also appropriate to examine the Commission's reply to the request from EURL *Le Levant* 114 by letter of 19 July 2001, by which it extended the one-month period granted to the interested parties to submit their comments on the decision to open the procedure. The last sentence of Article 6(1) of Regulation No 659/1999 provides that '[i]n duly justified cases, the Commission may extend the prescribed period' normally consisting of one month allowed to the parties to submit their comments on the decision to open the procedure.

93 However, by letter of 24 July 2001, the Commission replied to the letter from EURL *Le Levant* 114 by noting that the one-month period from the date of publication of the decision to open the procedure allowed for the lodging of comments by the interested parties had 'long since lapsed', without adopting a position on the request for an extension of that period made by EURL *Le Levant* 114. That refusal is all the more deplorable because the decision to open the procedure did not identify the private investors as beneficiaries of the aid to be recovered but, on the contrary, gave the impression that the beneficiary was CIL, which had been named as the operator and ultimate owner of the vessel.

94 Accordingly, by refusing to allow an extension of the period as requested and thereby failing to give EURL *Le Levant* 114 an opportunity to submit its comments on the decision to open the procedure, without even giving reasons why the request of 19 July 2001 was not 'duly justified', the Commission infringed the third sentence of Article 6(1) of Regulation No 659/1999.

95 If there had not been such a procedural failure, that is, if the applicants or EURL *Le Levant* 114 had actually had an opportunity during the formal investigation procedure to submit their comments on having been named as beneficiaries of the aid to be recovered, the possibility cannot be excluded that the procedure might have led to a different result, in particular with respect to the assessment of the incompatibility of the aid with the common market in accordance with the criteria laid down in Article 87(1) EC.

96 Furthermore, the Commission cannot entrench itself behind a formalist interpretation of its State aid obligations, given that the main issue here is the fact that an individual against whom the Commission is preparing to adopt an adverse decision designating that party as a beneficiary of incompatible aid from whom that aid is to

be recovered must be given the opportunity to submit comments prior to the adoption of such a decision.

97 In the present case, it is clear that the contested decision was adopted without such an opportunity having been given to the private investors. By refusing to hear EURL *Le Levant* 114 and by not identifying the investors as beneficiaries of the potentially incompatible aid to be recovered in the decision to open the procedure, the Commission violated a general principle of Community law. That principle requires that any person against whom an adverse decision may be taken must be given the opportunity to make his views known effectively regarding the facts held against him by the Commission as a basis for the disputed decision. Thus, in a procedure based on Article 86(3) EC (ex Article 90(3) of the EC Treaty), where, as in State aid cases, the Member State is the addressee of the Commission's decision, the Court has held that the undertakings which are the beneficiaries of the State aid in question have the right to be heard, stating that those undertakings were the direct beneficiaries of the State measure at issue, that they were expressly named in that measure and explicitly targeted by the contested decision and that the economic consequences of that decision directly affect them (Joined Cases C-48/90 and C-66/90 *Netherlands and Others* v *Commission* [1992] ECR I-565, paragraphs 50 and 51).

98 It follows from the foregoing that the Commission infringed Article 88(2) EC and Article 6(1) of Regulation No 659/1999.

99 Accordingly, the Court finds that the second plea is well founded, without it being necessary to consider the plea alleging violation of the principles on which Article 6 of the ECHR is based.

2. The third plea: infringement of Article 87(1) EC, and the ninth plea: infringement of the obligation to state reasons

— Arguments of the parties

100 The applicants state, first, that the contested decision infringes Article 87(1) EC in classifying the private investors as beneficiaries of the aid when the measure in question does not confer any competitive advantage on them and does not affect trade between Member States. Only an economic operator on whom an advantage is conferred and is thereby in a favourable position compared to his competitors could be classified as a beneficiary undertaking within the meaning of that provision. The search for the actual beneficiary of aid, who may or may not be the formal addressee of the measure, thus entails identifying the undertaking which actually enjoys an economic benefit in its commercial dealings which is likely to distort competition (Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 57).

