II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

DECISIONS

COMMISSION

COMMISSION DECISION

of 20 May 2008

on State aid implemented by France for building the cruise vessel Le Levant (C 74/99 (ex-NN 65/99))

(notified under document number C(2007) 5419)

(Only the French text is authentic)

(Text with EEA relevance)

(2008/746/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having regard to Council Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding [1] and in particular Article 4(7) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above [2] and having regard to their comments,

Whereas:

I. PROCEDURE

(1) On learning of the aid which is the subject of this decision, the Commission initially asked the French authorities for information by letters dated 2 December 1998 and 4 June 1999. The French authorities submitted comments by letters dated 12 May 1999 (A/33645) and 19 August 1999 (A/36449).

(2) In the light of this information, by decision of 2 December 1999 [3], the Commission initiated the formal investigation procedure provided for in Article 88(2) of the Treaty in respect of certain aid granted for building the cruise vessel Le Levant.

(3) Following this decision, the French authorities submitted observations by letters dated 12 January 2000 (A/30357), 14 June 2000 (A/34964), 30 April 2001 (A/33440) and 11 June 2001 (A/34609). The Commission also received comments from an interested party, Compagnie des Îles du Levant (hereinafter referred to as CIL), which were forwarded to the French authorities and to which they replied.

(4) The proceedings culminated in 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 [4], by which the Commission found the aid incompatible with the common market and called on France to 'take all necessary measures to discontinue and recover [the aid] from the investors, as the direct beneficiaries and current owners of the cruise vessel'.

[1] OJ L 380, 31.12.1990, p. 27.
[2] OJ C 33, 5.2.2000, p. 6, and OJ C 23, 1.2.2007, p. 28.
[3] OJ C 33, 5.2.2000, p. 6.
[4] OJ L 327, 12.12.2001, p. 37.

(5) Decision 2001/882/EC was annulled by judgment of the Court of First Instance of the European Communities of 22 February 2006 ([5]). The Court found in particular that the statement of reasons in the Commission's Decision was incomplete and that it was not therefore able to confirm that elements constituting State aid within the meaning of Article 87(1) of the Treaty were present.

(6) As a result of the Court's judgment, the investigation procedure initiated by the decision of 2 December 1999 is still open.

(7) In the light of the grounds of the Court's judgment and of new information brought to its attention, the Commission deemed it appropriate to ask the French authorities and interested parties to submit their comments again on the basis of Article 88(2) of the Treaty. The decision of 2 December 1999 to initiate the formal investigation procedure was therefore supplemented by a decision of 6 December 2006 ([6]).

(8) Following that decision, the French authorities initially requested and were granted an extension of the deadline for a reply, before submitting their comments by letters dated 16 March 2007 (A/32335) and 12 December 2007 (A/40301). Observations were also submitted by interested parties, namely CIL, by letter registered on 21 March 2007 (A/32446), and the investors who were former shareholders in the joint-ownership companies, backed by the Bank ([7]), by letters registered on 1 March 2007 (A/31951) and 7 March 2007 (A/32026).

II. DETAILED DESCRIPTION OF THE MEASURE

1. The 'Loi Pons'

(9) The amended Finance (Amendment) Act for 1986 of 11 July 1986 allowed tax concessions in relation to certain investments in the French overseas departments and territories ('Loi Pons').

(10) France notified the Commission of these measures so that their compatibility with the Community State aid legislation could be assessed. By letter of 27 January 1993, the Commission informed France that, having examined the measures, it had decided not to raise objections under Articles 92 and Article 93 of the Treaty (now Articles 87 and 88). The Commission nevertheless pointed out that the application of the aid was subject to the Community rules and frameworks on aid for various sectors of industry.

(11) In this decision, references to the Loi Pons should be taken as referring to Article 238a HA I and IIIc of the General Tax Code (CGI) as applicable on 23 November 1996, which can be summarised as follows.

Article 238a HA I CGI

(12) Under Article 238a HA I CGI, undertakings are authorised to deduct from their taxable profits a sum equivalent to the total amount of productive investments made in some of the French overseas departments and territories, including Saint-Pierre-et-Miquelon ([8]). This article offers a derogation from the general CGI scheme which does not allow these amounts to be deducted for purposes of determining an undertaking's taxable income.

(13) Article 238a HA IIIb CGI states that investments in certain sectors, including the pleasure boat sector, are eligible for the deduction provided for in paragraph I of the Article only subject to the prior approval of the budget minister. Such approval 'may be granted after seeking the opinion of the minister for the overseas departments and territories provided that the investment is of economic interest for the department in which it is made, that it is in keeping with regional planning and environmental policy and that it guarantees protection for investors and third parties.'

Article 238a HA IIIc CGI

(14) The CGI states that natural persons are taxed on their income. The tax is charged on the taxpayer's net income, i.e. the total net income from various categories of income. Net income in the various categories generally consists of property, capital assets, salaries, etc. owned or received by taxpayers, and profits from the lucrative activities in which they engage, minus the losses recorded in a year in an income category.

([5]) Case T-34/02 *EURL Le Levant 001 and Others* v *Commission* [2006] ECR II-267. France had brought an earlier action for annulment of Decision 2001/882/EC which had been dismissed by the Court of Justice (Judgment of 3 October 2002, Case C-394/01 *France* v *Commission* [2002] ECR I-8245).

([6]) OJ C 23, 1.2.2007, p. 28.

([7]) The company concerned has asked for its identity not to be published. In this decision, therefore, it is referred to only as 'the Bank'.

([8]) A 242 km^2 archipelago with some 6 500 inhabitants, Saint-Pierre-et-Miquelon is a French 'overseas collectivity' lying off the Canadian coast (approximately 25 km from Newfoundland).

(15) However, in relation to the category of 'industrial and commercial profits', Article 156(1a) CGI states that the deduction is not allowed for 'losses attributable, directly or indirectly, to activities for industrial and commercial profit where such activities do not involve the continuous, direct and personal participation of one of the members of the tax unit in the performance of the acts entailed in the activity. Such is the case, for example, where management of the activity is entrusted in law or in fact to a person who does not belong to the tax unit by virtue of a mandate, a contract of employment or other such agreement.'

(16) Nevertheless, Article 238a HA IIIc CGI states that Article 156(1a) does not apply to losses resulting from the deduction of the investments referred to in paragraph I of the said Article 238a HA and from their operation where such investments are made after 1 January 1996 and have the prior approval of the minister responsible for the budget in accordance with Article 238a HA IIIb.

2. **The Levant financing operation**

(17) In 1996 the Bank and the Compagnie des Iles du Ponant (CIP) put together a package to finance the building and operation of a small (capacity of approximately 95 passengers and 55 crew) luxury cruise vessel called Le Levant. This was formalised by an agreement of 9 December 1996 between the Bank, the CIP and CIL, a subsidiary of the CIP specially formed for the purposes of the project ([9]).

(18) The various components of the package may be summarised as follows:

The joint-ownership vehicle

(19) The Bank and CIL set up a joint-ownership vehicle (within the meaning of Law 67-5 of 3 January 1967 on the status of ships and other seagoing vessels, as amended), the 'copropriétée du navire Le Levant', with its head office in Nantes. According to its articles of association, the joint-ownership vehicle was set up for the purposes of 'financing, purchasing, fitting out and operating the luxury cruise vessel Le Levant'. The joint-ownership was divided into 740 co-ownership shares, or 'quirats', of which CIL acquired two and the Bank the remaining 738.

(20) The joint-ownership vehicle would order the vessel from the Leroux & Lotz Naval shipyards in France for a price of 228 550 000 French francs (FRF) (approx. EUR 35 million) ([10]). The vessel was to be delivered in 1998.

(21) CIL was appointed manager of the joint-ownership vehicle and, in return for payment, would oversee the construction of the vessel and its operation after delivery.