101 In the present case, the applicants maintain that there is a fundamental difference between the private investors, who are the direct addressees of the tax advantages granted, and the undertaking concerned, namely the operator CIL, which is the indirect beneficiary of the economic advantage in the market in question and, consequently, the beneficiary of the State aid (for an example of the distinction between the beneficiary of a tax benefit and the beneficiary of an economic advantage, see Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraphs 26 and 27). The tax benefit is only a means in the aid mechanism and not a benefit which actually distorts competition at the level of the private investors. The contested decision thus confuses the tax benefit received directly by the private investors, as indicated in recital 35, with the competitive advantage which is likely to flow indirectly from that benefit, which benefits only CIL. The fact that the investors receive a tax benefit does not necessarily mean that they receive a competitive advantage on a given market which affects trade between Member States.

102 Likewise, the applicants maintain that the contested decision breaches the obligation to state reasons by failing to specify exactly what the advantage received by the private investors was (Joined Cases C-329/93, C-62/95 and C-63/95 *Germany and Others* v *Commission* [1996] ECR I-5151, paragraph 56). On that point, they complain that the contested decision, without seeking to determine what economic advantage they could receive when they had no operational responsibility for the vessel, nevertheless finds that they were beneficiaries of the aid simply because they received income tax concessions in stating in recital 39 that, although it is doubtful whether any of the private individual investors can be held responsible for the misuse of the aid, they have nevertheless benefited and continue to benefit from the tax concessions as owners of a vessel which was bought on attractive terms.

103 The contested decision also contains contradictory reasoning in attempting to assign the effects of an economic advantage to the private investors, whereas it was in reality granted either to the shipyard as shipbuilding aid or to CIL for the management and operation of the vessel. Thus, as regards the shipyard, recital 41 of the contested decision states that no recovery should take place from it since it cannot be held responsible for the operation of the vessel after delivery. By contrast, a few paragraphs earlier, recital 37 states that the shipyard can be said to have benefited indirectly in that the aid enabled it to obtain an order that it might not otherwise have won. Likewise, with respect to CIL, the Commission should have found that it was responsible for the alleged non-compliance with the substantive OECD rules because it is in charge of the use of the vessel. Considered from this angle, the contested decision does not explain how recovery from the private investors will deprive the operator and manager of the joint ownership of the ultimate benefit of the economic advantage once the vessel has been sold to it at a favourable price.

104 Second, the applicants maintain that the contested decision infringes Article 87(1) EC and the obligation to state reasons by failing to state how the aid in question is likely to affect competition and trade within the Community (*Intermills* v *Commission*, paragraph 38; Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, paragraphs 22 to 24; and *Germany and Others* v *Commission*, paragraphs 52 and 53). The applicants state in particular that the contested decision does not identify the market on which competition was allegedly distorted and on which the private investors allegedly enjoyed an advantage. Thus, the contested decision does not clarify whether the relevant market is the cruise services market or the market for products relating to cruise vessels, or what the geographical dimensions of such a market might be: global, regional or local to Saint-Pierre-et-Miquelon. Likewise, the contested decision does not identify the distortion of competition at issue, which is all the more difficult to do because the Loi Pons is applicable to all taxpayers and a tax measure which benefits all taxpayers equally does not distort competition (see Commission Notice (EC) 96/C 266/14 pursuant to Article [88](2) of the EC Treaty to the other Member States and other interested parties concerning aids granted by Spain for the purchase of commercial vehicles — the Plan Renove Industrial (OJ 1996 C 266, p. 10)). The Loi Pons is selective only as regards the ultimate beneficiaries in that it confers full advantages only on certain undertakings established in the French overseas territories. Lastly, the private investors' tax situation has no effect on trade between Member States.

105 Third, the applicants observe that Commission Decision 1999/719/EC of 30 March 1999 on State aid which France is planning to grant as development aid in the sale of two cruise vessels to be built by Chantiers de l'Atlantique and operated by Renaissance Financial in French Polynesia (OJ 1999 L 292, p. 23; 'the Renaissance decision'), which found that aid which the French Republic intended to grant in the form of tax concessions granted to private investors under the Loi Pons was compatible with the common market, adopts this distinction between investor and operator, because it states that Renaissance Financial, and not the individual investors (natural persons), had to be regarded as the effective beneficiary of the aid.