Sale of the co-ownership shares

(22) The Bank sold its 738 shares to investors subject to income tax who wished to benefit from tax advantages under the Loi Pons. For this purpose, each investor set up an undertaking of which they were the sole shareholder whose corporate purpose was to acquire the shares and operate the vessel as joint owners ('joint-ownership companies'). These companies had the status of one-person limited liability undertakings (EURLs).

(23) An EURL in which the sole shareholder is a natural person is fiscally transparent. The shareholder therefore includes the company profits of the EURL in his income tax return (under industrial and commercial profits). He may also, if necessary, write off the company's losses against his other income, provided it is the same type of income. However, under Article 156(1a) CGI, he may not as a rule write off losses from activities for industrial and commercial profit unless such activities involve the personal participation of one of the members of the tax unit in the performance of the acts necessary to the activity.

(24) Each investor would acquire at least two co-ownership shares. The price was FRF 636 216 (about EUR 100 000) per set of two shares. The joint-ownership companies financed the acquisition of the shares as follows (per set of two shares):

— a capital investment by the shareholder of FRF 50 000 (about EUR 7 700),

([9]) CIL is a wholly controlled subsidiary of CIP. CIP is the guarantor of all commitments entered into by CIL as part of the Le Levant financing operation. The Commission does not therefore consider it necessary to distinguish between the two bodies and CIP and CIL are used interchangeably in this decision.

([10]) For events preceding the introduction of the euro, an indicative conversion rate of FRF 6,5 to EUR 1 has been used to convert amounts in French francs.

— a loan from the Bank at a fixed rate of 8 % over a period of seven years from 31 December 1996. The amount was FRF 554 683 (about EUR 85 300) for a set of two shares,

— the share of CIL's deposit of guarantee set up with each joint-ownership company as security for its sound management of the joint ownership. This guarantee was for a sum of FRF 40 000 000 (about EUR 6 150 000), or FRF 108 108 (about EUR 16 600) per set of two shares, at an interest rate of 8 % per annum, with the interest capitalised annually from 31 December 1996. The principal and capitalised interest on the guarantee would be repayable as of 31 December 2003.

(25) After all the Bank's shares had been transferred, the joint-ownership vehicle consisted of the joint-ownership companies and the CIL (as holder of two shares).

Operating phase of the vessel

(26) As part of the package, Le Levant was to be operated as a cruise vessel following its delivery until the end of 2003. In accordance with the joint-ownership vehicle's articles of association, the investor-shareholders would share the operating profits and losses pro rata to their interest in the vessel. It should however be underlined that the package was based on the assumption of significant losses in the first five years of Le Levant's operation ([11]).

(27) The joint-ownership companies' cash requirements would arise from:

— the operating results of the joint-ownership vehicle, forecast as a loss,

— the annual repayments and financial costs of the bank loan granted by the Bank to acquire the shares, and

— the companies' operating expenses.

(28) The cash requirements were to be covered by the investors who formally undertook to reinvest each year the tax savings made as a result of deducting the vessel's operating losses in the joint ownership in the form of capital increases by the respective joint-ownership companies (other than in the last operating year, when the investors had the right to retain the tax savings). The reinvestment of the tax savings would be the sole source of financing for the joint-ownership companies during the operating phase.

End of the operation

(29) The joint-ownership companies promised to sell the shares to the Bank (and the Bank promised to buy them) for a total price of FRF 124 861 905 (about EUR 19 million) at the end of the vessel's operating phase. This price (the 'base price') could however vary according to a predefined formula on the basis of the actual rates applied in the top income tax bracket for the years 1997-2003. The base price would be reduced by the joint-ownership companies' liabilities on the date of transfer (consisting essentially of the CIL's deposit of guarantee plus capitalised interest). The net price was estimated at FRF 56 494 213 (about EUR 8,7 million), or FRF 153 101 (about EUR 23 500) per set of two shares. The transfer was expected to take place by 29 February 2004 at the latest.

(30) For their part, the Bank and CIL made a mutually binding promise according to which CIL would acquire all the Bank's shares at a price corresponding to the price paid by the Bank. This transfer, which would make the CIL the legal owner of Le Levant, would take place not later than 29 February 2004.

3. **The approval of the French authorities**

(31) The Bank and CIP submitted the scheme summarised in section 2 to the French authorities in order to obtain the necessary approval to benefit from the tax advantages under the Loi Pons.

(32) By approval dated 26 November 1996, granted pursuant to Article 238a HA IIIb and c CGI, the budget minister decided that:

— the joint-ownership companies could deduct the amount of their investments from their tax results for the year of purchase of their shares (the total basis for deduction was set at FRF 228,5 million, plus any bridging costs), and that,

([11]) According to the background documents submitted by the Le Levant project promoters to France's Commission des opérations de bourse (COB, stock exchange committee), the shareholders would '… in theory reinvest practically the whole of their tax savings by subscribing to the joint-ownership companies' annual capital increases. The capital increases will be done in such a way as to balance the companies' accounts without leaving any surpluses'. Regarding the joint-ownership companies' accounts, the 'forecast profit-and-loss accounts of the joint-ownership' annexed to the documents submitted to the COB show a projected negative operating result for each year in the period 1996-2003.

— Article 156(1a) CGI would not apply to losses arising from the acquisition and operation of the vessel (which would thus allow the shareholders of the joint-ownership companies to deduct these losses from their income).

(33) In the text of the approval decision the French authorities expressly noted certain elements of the operation, in particular that CIP and the Bank would 'guarantee … holders of shares in the companies set up to purchase the shares that they would buy back their shares at the end of the 5th year of operation at a value of FRF 56 756 million'.

(34) The approval was subject to the condition that the joint-ownership companies keep their joint-ownership shares for five years from the delivery of the vessel and that the vessel operate overseas, notably out of Saint-Pierre-et-Miquelon, for a period of five years. The shareholders should keep their shares in the joint-ownership companies for the same period.

(35) The application for approval also reveals that the Bank and CIP were aware that the tax benefit claimed constituted State aid within the meaning of Article 87 of the Treaty ([12]). The Bank and CIP implemented the financing scheme despite the fact that the approval decision made no mention of notifying the Commission of the aid in accordance with Article 88 of the Treaty or of its compatibility with the common market.

4. **Current situation**

(36) According to information at the Commission's disposal, the Le Levant financing operation was implemented in accordance with the package summarised in section 2.

(37) The various binding promises of sale and purchase between the parties in the package were applied as expected, as a result of which CIL took ownership of all the shares in Le Levant in January 2004 for a price of EUR 17 825 989.

(38) The Commission notes that, under French law, the fact that all shares in a vessel have come to be held by a single shareholder requires the joint-ownership vehicle to be dissolved. The joint-ownership companies were dissolved and deleted from the company register in May and July 2004 ([13]).

III. **GROUNDS FOR INITIATING THE PROCEDURE**

(39) In its initiation decisions of 2 December 1999 and 6 December 2006, the Commission found that the application of the Loi Pons to the Le Levant financing package had provided an advantage to shareholders in the joint-ownership companies ('the investors') and to CIL and that that advantage, which led to a shortfall in tax revenue, had been granted through State resources. As regards the selectivity of the advantage, the Commission noted that the Loi Pons was selective in scope as the scheme applied only to investments in certain French overseas communities. Lastly, the Commission considered that the aid was likely to distort competition in the cruise market, a market which was characterised by trade between Member States. The Commission therefore found that the measure in question constituted State aid.

(40) As regards the compatibility of the aid with the common market, the Commission felt that it did not appear to satisfy the conditions applicable to the development assistance referred to in Article 4(7) of Directive 90/684/EEC. In particular, the Commission expressed doubts regarding the condition that the real owner of the vessel must reside in the territory eligible for development assistance and as to the existence of a real development component.

(41) The Commission therefore initiated a formal investigation procedure.

IV. **COMMENTS FROM INTERESTED PARTIES**

(42) The Commission received comments from CIL and from the investors' representatives, backed by the Bank.

1. **CIL comments**

(43) CIL first questions the applicability of Directive 90/684/EEC. CIL believes that the aim of that Directive is to manage the aid for which shipyards established in the Community may be directly or indirectly eligible and concludes that the Directive applies only to aid that benefits a shipyard. As the Commission had not demonstrated such a benefit, the Commission could not base its assessment of the aid on Directive 90/684/EEC.

([12]) Application of the Bank and CIP for approval, dated 19 August 1996 (the 'application for approval'), pp. 21-22.

([13]) Apart from two EURLs which were not deleted for technical reasons but have been inactive since 2 January 2004.

(44) Secondly, CIL disputes the existence of State aid with reference to the criteria of Article 87(1) of the Treaty. Regarding the advantage allegedly obtained by CIL on the purchase of the investors' shares in the vessel, CIL points out that it bought the shares in the vessel from the joint-ownership companies for a price of EUR 17 825 989. This price was higher than the vessel's market value, estimated in June 2004 by the reputable shipbrokers Barry Rogliano Salles at between EUR 14,5 and 16,1 million. It was also higher than the price at which CIL resold the vessel in June 2004 (EUR 15 322 581). The Commission's assertion that CIL had thus benefited from an advantage by purchasing the investors' shares at a reduced price was not therefore accurate.

(45) Regarding the advantage that CIL allegedly gained from operating Le Levant, CIL makes the following three observations. Firstly, it is incorrect to regard CIL as operator of the vessel as, in fact, it had acted only in the capacity of manager on behalf of the joint-ownership which was the vessel's real operator. Secondly, CIL believes that the Commission has failed to prove that the aid helped to operate Le Levant under more favourable conditions than those available to other operators as the Commission had not quantified the size of the alleged advantage.

(46) Lastly, as regards the effect on trade between Member States, CIL notes that Le Levant is a low-capacity vessel, that it did not once operate in Community waters in the first five years of operation, that its clientele in this period consisted mainly of North Americans, i.e. non-Community nationals, and finally that it had no European competitors in its market niche. CIL doubts whether the operation of Le Levant can be considered to have affected trade between Member States.

(47) Nor did CIL benefit from aid in its capacity as investor-shareholder given that, as a company established outside mainland France, it did not pay tax in France and could not therefore make any tax deductions.

2. **The investors' comments**

(48) The investors consider first that the procedure adopted by the Commission was flawed. The Court of First Instance judgment of 22 February 2006 had invalidated the initiation decision of 2 December 1999, as this was inextricably linked to the final decision annulled, so the Commission could not legitimately supplement it with its Decision of 6 December 2006. In accordance with the procedure, the Commission should have adopted a new initiation decision and its supplementary decision of 2 December 2006 must thus be regarded as initiating proceedings from scratch.

(49) Secondly, the investors believe that the supplementary decision of 6 December 2006 contains a number of errors and shortcomings, in short the omissions identified by the Court of First Instance in its judgment of 22 February 2006 relating in particular to the nature of the business relationship between the investors, the Bank and CIL.

(50) The investors stress that they had signed a membership contract proposed by the Bank which was designed to bring them the benefits of a tax optimisation scheme. They also point out that they were not qualified to operate a cruise business as most of them were senior managers or professionals (doctors, chemists, lawyers, bailiffs, solicitors) or had retired. While it is formally correct that they were shareholders in the joint-ownership companies, the latter had no assets other than the shares and at no stage were they undertakings within the meaning of Article 87(1) of the Treaty. Rather than economic operators bearing the risks inherent to an economic activity, the investors had merely subscribed to a financial product with a minimum return guaranteed by the promoters of the package. As a result, neither the investors, nor their joint-ownership companies, nor the joint-ownership vehicle to which they belonged were eligible to receive State aid as they were not engaged in an economic activity.

(51) The investors further contend that the Commission made a mistake by applying Directive 90/684/EEC to the aid in question. They believe that the Directive applies only to aid received by a vessel's constructor (i.e. the shipyard), a fact which the Commission had dismissed in this case. In this connection, the investors are also of the opinion that the Commission's conclusion is based on a superficial analysis and that a closer examination of the facts would have shown that the aid granted had benefited a shipyard. Winning the contract had given the shipyard, which was in financial difficulties, a genuine lifeline. As the vessel would not have been built without the financing scheme which the Loi Pons allowed, the tax benefits at issue did indeed confer a financial advantage on the yard without any reciprocal concession.

V. **COMMENTS OF THE FRENCH AUTHORITIES**

(52) In their observations, the French authorities first point out that the real purpose of the Loi Pons was to help overseas operators develop their activities in order to compensate for the specific disadvantages they faced. It was not therefore aid for shipbuilding and, moreover, no direct construction aid was granted under the project.

(53) In this connection the French authorities also comment that, although the financing of the vessel under the Loi Pons requires an outsourcing scheme to bring in investors — in the form of a joint-ownership vehicle — who supply the vessel to the actual operator, the investors' role is merely as subscribers to a ready-made financial product with potential tax benefits which transmits the aid to the operator who is the real beneficiary insofar as the scheme allows him eventually to acquire the vessel on favourable terms. They therefore formally dispute the fact that the investors can be qualified as beneficiaries of State aid.

(54) Regarding the selective nature of the aid, the French authorities dispute the additional argument made by the Commission on the basis of the margin of discretion left to the authorities to issue the approvals necessary for granting tax benefits under the Loi Pons. The French authorities state firstly that the above aspect is part of the Loi Pons as approved unreservedly by the Commission. Secondly, the French authorities express surprise that the criteria for granting approval can be qualified as imprecise when they have been clarified by an administrative instruction and are identical to criteria set out in the Loi Paul and Loi Girardin, two State aid schemes which the Commission has approved without any reserves on this point ([14]).

(55) The French authorities thirdly state that, as the aid had not benefited the shipbuilding industry (and, in particular, had not benefited the shipyard that built Le Levant), Directive 90/684/EEC did not apply.

(56) Even if the aid were to be assessed in the light of Directive 90/684/EEC, the French authorities are of the opinion that the conditions are met for considering the aid in question compatible as development aid within the meaning of Article 4(7) of the Directive. The French authorities put forward the following arguments in particular in this connection.

(57) Regarding the condition that the real owner must be resident in the recipient country and that the recipient company must not be a non-operational subsidiary of a foreign company, the French authorities state, with reference to the Commission's assessment put forward in a similar case, 'Renaissance' ([15]), that CIL must be regarded as the actual owner of the vessel and the real recipient of the aid. As CIL is established in Wallis-et-Futuna, a territory that is eligible for development aid, the residence condition is met. Moreover, as CIL is responsible for all aspects relating to the operation of the vessel, it is not a non-operational subsidiary.

(58) On the question of the development component, the French authorities have made the following comments:

— firstly, the French authorities consider that the aid should be assessed in the light of the special situation of Saint-Pierre-et-Miquelon, notably its remoteness, the difficult operating conditions there owing to the climate and geographical constraints, and, in particular, the economic and social situation of the islands arising from the fisheries monoculture crisis. The French authorities underline the importance in this connection of diversifying tourism to revive the local economy and maintain that the operation of Le Levant would be one of the few major projects likely to contribute to such a revival,

— secondly, regarding the repercussions for employment, the French authorities point out that 16 persons from Saint-Pierre-et-Miquelon were employed on Le Levant in the first five years of its operation. Expenditure in the islands in connection with the vessel's operation in the years 1999 to 2003 is estimated at a total of EUR 3 328 891. In addition to this amount, the French authorities refer to the expenditure in other territories eligible for development aid when Le Levant stops there during its cruises.

(59) Lastly, in the French authorities' opinion, the proportionality of the aid should be assessed not in terms of absolute value, but of relative value. The impact of the aid should be judged in the light of the size of the economy in the islands and their economic potential.

VI. RESPONSE OF THE FRENCH AUTHORITIES TO THE COMMENTS OF THE INTERESTED PARTIES

(60) The comments of interested third parties have been forwarded to the French authorities who have not made any further observations.