The Renaissance decision also states that the effective beneficiary of the aid would be the shipyard if the conditions laid down in the decision were not complied with, in particular if the aid proved to be contrary to Article 4(7) of the Seventh Directive. Regarding the application of the OECD criteria, in particular the condition of residency of the actual owner and the condition that the undertaking which is the beneficiary of the aid must not be a non-operational subsidiary of a foreign company, neither the Renaissance decision, nor Commission Decision 92/569/EEC of 31 July 1992 concerning proposed aid by Germany to the Chinese shipping company Cosco for the construction of container vessels (OJ 1992 L 367, p. 29; 'the Cosco decision'), nor the decision to open the procedure in the present case identifies the investors concerned as actual owners of the vessel or as beneficiaries of the aid.

106 The Commission submits, first, that the *Le Levant* operation was set up in order to enable the private investors to take advantage of a tax benefit. The fact that that package was legal under French law does not in itself make it lawful from the point of view of the rules governing State aid. After noting that cases of application of the Loi Pons in shipbuilding were to be notified to it, the Commission argues that, because of the fiscal transparency of the EURLs, each private investor received an income tax benefit from the deduction allowed under the Loi Pons in favour of certain undertakings investing overseas. Consequently, the effect of the State aid resulting from the benefit under the Loi Pons in the form of tax concessions was to provide operating aid in favour of the supply of cruises by the owners and operators of the vessel.

107 The Commission submits, second, that the contested decision states clearly, from the title onwards, that the aid in question concerns the operation of a cruise vessel intended for operation in Saint-Pierre-et-Miquelon. The Commission's analysis with respect to the assessment of the development component and the economic spin-

offs from the *Le Levant* operation also shows that it was indeed to the operation of a cruise vessel and the supply of cruises that the contested decision refers. That is also readily apparent from the very nature of the Loi Pons and the features of the *Le Levant* operation. The Commission adds that the contested decision states clearly that the investors, the then owners of the vessel, obtained tax benefits intended to offset specific difficulties associated with a productive investment intended to be utilised overseas for a period of five years, at the end of which they were to sell the vessel to CIL at a price which would pass the aid on to it, so that CIL would become the ultimate beneficiary of the aid once the vessel had been sold to it at a favourable price (recitals 36, 39 and 40 of the contested decision). Lastly, the Commission states that recital 16 of the contested decision specifies the framework for the assessment of the aid in question, namely Article 4(7) of the Seventh Directive, and that recital 33 contains the conclusion of that assessment, namely that that aid did not meet the criteria laid down in that provision. There is nothing in the analysis from which it might be inferred that the beneficiary of the aid was to be the shipyard.

108 The Commission submits, third, that the contested decision does not contradict its earlier decision-making practice. Regarding the Renaissance decision, it observes that it was indeed a case of application of the Loi Pons and that the French authorities had indicated to the Commission that the financing plan in question provided for the use of structures involving individuals and that, when the investment was to be leased to the operating undertaking, the administrative authorities would check that the tax benefit had been transferred to that undertaking through a markdown of the fees to be borne by it. However, that decision had been adopted on the basis of the information provided by the Member State, according to which the investors in question were metropolitan companies and the package used allowed for effective retrocession of the tax aid to the owner-operator, which is a material configuration different from the one in this case. Regarding the Cosco decision, the Commission states that the situation was fundamentally different from the present one, since the Chinese owner-operator Cosco had ordered container vessels from German shipyards and the notified aid was intended to cover part of the contract price of the vessels in question.

— Findings of the Court

109 Article 87(1) EC provides that '[s]ave as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market'.

110 Classification as aid, in the sense of State aid incompatible with the common market, requires that all the conditions set out in that provision are fulfilled (Case C-142/87 *Belgium* v *Commission ('Tubemeuse')* [1990] ECR I-959, paragraph 25; Case C-482/99 *France* v *Commission* [2002] ECR I-4397, paragraph 68; and Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraph 74). It follows from Article 87(1) EC that those conditions are as follows. First, there must be an intervention by the State or through State resources. Second, the intervention must be likely to affect trade between Member States. Third, it must confer an advantage on the recipient by favouring certain undertakings or the production of certain goods. Fourth, it must distort or threaten to distort competition.