([14]) For the Loi Paul, see the Commission Decision of 3 December 2001 (OJ C 30, 2.2.2002, p. 13) and for the Loi Girardin, see the Commission Decision of 11 November 2003 (OJ C 16, 22.1.2004, p. 24).

([15]) 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 L 292, 13.11.1999, p. 23).

VII. ASSESSMENT OF THE MEASURE

1. Procedure

(61) The investors' complaints about irregularities in the procedure must first be dismissed.

(62) The Commission cannot agree with the view that the Court of First Instance's annulment of Decision 2001/882/EC had the effect of invalidating the initiation decision of 2 December 1999. It is established case-law that the annulment of a Community measure does not necessarily affect the preparatory acts leading to its adoption ([16]).

(63) It is incumbent on the institution whose act has been declared void to take the necessary measures, having regard both to the operative part and the grounds of the judgment annulling the act, to remedy the defects that gave rise to the annulment. In this case, the Court of First Instance annulled Decision 2001/882/EC on the grounds that the Commission had not respected the rights of the defence and the duty to give reasons for its conclusions regarding the existence of a State aid within the meaning of Article 87(1) of the Treaty.

(64) Regarding the acts preliminary to the final decision in this case, the Court's judgment therefore requires the Commission to take the necessary measures of inquiry in order to comply fully with the rights of the defence of the Member State and interested parties. This does not mean that the initiation decision of 2 December 1999 should be regarded as invalid and excluded from the procedure, as the investors would appear to believe. The decision needs only to be amended and the parts that are incomplete supplemented in order for the French authorities and interested parties to be able to duly submit their observations as provided for in Article 88(2) of the Treaty ([17]). That result is achieved in full by the supplementary decision of 6 December 2006.

2. Existence of State aid

(65) Following the formal investigation procedure and in the light of the arguments presented in that respect by the French authorities and interested parties, the Commission considers that the tax benefits granted in relation to the construction and operation of Le Levant constitute State aid within the meaning of Article 87(1) of the Treaty, according to which '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'.

(66) The classification of a national measure as State aid presupposes that the following cumulative conditions are met: (1) the measure in question confers an advantage through State resources; (2) the advantage is selective, i.e. it favours certain undertakings or the production of certain goods; and (3) the measure distorts or threatens to distort competition and is capable of affecting trade between Member States ([18]).

(67) It is necessary to explain the reasons why it is considered that the tax measures adopted in relation to the construction of Le Levant satisfy these conditions.

2.1. *The existence of an advantage conferred through State resources*

(68) The provisions of the Loi Pons applied to the contested financial package are a derogation from the general tax legislation and, because they allow a larger than usual deduction, confer an advantage on the taxpayers to which they relate. By conferring that advantage, France is foregoing tax revenues and its resources are consequently diminished. The aid is thus granted through State resources.

(69) The instrument conferring that advantage is the budget minister's approval decision of 23 November 1996. Pursuant to the approval, the benefit of Article 238a HA IIIb and c CGI is granted to the 'joint-ownership of the vessel Le Levant'.

(70) However, the earnings of the joint-ownership vehicle are liable to tax in the hands of the joint-ownership companies that form it and it is to these companies that the possibility of deducting the amount for the purchase of the shares (granted on the basis of Article 238a HA I CGI) relates.

([16]) Judgment of 12 November 1998 in Case C-415/96 *Spain* v *Commission* [1998] ECR I-6993, paragraph 32.

([17]) For this, see the judgment of the Court of Justice in Case C-415/96, in particular paragraphs 33 and 34.

([18]) See, for example, the Judgment of the Court of Justice of 10 January 2006 in Case C-222/04, *Ministero dell'Economia e delle Finanze/Cassa di Risparmio di Firenze*, [2006] ECR. I-289, paragraph 129.

(71) The derogation from Article 156(1a) CGI granted on the basis of Article 238a HA IIIc CGI benefits the investors in whose hands the earnings of the joint-ownership companies are subject to tax (income tax) by virtue of the fiscal transparency of the joint-ownership companies. The advantages conferred by the approval thus have an immediate financial impact on the investors in the form of tax savings, made possible by the deductions applied under the Loi Pons derogation scheme.

(72) It should however be noted that the tax savings are not simply left at the investors' disposal but pre-assigned under the terms of the financing package endorsed by the French authorities under the approval decision. The investors are in fact obliged, under the terms of the investment to which they have subscribed, to reinvest practically all the tax savings in the joint ownership in the form of capital increases by their respective joint-ownership companies in order to cover the costs of financing the purchase of Le Levant and the losses arising from its operation (see recital 27).

(73) In order to identify the beneficiaries, a detailed examination is required of the circumstances governing the purchase and operation of Le Levant.

(74) Firstly it should be recalled that the objective of the financing package, in accordance with the application for approval lodged by CIP, was 'the purchase of a cruise vessel' ([19]).

(75) But 'the CIP does not possess the necessary financial resources to bear the cost of purchasing Le Levant through a traditional source of financing (mortgage)'. CIP therefore proposes to finance its vessel 'by means of a financial package qualifying for tax assistance for overseas investment', which will be based on a 'financing scheme involving the setting-up of a joint-ownership vehicle'. For this purpose the Bank would 'propose that its clients buy shares in the joint-ownership' and 'launch a public offer …' ([20]).

(76) Clearly the purpose of the package was to allow CIP to purchase a vessel which it would own and the role of the investors recruited from the Bank's clients was merely to finance the purchase.

([19]) Application for approval, p. 11.
([20]) Application for approval, pp. 11 and 15.

(77) The financial package selected for this purpose is one that is very common in the case of tax-free overseas investments ([21]), i.e. an 'outsourced' package, where a company that wishes to acquire an asset but which cannot make that investment from its own funds because of a lack of resources brings in outside investors who purchase the asset and put it at the disposal of the operator, who then uses it, and at the end of the period of operation laid down by law, becomes its owner. In packages of this type, the tax benefit is partially transferred to the buyer, while the investor retains another part, thus ensuring a return on his investment. The transfer of the benefit to the buyer is carried out normally through a reduction in the rent charged during the operating period (a 'lease' package).

(78) The Commission has already assessed the State aid aspects of such packages in relation to the financing of cruise vessels through the benefits deriving from the Loi Pons in the 'Club Med' ([22]) and 'Renaissance' ([23]) cases. The latter case is especially relevant in view of its resemblance to the Le Levant financing operation. Both cases concern investors whose tax situation allows them to take advantage of the tax exemption, who form a joint-ownership and who purchase cruise vessels to be operated overseas for a specific period by an operator (Renaissance or CIL) that makes an undertaking to the investors to buy the vessel at the end of the operating period.

(79) In 'Renaissance' the vessel was leased to the operator and the investors' tax concession under the Loi Pons was transferred to him by means of a reduction in the rent using the traditional technique of a leasing package described in recital 77. The French authorities commented that this package allowed for 'effective retrocession of the tax aid to the operator'. The Commission (which, in the initiating decision, had found that the investors were the 'immediate beneficiaries' and the 'beneficiaries of quantifiable aid' ([24])) noted that 'RF [Renaissance] is the effective recipient of the aid, and since RF is obliged to buy the vessels, RF can be considered to be the de facto owner'. The Commission therefore made a distinction between the investors, the immediate beneficiaries of the aid, and the 'effective' beneficiary (within the meaning of the State aid rules) to whom the tax benefits were partially transferred by means of a rental that was below the vessel's market value ([25]).

([21]) See the report on behalf of the National Finance, Budgetary Control and Accounts Committee on tax exemptions in the overseas departments and territories (Senate, ordinary session 2002-2003, report No 51, annexed to the record of the session of 7 November 2003).
([22]) OJ C 279, 25.10.1995, p. 3.
([23]) See Decision 1999/719/EC above.
([24]) OJ C 307, 7.10.1998, p. 6.
([25]) This is further supported by the Commission's more recent approach in the 'GIE fiscaux' case: Commission Decision 2007/256/EC of 20 December 2006 on the aid scheme implemented by France under Article 39 CA of the General Tax Code (OJ L 112, 30.4.2007, p. 41), paragraphs 101 to 103.