111 The Court also notes that it is settled case-law that the statement of reasons in an adverse individual decision must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63).

112 In the assessment of the incompatibility of the aid, the contested decision merely indicates that the aid granted for the vessel *Le Levant* must be assessed in the light of Article 4(7) of the Seventh Directive, 'given that it concerns aid for shipbuilding

granted as development assistance in 1996 under an aid scheme (the Loi Pons) approved in 1992' (recital 16). According to the decision, although the aid meets the OECD development aid criteria, which were communicated in the letter of 3 January 1989 from the Commission to the Member States (recitals 18, 19 and 21), it does not contain a genuine development component (recitals 20 and 22 to 33). Consequently, the contested decision finds the aid to be incompatible with the common market.

113 The contested decision does not, however, examine how the conditions laid down in Article 87(1) EC for a finding of incompatibility with the common market are met in the present case.

114 The Court notes that the conditions provided for in Article 87(1) EC must be met for State aid to be found to be incompatible with the common market. If the aid in question is compatible with the common market because the conditions laid down in Article 87(1) EC are not met, the Seventh Directive — which was adopted on the basis of Article 87(3)(e) EC — does not apply, because that directive necessarily supposes that the aid in question is incompatible with the common market under Article 87(1) EC.

115 First, regarding the condition in Article 87(1) EC relating to trade between Member States being affected, it is apparent from the contested decision that the aid in question concerns the operation of a vessel intended for operation in Saint-Pierre-et-Miquelon (title and recital 5).

116 It must be borne in mind that the islands of Saint-Pierre-et-Miquelon constitute a French administrative area situated in the north Atlantic off the coast of Newfoundland. It is one of the 'overseas countries and territories' (OCTs) which are not part of the territory of the Community.

117 In not offering any explanation on this point, the contested decision does not explain how the aid granted in the context of the *Le Levant* operation is likely to affect trade between Member States as contemplated in Article 87(1) EC.

118 Second, regarding the condition relating to the identification of the advantage conferred on the beneficiary of the aid and the fact that it favours certain undertakings or the production of certain goods, it is apparent from the contested decision that, although the direct beneficiaries of the aid were the private investors, the effects of the aid on competition related to CIL's ability to operate the vessel on favourable terms out of Saint-Pierre-et-Miquelon (Article 1 and recital 5).

119 However, given that the shipyard did not benefit directly from the aid (recital 37), that the private investors are identified by the contested decision only as owners of a vessel which was then leased to CIL (recital 5) and that CIL, which operates the vessel on favourable terms, is not the beneficiary of the aid at this stage and therefore cannot be considered liable to repay the aid (recital 40), the question arises as to how, in those circumstances, the financing of the construction of a vessel by those investors with the help of tax concessions conferred on them a benefit capable of favouring certain undertakings or the production of certain goods.

120 In failing to examine how the private investors' obtaining a tax benefit constitutes a competitive advantage as contemplated in Article 87(1) EC when the contested decision attributes that competitive advantage to CIL, the contested decision does not explain how the private investors were placed in an advantageous position by the aid in question.

121 Likewise, the contested decision does not provide any explanation as to how the private investors' leasing of the vessel to CIL was capable of transferring a potential competitive advantage from the private investors to the operator of the vessel.

122 The Court notes, moreover, on this point that the contested decision departs from the approach adopted by the Commission in the Renaissance decision. In that case, the Commission found aid granted by France in the form of tax benefits granted pursuant to the Loi Pons for the construction of two cruise vessels intended to be operated by Renaissance Financial in French Polynesia to be compatible with the common market. The financial package in question was similar to that used in the present case, in that it also provided for the acquisition of the ownership of the vessels by private investors, who subsequently leased the vessels to Renaissance Financial so that that company could operate them for five years in French Polynesia. In the Renaissance decision, the Commission found that the benefit of the aid had been transferred by the private investors to the operator of the vessel, who was the effective beneficiary because that operator had leased the vessels and undertaken to purchase those vessels at the end of a five-year period.

123 Third, regarding the condition relating to distortion or threat of distortion of competition, it is clear — as acknowledged by the Commission at the hearing — that there is nothing in the contested decision explaining how and on what market competition is affected or likely to be affected by the aid.

124 This absence of analysis is all the more striking because, in response to the comments submitted by the French authorities to the Commission on 14 June 2000, in which the French authorities stated that Saint-Pierre-et-Miquelon had benefited from the commercial spin-off effects of the vessel *Le Levant* because a number of shipping companies had indicated their intention to put in there, the contested decision states in recital 31 that it was not necessary to take account of those comments in order to assess the compatibility of the aid with the common market, since that statement was not quantified and probably could not be so and that such a statement did not relate directly to the development component of the *Le Levant* operation. In so doing, the Commission refused to consider the information relating to a possible cruise market on the islands, or elsewhere, which might be affected by the distortion of competition.

125 Consequently, the contested decision does not explain how the aid in question here meets three of the four conditions laid down in Article 87(1) EC for a finding that that aid is incompatible with the common market.

126 The Court also notes that the aid was granted under a tax scheme — the Loi Pons — which allowed for tax concessions for investments made in the overseas departments and territories and that that scheme had been approved by the Commission in 1992 (recitals 5 and 16).

127 The press release published by the Commission on 23 December 1992 concerning the Loi Pons stated that it based its assessment 'on the socioeconomic situation of the French overseas departments which justifies maintaining them as areas which can utilise the derogation provided for in Article 92(3)(a) of the EC Treaty [now Article 87(3)(a) EC]'. That derogation covers cases of aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment.

128 Thus, the contested decision also fails to explain why the aid in question is not capable of benefiting from the Commission's earlier decision not to raise objections to the tax measures provided for by the Loi Pons, in particular with respect to productive investments in the tourism sector in Saint-Pierre-et-Miquelon.

129 The Court also notes that the Commission's earlier practice shows that, in other decisions relating to shipbuilding aid, it considered whether the conditions in Article 87(1) EC were met (Cosco decision; Commission Decision 1999/657/EC of 3 March 1999 on the aid which Germany has granted by way of development assistance to

Indonesia in connection with the construction of two dredgers by Volkswerft Stralsund and the sale of the dredgers to Pengerukan (Rukindo) (OJ 1999 L 259, p. 19); and Commission Decision 1999/675/EC of 8 July 1999 on the State aid implemented by Germany in favour of Kvaerner Warnow Werft GmbH (OJ 1999 L 274, p. 23)).

130 In the Cosco decision in particular, the Commission examined the aid not only in the light of Article 4(7) of the Seventh Directive, but also on the basis of Article 87(1) EC. In that case, the aid in question was development aid which the German Government intended to grant to the People's Republic of China in the form of loans to finance container vessels. Those vessels were to be operated by Cosco, a State-owned corporation established in Peking. The vessels were to be built in Germany by German shipyards. In the Cosco decision, the Commission found that the aid in question distorted or threatened to distort competition in the common market and affected trade between Member States both in the shipbuilding and in the shipping sectors to an extent contrary to the common interest within the meaning of Article 87(1) EC.

131 It follows from all of the foregoing that the statement of reasons in the contested decision is flawed, such that the Court is not able to exercise its power of judicial review.

132 Consequently, the Court finds that the ninth plea is also well founded and that, accordingly, the contested decision must be annulled because the Commission failed to comply with its obligation to state reasons as required by Article 253 EC, without it being necessary to consider the other complaints and pleas put forward by the applicants.