(80) In the case of Le Levant, the tax benefits of the investors (the immediate beneficiaries) were transferred to CIL by a different mechanism. In the 'Renaissance' case the investors leased the vessels to the operator whereas, in the present case, CIL formally disposes of the vessel only in its capacity as manager of the joint-ownership vehicle, the formal operator of the vessel in its own right. There is therefore in principle no tenancy relationship that would allow the benefit to be retroceded through a reduction in the rent.

(81) In practice the benefit is transferred to CIL as follows:

(82) The cost of acquiring the vessel and its operating losses are reflected in losses in the shareholding EURLs. Thanks to the tax benefits allowed under the Loi Pons, the investors may deduct these losses from their other revenue liable for income tax, thereby obtaining a tax saving which represents the concretisation of their tax benefit and which consists, as such, of State resources within the meaning of Community law. However, rather than keep these tax savings, the investors undertook to use most of them for calls for funds to cover the losses of the EURLs.

(83) In the normal process of capitalisation, an investor would make sure of capitalising on his investment (in this case, the vessel) by securing a return on the investment that would cover his purchasing costs and include an adequate profit margin. In the case of the leasing package in 'Club Med' and 'Renaissance', this outcome is achieved through the rent paid by the buyer (although the rent is beneficial to the buyer as part of the tax benefit is retroceded to him in the form of a below market-price rent).

(84) In a normal situation, these costs (e.g. payment of the rent or covering all the losses) would be borne by CIL and not by the investor. In the disputed package, these costs are allocated to the EURLs and, by means of the calls for funds, absorbed into the tax savings which are State resources within the meaning of Article 87(1) of the Treaty. CIL is likewise relieved of the expenses it would normally have had to bear for the operation of the vessel. For all the above reasons, the Commission finds that the investors' benefit is transferred to CIL. It should nevertheless be said that not all the tax benefit is transferred to CIL. Under the terms of the package, the investors keep the tax savings relating to 2003, the last year of operation.

(85) Regardless of this technical difference in the package, the results are no different to those produced by the package in the 'Renaissance' case. In fact, as in 'Renaissance', CIL enjoys the actual benefit of Le Levant as soon as it is delivered, thus anticipating its formal ownership of the vessel, which will take effect only on completion of the package. Just as in 'Renaissance', the vessel is made available to CIL without its having to bear the real cost as no financial contribution is required of it. The costs that CIL should normally have borne for the operation of the vessel are thus reduced, which represents an advantage to CIL.

(86) The fact that the investors are able to put the vessel at CIL's disposal free of charge is due to the tax benefits granted to them under the Loi Pons which enable them, through their EURLs, to deduct from their taxable income both the purchase price of the vessel and the losses of their EURLs, which include the annual capital and interest on the loan granted by the Bank for the purchase of the shares. The deductible profits of the EURL also include their respective shares of Le Levant's operating profits within the limits guaranteed by CIL.

(87) The package and the coverage by the investors of the costs of financing and, in part at least, of operating Le Levant by means of the compulsory calls for funds for the EURLs are intended to ensure that CIL benefits from the advantages granted under the Loi Pons. This mechanism for transferring aid was one of the conditions laid down in the application for approval and was, as such, endorsed by the French authorities. This transfer of resources from the investors to the joint-ownership vehicle helps to subsidise the operation of Le Levant by the CIL. Without this mechanism, the operation of the vessel by the CIL would not be economically viable.

(88) For the investors, the return from the package is produced at the end of the financing operation through the purchase of their shares and the fact that they can keep the tax savings relating to 2003, the last year of the period of operation (which is not negated by a compulsory call for funds).

(89) The State resources (consisting of the investors' tax savings) are thus split between CIL, to whom practically all the aid is retroceded, and the investors. The part of the benefit retroceded to CIL consists of the total of the calls for funds to which the investors responded for the EURLs.

(90) CIL's comment that the Commission has not proved that the aid would allow Le Levant to be operated under more favourable conditions than those available to other operators cannot therefore be accepted.

(91) As regards the price for the sale of Le Levant to CIL in January 2004, according to the Commission's information, it did not appear to include a concessionary element in favour of CIL. According to CIL, the selling price was estimated by an independent maritime broker as higher than the vessel's market value. The Commission has no reason to question the validity of this information.

2.2. *The classification of recipients of State resources as an undertaking*

(92) One further precondition for classifying a measure as State aid is that the advantage conferred favours certain undertakings (or the production of certain goods). According to Article 87(1) of the Treaty, the definition of undertaking covers every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed. Any activity consisting in offering goods and services on a given market is therefore an economic activity ([26]).

(93) The Court of Justice of the European Communities found, however, in Cassa di Risparmio, in which it distinguished between 'an operator in direct contact with the market and, indirectly, [of] another entity controlling that operator as part of an economic unit which they together form' that 'the mere fact of holding shares, even controlling shareholdings, is insufficient to characterise as economic an activity of the entity holding those shares, when it gives rise only to the exercise of the rights attached to the status of shareholder or member, as well as, if appropriate, the receipt of dividends, which are merely the fruits of the ownership of an asset' ([27]).

(94) Case law thus demonstrates that the classification as an undertaking must be based not just on the legal forms but on an assessment of the economic realities of a specific case. CIL and the investors' status as an undertaking must therefore be established by an assessment of business relationships in the package in order to determine how the economic activity that consists of operating Le Levant as a cruise vessel is actually conducted.

(95) It should first be noted that under the formal terms of the package, it is the investors, through their EURLs brought together in the joint ownership vehicle, who are presented as owners and operators of the vessel, on their own account. CIL's role, on the other hand, is simply that of the vessel's manager 'for the account and risk of the joint ownership vehicle' ([28]). It is, of course, perfectly feasible for an owner/operator to entrust a manager with the day-to-day management of his economic activities. This does not mean that the owner is not classified as an undertaking within the meaning of the State aid rules, provided that he meets the determining criteria formulated by case law, namely that he is engaged in an activity consisting of supplying goods and services in a given market and that he does not merely have shareholdings and receive dividends.

(96) In the case at hand, the Commission notes that under the terms of the joint ownership articles of association, each investor exercises rights over the vessel through his shares and that these rights may only be exercised jointly (each share also gives entitlement to a proportional part of the operating revenue). The investors exercise their rights at the general meeting of joint owners where each shareholder has voting rights proportional to his share in the joint-ownership. In this sense, the investors' situation is comparable to that of shareholders or members.

(97) In addition, investors are not actively involved in Le Levant's economic activities, which are completely left to CIL. It is quite clear from the management mandate that CIL is responsible for all aspects of operating the vessel and has all the necessary powers, so that investors cannot interfere in its operation in any way. Accordingly:

— CIL is responsible for the fitting-out, maintenance, operation and technical and commercial management of the vessel,

— CIL manages the hotel and catering services and organises ports of call and sightseeing visits. CIL is responsible for managing port and pilotage charges etc. More generally, it operates the vessel on the best economic terms and 'is authorised to conclude all charter contracts and, more generally, to negotiate all commercial transactions' (Article 3.1 of the management mandate). The joint-ownership has therefore given CIL a completely free hand in the core business in question — namely the provision of cruises on board Le Levant,

([26]) See, for example, the *Cassa di Risparmio* judgment above, paragraphs 107 and 108.

([27]) *Cassa di Risparmio*, above, paragraphs 109 to 114.

([28]) Management mandate of the joint-ownership of the vessel Le Levant, Annex 4 of the file submitted to the COB (hereinafter the management mandate).

— 'the manager has full powers with respect to third parties to manage the joint-ownership's property and business and can carry out all tasks relating to administration, including laying-up of the vessel, but not disposition of the property' (Article 6 of the management mandate). The joint-ownership therefore gives CIL virtually full autonomy as, on its own initiative and without consulting the investors, CIL can even have the vessel laid-up — i.e. terminate its operation,

— according to Article 6 of the management mandate, the manager 'shall undertake the following measures on behalf of the joint-ownership vehicle: staff recruitment and management, shipboard working arrangements […]. The full powers thus conferred on the manager mean that he can undertake management tasks with a maximum degree of flexibility'.

(98) The investors' lack of involvement in operations is not the result of a commercial choice which they could freely go back on — rather it is determined by the actual structure of the package. Under the terms of their investment contracts, each joint-ownership company is headed by two joint managers who are actually Bank executives. All the practical aspects of setting up and running the joint-ownership companies are undertaken by these managers or people presented by the Bank. At the joint-ownership's general meeting (where, in theory the investors could exercise their rights over the vessel and its operation), the joint-ownership companies are represented not by their members but by their managers. The investor cannot appoint other managers or even take over management of his EURL, without sacrificing the Bank's undertaking to acquire the shares, which is the guarantee of the return on his investment. As for the choice of manager of the joint-ownership and the terms of its mandate, CIL was appointed in the joint ownership's articles of association (drawn up by the Bank and CIP) and in practice cannot be revoked except in cases of serious misconduct or wilful wrong. The Commission therefore concludes that the package does not include any way of allowing the joint-ownership to be effectively involved in the operation of Le Levant as a cruise ship, i.e. in the actual business itself, which is carried on exclusively by CIL. In short, it can be concluded that the investors signed a membership contract whose terms they could not freely determine.

(99) It is also important to note that in the relationship between an owner-operator and his manager, the economic risk inherent in operating the vessel is usually borne by the owner as the manager is paid for his services and is not concerned by the operating results. In the case of Le Levant, however, as the investors are guaranteed a return by the promoters of the project, they do not run any real risks in respect of the Le Levant's operating results. It is really CIL which incurs the risks and, even though it has only two shares out of the 740 shares of the joint ownership, it has agreed to assume full responsibility for any losses which exceeded the operating estimates for the period 1996-2003. The Commission concludes that this distribution of risks, which is unusual in a normal relationship between operator and manager, demonstrates that CIL bears sole responsibility for commercial activity.

(100) It is therefore quite right that the Le Levant project was described to potential investors not as an offer to take part in organising and marketing cruises on the board Le Levant but as 'a profitable, risk-free investment and with no management obligations' ([29]). It is also symptomatic of the real relations between CIL and the investors that 'the CIP via its subsidiary CIL' is described as 'shipowner and manager of the joint-ownership vehicle' ([30]).

(101) This organisation faithfully reflects the purpose of the package, whereby CIL must acquire a vessel and the investors intervene only in its financing and not in its operation. The only reason why the investors, via their companies, are the official owners of the vessels is because of the fiscal engineering of the package. It does not mean actual participation in its commercial operation.

(102) The investors' activity is limited to an equity holding aimed at making a return, with no real participation in Le Levant's operation. CIL, which in formal terms is just the manager, has the guarantee that on conclusion of the package, it will obtain sole ownership of the vessel at a price calculated according to a pre-determined method. Pending this legal formalisation of its rights over the vessel, it can decide freely (unlike the investors) how it is operated. CIL therefore acts as the real owner of the vessel as regards everything to do with the Le Levant's commercial operation.

(103) In terms of Le Levant's operation, only CIL can be classified as an undertaking under Article 87(1) of the Treaty. As the investors are not undertakings in this sense, the advantages that they have obtained through State resources under the Le Levant financing package do no constitute State aid.

([29]) Brochure 'Become a joint-owner of the "Le Levant" cruise ship', included in the documents submitted to the COB.

([30]) Idem. Under French maritime law, the fact of being joint-owner (*copropriétaire*) of a vessel does not automatically make you the shipowner (*armateur*). This merely implies a presumption, which can be confirmed or overturned on the basis of management actions concerning the vessel, in order to identify, via these actions (appointment of the captain, responsibility for nautical and/or commercial management) who is the operator of the vessel (Articles 1 and 2 of Law No 69-8 of January 3 1969 concerning shipowning and maritime sales, as last amended).

(104) As regards the status of the shipyard, the Commission finds that the comments from interested parties provide no proof of an advantage financed through State resources to the benefit of the shipyard. The formal investigation procedure has therefore not found any evidence that the shipyard was the beneficiary of the aid.

2.3. *Selective character of the measure*

(105) The specific nature of a State measure, namely its selective application, constitutes one of the necessary elements of the concept of State aid within the meaning of Article 87(1) of the Treaty. In that regard, it is necessary to determine whether or not the tax scheme in question entails advantages accruing exclusively to certain undertakings or certain sectors of activity ([31]).

(106) In principle, in order for a tax measure to be classified as state aid, the recipient undertakings must belong to a specific category determined by the application, in law or in fact, of the criterion established by the measure in question ([32]). In the case at hand, it is sufficient to note that the measure under examination is an application of the Loi Pons, a tax scheme that only concerns investments made in certain French overseas territories and whose selective character was already recognised by the Commission in its Decision of 27 January 1993 not to raise any objections to the state aid scheme established by the Loi Pons ([33]).

(107) The Commission considers that the selective nature of the measure in question has been sufficiently demonstrated by the fact that it results from applying the selective scheme of the Loi Pons and that it is not therefore necessary to comment on the nature of the discretion given to the French authorities in granting the approval provided for under Article 238a HA IIIb of the CGI, a point which the Commission raised merely for the sake of completeness.

2.4. *Effect on trade between Member States and distortion of competition*

(108) The French authorities and CIL stated that Le Levant was operated out of Saint-Pierre-et-Miquelon, therefore on a very limited market where no other cruise company was present. CIL also invoked Le Levant's small capacity and the fact that it was mainly targeted at North American customers. For these reasons, the French authorities and CIL dispute that the advantage granted to CIL could have caused distortion of competition and affected trade between Member States.

(109) It should be recalled that aid which is intended to release an undertaking from costs which it would normally have had to bear in its day-to-day management or normal activities, distorts the conditions of competition ([34]). It has been ruled that any grant of aid to an undertaking exercising its activities in the Community market would be likely to affect trade between Member States and would threaten to distort competition between Member States ([35]).

(110) The Commission considers that it is not relevant to consider cruises from Saint-Pierre-et-Miquelon as a separate market. A consumer who is planning to go on a cruise in that region would probably also be prepared to consider cruises to other destinations or from other ports and his choice would be determined by a range of factors, including price, which could be affected by the measure in question. Cruises therefore form part of a bigger market and since the tax benefits in question release CIL from costs that it would normally have had to bear to finance its economic activities, the aid could cause a distortion of competition on this market.

(111) As regards the effect on trade between Member States, the Commission has taken note of the fact that Le Levant mainly targeted the North American market and that CIL therefore worked with a US travel agency which promoted and distributed the cruises. The Commission nevertheless points out that it is possible that aid might distort competition within the Community, even if the undertaking receiving it exports almost all its production outside the Community ([36]). Furthermore, it seems that some cruises may have been marketed in Europe.

(112) The measure in question may therefore distort competition and affect trade between Member States.

([31]) See, for example, the judgments of the Court of Justice in Case C-241/94 *France* v *Commission* [1996] ECR I-4551, and in Case C-200/97 *Ecotrade* v *Altiforni e Ferriere di Servola* [1998] ECR I-7907.

([32]) See, to that effect, the judgment of the Court of First Instance in Case T-308/00 Salzgitter v Commission [2004] ECR II-1933, paragraph 38.

([33]) See recital 10.

([34]) See the judgment in Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 30, and the case-law cited there.

([35]) See, in particular, the judgment of the Court in Case 730/79 *Philip Morris* v *Commission* [1979] ECR 2671, paragraphs 11 and 12.

([36]) Judgment of the Court in Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, paragraph 35.

2.5. *Aid intensity*

(113) The Commission considers that the aid includes all the tax savings passed on by the investors to their joint-ownership companies in the form of the capital increases that they were committed to as part of their involvement in the Le Levant financing package.

(114) The French authorities claimed that they are unable to provide figures for the tax savings without conducting a separate examination of the tax situation of each of the investors.