The issue of whether the applicants and the Commission may rely on certain documents annexed to the application

— Arguments of the parties

133 The Commission submits that the applicants may not rely before the Court on arguments of fact which were not part of the administrative procedure (Case T-110/97 *Kneissl Dachstein* v *Commission* [1999] ECR II-2881, paragraph 102), whilst observing that the question of the applicants' participation in that procedure falls to be discussed as part of the substance of the case. Those arguments are superfluous when they merely reiterate facts put forward in documents which were part of the administrative procedure and are inadmissible when they raise facts which were not part of the administrative procedure. On the latter point, the applicants may not rely on the following documents in the judicial proceedings: the request for approval of the *Le Levant* operation submitted by the Bank and CIL on 19 August 1996, the approval of the operation by the French Budget Ministry on 26 November 1996, the prospectus approved by the French Commission des opérations de bourse on 3 December 1996, the record of the agreement of 9 December 1996 between the Bank and CIL, the written authority for the management and operation of the vessel by CIL, the cross-promises of purchase and sale between the Bank and CIL and the cross-promises of purchase and sale between the EURLs and the Bank.

134 The Commission submits that it, on the other hand, is entitled to rely on those documents in order to demonstrate that the allegations in the application are unfounded, and that the Court is empowered to take account of them.

135 The applicants argue that the Commission's reasoning presupposes that the administrative procedure takes place in a transparent and equitable manner, which was not the case here. Moreover, the documents referred to by the Commission

must necessarily be considered in this action because they relate to the grounds for annulment on which the applicants rely. Furthermore, those documents and the assertions derived from them do not concern the administrative procedure but rather the *Le Levant* operation and serve to identify the methodological errors committed by the Commission.

— Findings of the Court

136 According to settled case-law, in the context of an action for annulment under Article 230 EC, the lawfulness of a Community measure falls to be assessed on the basis of the elements of fact existing at the time when the measure was adopted. In particular, the assessments made by the Commission must be examined solely on the basis of the information available to the Commission at the time when those assessments were made (Case C-394/01 *France* v *Commission*, paragraph 34; Joined Cases T-371/94 and T-394/94 *British Airways and Others* v *Commission* [1998] ECR II-2405, paragraph 81; *Kneissl Dachstein* v *Commission*, paragraph 47; and Joined Cases T-111/01 and T-133/01 *Saxonia Edelmetalle and ZEMAG* v *Commission* [2005] ECR II-1579, paragraph 67).

137 In the present case, the question of whether the disputed documents may be used is now a moot point, as the Court has decided to annul the contested decision on grounds of procedural irregularities and failure to state reasons.

138 In any event, under the second plea, the Court has found that the Commission disregarded its obligations and did not take the necessary steps to enable the applicants to submit their comments in the course of the formal investigation procedure provided for in Article 88(2) EC.

139 The applicants were therefore entitled to rely on the disputed documents in support of their action for annulment of the contested decision and the Commission could contest those arguments in the judicial proceedings. In any event, however, the Court may assess those documents only within the limits of the powers at its disposal. If those documents contain facts which are liable to contradict the facts which the Commission had before it during the administrative procedure and on the basis of which the contested decision was adopted, the Court may not substitute its assessment for that of the Commission of the economic or legal implications which those facts might have on its analysis. As rightly pointed out by the Commission in its pleadings, if the Court were to do so, it would be conducting its own analysis and drawing its own conclusions from the new facts alleged rather than appraising the lawfulness of the contested decision. This is not the function of the Court of First Instance. If the Community Courts may not substitute their own assessment of the facts, especially in the economic field, for that of the originator of the decision (Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 23, and Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta and Others* v *Commission* [2000] ECR II-2319, paragraph 130), still less may they conduct a fresh assessment on the basis of facts which were not part of the administrative procedure before the Commission.

Costs

140 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to bear its own costs and to pay the costs incurred by the applicants, including those relating to the interim proceedings.

On those grounds,

THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)

hereby:

1. **Annuls Commission Decision 2001/882/EC of 25 July 2001 on the State aid implemented by France in the form of development assistance for the cruise vessel *Le Levant*, built by Alstom Leroux Naval for operation in Saint-Pierre-et-Miquelon;**

2. **Orders the Commission to bear its own costs and to pay the costs incurred by the applicants, including those relating to the interim proceedings.**

Vesterdorf Cooke García-Valdecasas

Labucka Trstenjak

Delivered in open court in Luxembourg on 22 February 2006.

E. Coulon B. Vesterdorf

Registrar President

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