(115) The Commission does not in any case consider that it has to provide exact figures for the aid but just to specify the bases of its calculation. It points out, however, without prejudice to the calculation of the total amount of the aid, that according to the Bank's estimates based on the profile of a 'typical investor' ([37]), the tax savings made by deducting just the purchase price of the ship would give capital contributions of FRF 278 506 per set of two shares, i.e. for the 738 shares sold to investors, a total of FRF 102 490 200, namely an intensity of some 44,8 % compared with the price of the ship.

3. **Compatibility of the aid with the common market**

Legal provisions applicable

(116) As the Commission found that the measure constitutes State aid within the meaning of Article 87(1) of the Treaty, the question of its compatibility with the common market should be addressed. In this respect, the Commission indicated in its decisions opening the procedure that it considered that the aid should be examined in the light of Directive 90/684/EEC, and in particular, given the purpose of the aid, of Article 4(7) thereof ([38]). The French authorities and the interested parties disputed the relevance of this legal basis on the grounds set out in parts IV and V. The reasons for the choice of this legal basis should therefore be examined.

(117) The Commission's Decision of 27 January 1993 not to raise any State aid objections as regards the Loi Pons clearly stated that 'the application of the aid in question is subject to the rules and guidelines laid down by Community law in relation to (…) certain industrial sectors …'. Consequently that Decision does not cover the aid in question since it comes under the scope of Directive 90/684/EEC.

(118) France and the interested parties claim that Directive 90/684/EEC only applies to aid to a shipbuilder and that since the Commission has not identified an advantage for the shipyard that built Le Levant, Directive 90/684/EEC is not applicable to this case. The Commission does not accept this argument. It is clear from the wording itself of Article 3(1) of Directive 90/684/EEC that it applies to 'all forms of aid to ship-owners or to third parties which are available as aid for the building or conversion of ships'. It is therefore not so much the nature of the beneficiary as the purpose of the aid that is decisive for the application of Directive 90/684/EEC, which refers to aid for 'shipbuilding' and not for 'shipbuilders'. This interpretation is supported by the case law of the Court which, in response to the argument that only aid available for the production of ships, and not for their operation, should be taken into account in the context of Directive 90/684/EEC, found that its provisions are applicable 'not only to all forms of production aids granted directly to the yards but also to the aid covered by Article 3(2), which refers to all forms of aids granted to shipowners or to third parties where these aids are actually used for the building or conversion of ships in Community shipyards' ([39]).

(119) The Commission accordingly confirms that the compatibility of the aid with the common market should be assessed in the light of Directive 90/684/EEC.

Analysis of compatibility

(120) Under the terms of Article 4(7) of Directive 90/684/EEC, aid related to shipbuilding and ship conversion granted as development assistance to a developing country 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 or with any later addendum or corrigendum to the said Agreement (hereinafter OECD criteria).

([37]) See the supplementary Decision of 6 December 2006, paragraph 72.

([38]) Directive 90/684/EEC ceased to have effect on 31 December 1997. It is, however, still relevant for examination of this case as its provisions were in force at the time the aid was granted, in accordance with the Commission notice on the determination of the applicable rules for the assessment of unlawful State aid (OJ C 119, 22.5.2002, p. 22).

([39]) Judgment of the Court in Joined Cases C-356/90 and C-180/91 *Belgium v Commission* [1993] ECR I-2323, paragraph 14.

(121) As communicated to Member States by Commission letter SG(89)D/311 of 3 January 1989, development-aid projects must comply with the following OECD criteria:

— vessels must not be operated under a flag of convenience,

— in the event that the aid cannot be classified as public development aid for the purposes of the OECD, the donor must confirm that the aid is part of an intergovernmental agreement,

— the donor must give appropriate assurances that the real owner is resident in the recipient country and that the recipient company is not a non-operational subsidiary of a foreign company (eligible recipient countries include not only developing countries classified as such by the OECD but also all overseas countries and territories associated with the European Union, including the French overseas territories),

— the recipient must give undertakings not to sell the ship without governmental approval.

(122) Also, the aid granted must include a concessionary element of 25 % at least.

(123) In addition, as indicated above, the Commission must also verify that the project has a genuine 'development component'. The Court ([40]) ruled that the Commission is obliged to verify the development content of the project separately from the OECD criteria. It follows that the Commission's assessment must include verification that projects have a genuine development objective and that they would not be viable without the aid (i.e. that the aid is necessary).

(124) As the Commission indicated when the Article 88(2) procedure was initiated, the project meets the OECD criteria for the following reasons:

— Le Levant is operated under the French flag. The requirement that it not be operated under a flag of convenience is thus met,

— Saint-Pierre-et-Miquelon is on the list of countries eligible for development aid annexed to Commission letter SG(89)D/311 to Member States,

— the Commission notes that under the terms of the package, CIL is intended to become the sole owner of the vessel and that, during the intervening period, it operates the vessel in its commercial business as a de facto owner. For the purposes of the residence condition for the owner, the Commission finds that CIL should be considered the real owner of Le Levant ([41]). CIL has its head office in Wallis-et-Futuna. This archipelago is not the 'beneficiary country' (which is Saint-Pierre-et-Miquelon). However, since both groups of islands are on the Commission's list of countries eligible for development aid, the aid cannot be objected to on this ground. Furthermore, CIL is not a non-operational subsidiary of a foreign company,

— the vessel cannot be resold without the approval of the French authorities since the aid is granted on the condition that CIL actually operates the vessel for at least five years mainly to and from Saint-Pierre-et-Miquelon,

— the aid intensity exceeds 25 % (see recital 115).

(125) The Commission must still verify the 'development component', namely satisfy itself that the aid will contribute to the development of the beneficiary territory. This analysis must take into account the circumstances and specific needs of the territory in question. In this connection, the French authorities underlined that the economy of Saint-Pierre-et-Miquelon was in a particularly difficult situation when the aid was granted. The archipelago was historically dependent on industrial fishing. The sudden and total collapse of this industry in 1993, following the settlement in Canada's favour of a dispute with France on fishing rights and a Canadian moratorium on cod fishing, meant an urgent need to re-orient the territory's economy. Opportunities for reorientation were considerably hampered by the small size of the archipelago and its population, its relative isolation and limited economy. Diversifying into tourism therefore seemed to be the best option, taking advantage of the territory's untouched nature and its proximity to North America. As Saint-Pierre-et-Miquelon could not offer long-stay tourism it seemed reasonable to try developing the archipelago as a cruise port.

([40]) Judgment of the Court in Case C-400/92 *Germany* v *Commission [1994]* ECR I-4701.

([41]) This analysis is in line with that in the abovementioned 'Renaissance' case.

(126) In the comments submitted following the Decision of 2 December 1999 initiating the procedure, the French authorities claimed that operating Le Levant would contribute to Saint-Pierre-et-Miquelon's development, in particular by creating jobs and expenditure in the territory generated by its operation.

(127) In Decision 2001/882/EC, the Commission concluded, however, that there was no 'development component' ([42]). This assessment was based on the following conclusions as regards the economic benefits of the aid:

— the Commission found on the basis of the information at its disposal that the economic benefits linked to operation of le Levant could be estimated at FRF 5,52 million for the period 1999-2001, i.e. some EUR 0,84 million,

— as regards the creation of direct jobs, the Commission considered that there was no proof of any effect as the information provided by the French authorities only stated that 'four former fishermen from the islands had been trained to work on the ship',

— finally, as regards the effect on the archipelago's infrastructure development and the indirect effects linked to the possible entry of other operators, the Commission found that the French authorities' assertions had not been quantified and that it was not necessary to take them into account in the assessment of the aid measure for le Levant.

(128) These conclusions were clearly based on the information available to the Commission at the time when it took its Decision. As it emerged clearly from the judgment of the Court in the action for annulment in abovementioned Case C-394/01 ([43]), the Commission could only base its Decision on the information that it had been given during the formal investigation procedure initiated by its Decision of 2 December 1999, which ruled out certain information that the French authorities only presented at the stage of proceedings before the Court.

([42]) Decision 2001/882/EC, recital 33.
([43]) See footnote 5.

(129) In the fresh observations submitted following the Commission's supplementary decision of 6 December 2006, the French authorities and the interested parties provided information which the Commission did not have when Decision 2001/882/EC was adopted and which give a different impression of the economic effects of operating Le Levant.

(130) It would therefore appear from the observations submitted by the French authorities that at least 14 people from Saint-Pierre-et-Miquelon were employed on board Le Levant from 1999 to 25 July 2001. In addition to these jobs at sea there were jobs on land because of the use of local suppliers and service providers. The French authorities estimate that operating Le Levant generated at least 10 jobs on land from 1999 to 25 July 2001 ([44]).

(131) According to the same information from the French authorities, operating Le Levant generated EUR 1,66 million of direct expenditure in Saint-Pierre-et-Miquelon (linked to the ship's supplies, passenger transfers etc.) in the period 1999-2001 ([45]).

(132) Unlike the information available to the Commission in 2001, this new information therefore demonstrates a quantified impact in terms of job creation. This effect is not insignificant bearing in mind the small size of the labour market in the territory and comparing it with the number of job seekers (409 people in 1999) ([46]). It also shows that direct expenditure in Saint-Pierre-et-Miquelon linked to operating Le Levant is about twice the amount stated by the Commission in the grounds for Decision 2001/882/EC ([47]).

([44]) According to the French authorities, 14 to 16 nationals of Saint-Pierre-et-Miquelon were employed on board during the first five years of Le Levant's operation, i.e. 1999-2003. During the same period, operation of Le Levant generated 11 to 12 jobs on land. However, for reasons linked to the principle of legal certainty, for the purposes of this Decision the Commission will only take into account facts concerning the period prior to Decision 2001/882/EC. Likewise, the Commission will only consider the lowest number of jobs.
([45]) This period covers the whole of 2001. It should also be noted that the French authorities estimate the expenditure directly generated by Le Levant in 2002 and 2003 at EUR 1,66 million a year, i.e. some EUR 3,4 million for the first five years of Le Levant's operation.
([46]) Number of job seekers at 31 December 1999 (report by the Institut d'émission des départements d'outremer (IEDOM): '*Saint-Pierre-et-Miquelon in 1999*').
([47]) That is, for the period 1999-2001, some EUR 1,66 million as against EUR 0,84 million (FRF 5,52 million) estimated by the Commission in Decision 2001/882/EC.

(133) This new information shows that the aid to le Levant generated economic effects, admittedly limited but which could none the less contribute to Saint-Pierre-et-Miquelon's economic development.

(134) The French authorities also argued that the aid could, more generally, contribute to the development of Saint-Pierre-et-Miquelon by encouraging the necessary economic diversification. On this point, the Commission's investigation procedure showed that Saint-Pierre-et-Miquelon's economy had been almost entirely dependent on industrial fishing until 1993 and then it was dependent on the public sector and public procurement ([48]).

(135) The Commission accepts that this dependence on very limited sources of jobs and income may hold back the territory's development. In view of the particular geographic characteristics of Saint-Pierre-et-Miquelon and the very small size of its domestic market, the Commission admits that economic diversification was useful for its development and that tourism could prove a promising path for diversification when the aid was granted. The Commission also accepts the French authorities' comments that the small size of the archipelago limited the possibilities for proposing long-stay tourism but that on the other hand it was suited to developing cruise activities.

(136) The Commission notes that according to the information provided by the French authorities, the number of cruises visiting the archipelago fluctuated sharply in the years prior to the granting of the aid and the commissioning of Le Levant, but that this figure seems to have stabilised at a relatively high level from 2000 ([49]).

(137) However real they are, these contributions to Saint-Pierre-et-Miquelon's development may never the less seem limited, especially in comparison with the aid intensity. The Commission considers, however, that the compatibility of the aid with the common market should be assessed by comparing the contribution that the aid can make to Saint-Pierre-et-Miquelon's development and the degree of trade distortion between Member States that it could cause. In this respect, the Commission considers that while there is no doubt that the aid could have some adverse effect on trade between Member States as shown in section 2.4, it is none the less likely that this effect will be very slight given the specific circumstances of the case. In this connection, the Commission notes the following:

— Le Levant is a small capacity ship as it carries only about 95 passengers, which obviously limits its impact on the market,

— the cruises offered by Le Levant from Saint-Pierre-et-Miquelon (i.e. outside Community waters) were mainly targeted at the North American market ([50]), both because of the marketing networks set up by CIL and the geographic location of the archipelago, which made it a cruise 'hub' (some 4 600 kilometres from Paris, but only 25 kilometres from the Canadian coast) ([51]),

— the Commission also notes that according to the information it has received, no other operator established in the Community offers or offered in the period in question, cruises to Saint-Pierre-et-Miquelon and that the cruises organised by Le Levant, which combined top luxury and unusual destinations, were clearly targeted at a very narrow segment of the cruise market, and one which was not highly developed in Europe.

(138) In the light of the above, the Commission finds that the aid in question could make a contribution to Saint-Pierre-et-Miquelon's development by creating jobs and diversifying its economy and that although modest, this contribution is greater than the distortion of trade between Member States that the aid could cause.

([48]) In 1999, the building and public works and the fisheries sectors, widely supported by the public authorities, accounted for 63,8 % of employment. Civil servants made up 25,8 % of the working population (see report by the Institut d'émission des départements d'outremer (IEDOM): '*Saint-Pierre-et-Miquelon in 1999*').

([49]) There were 2 134 cruise passengers in 1995, 820 in 1996, 785 in 1997, 2 123 in 1997, 2 123 in 1998, 428 in 1999, rising to 3 242 in 2000 and 2 474 in 2001. It should also be noted that the level was maintained throughout the whole period of Le Levant's operation, with 5 120 cruise passengers in 2002 and 3 022 in 2003.

([50]) It is also clear from the request for approval submitted to the French authorities by the Bank and CIP that the 'Le Levant' project depended 'closely on the links forged between CIP and Travel Dynamics […] a US tour operator which specialises in organising cruises'. CIP emphasises that the 'Le Levant' project is based on experience gained with its first ship, Le Ponant, whose 'customers … chiefly North American … now mainly come from the partnership established with Travel Dynamics'. CIP adds that it has shown that 'it was capable of attracting North American customers on to a French ship …'. It is also clear from the report by the Institut d'émission des départements d'outremer (IEDOM): 'Saint-Pierre-et-Miquelon in 1999' (page 37) that in 1999 the destination was sold by 11 North American tour operators as against only two French tour operators.

([51]) Under Decision 2003/66/EC of 24 July 2002 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (Case No COMP/M.2706 — Carnival Corporation/P&O Princess) (OJ L 248, 30.9.2003, p. 1), the Commission already concluded that the market for cruises was still predominantly of a national character.

(139) The Commission also finds that this aid was necessary. The profitability forecasts for operating the vessel from Saint-Pierre-et-Miquelon under the terms of the package approved by the French authorities were such that the project's profitability could only be guaranteed as a result of the aid. The project to build and operate Le Levant could therefore not have been achieved without the aid.

(140) For the above reasons, the Commission therefore finds that the aid to Le Levant includes a 'development component'.

VIII. **CONCLUSIONS**

(141) The Commission finds that France has unlawfully implemented the aid in question in breach of Article 88(3) of the Treaty. However, the Commission considers that the aid constitutes development assistance pursuant to Article 4(7) of Directive 90/684/EEC and that it is therefore compatible with the common market,

HAS ADOPTED THIS DECISION:

Article 1

The State aid which France has implemented in favour of la Compagnie des Îles du Levant in respect of the construction of the cruise ship Le Levant is compatible with the common market.

Article 2

This Decision is addressed to the French Republic.

Done at Brussels, 20 May 2008.

For the Commission

Neelie KROES

Member of the Commission