

## II

(Acts whose publication is not obligatory)

## COMMISSION

## COMMISSION DECISION

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**

(notified under document number C(2001) 2435)

(Only the French text is authentic)

(Text with EEA relevance)

(2001/882/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<sup>(1)</sup>, and in particular Article 4(7) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above<sup>(2)</sup>,

Whereas:

### I. PROCEDURE

(1) From an article published in *Lloyds List*, the Commission learned in late 1998 that the cruise vessel *Le Levant*, built by Alstom Leroux Naval in France at a contract price of FRF 228,55 million, had been financed by means of tax concessions available to investors financing the building of the vessel. This aid had not been notified to the Commission. In response to the Commission's enquiries, France provided information about the project by letter dated 12 May 1999. The Commission asked additional questions by letter dated 4 June 1999, to which France replied by letter dated 19 August 1999. France submitted observations by letters dated 12 January and 14 June 2000, the latter letter commenting on the

observations submitted by the legal representatives of Compagnie des Îles du Levant (hereinafter referred to as 'CIL') in the context of the procedure. The Commission asked further questions in a letter dated 26 February 2001, to which France replied by letters dated 30 April 2001 and 11 June 2001.

- (2) By letter SG(99)D/9733 dated 2 December 1999, the Commission informed France that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty.
- (3) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities*<sup>(3)</sup>. The Commission invited interested parties to submit their comments on the aid.
- (4) The comments received were forwarded by the Commission to France, which was given the opportunity to react.

### II. DETAILED DESCRIPTION ON THE AID

- (5) The aid was granted in 1996, when the cruise vessel *Le Levant* was acquired by a group of private investors who put it into joint ownership on the initiative of [...] (\*). The vessel was then leased to CIL, which is a subsidiary of the French company Compagnie des Îles du Ponant registered in Wallis and Futuna. The investors were authorised to deduct their investment from their taxable income. These tax concessions enabled CIL to operate the vessel on attractive terms. The investors have the

<sup>(1)</sup> OJ L 380, 31.12.1990, p. 13.

<sup>(2)</sup> OJ C 33, 5.2.2000, p. 6.

<sup>(3)</sup> See footnote 2.

(\*) Business secret.

right and obligation to sell back their shares to [...] after five years, i.e. at the beginning of 2004. CIL in turn has the right and obligation to buy the shares from [...] at a price which will enable the value of the aid to be passed on to it. As a condition of the aid, CIL is required to operate the vessel for a minimum of five years, essentially to and from St-Pierre-et-Miquelon, and for 160 days a year.

- (6) The aid was granted under a tax scheme, the Loi Pons, allowing tax concessions for investments in the French overseas departments and territories. This scheme was approved by the Commission in 1992.
- (7) France has informed the Commission that the aid in this case is identical to the aid granted for the vessel *Tahiti Nui (Paul Gauguin)*, for which the Commission estimated the tax concessions to have a net grant equivalent of 34 % <sup>(4)</sup>. The aid represented by the tax concessions was thus FRF 78 million (EUR 11,9 million).
- (8) The Commission had doubts concerning the estimated economic benefits for Saint-Pierre-et-Miquelon. The project was expected to create 55 jobs on board the vessel, but there was no guarantee that the crew would be residents of the islands. Moreover, the overall economic benefits (originally estimated by France at FRF 12 million per annum over the five-year period during which CIL was required to operate the vessel essentially to and from the islands) were lower than the total amount of aid, a fact which gave rise to questions concerning its proportionality. The Commission also had doubts as to whether the aid really was development assistance since the vessel seems to have called in at Saint-Pierre-et-Miquelon much less often than originally envisaged.
- (9) The Commission therefore doubted whether the conditions of Article 4(7) of Directive 90/684/EC had been met and decided to initiate the procedure laid down in Article 88(2) of the Treaty.

### III. COMMENTS FROM INTERESTED PARTIES

- (10) The Commission has received comments from CIL's legal representatives.
- (11) They argued that the company should not be regarded as the beneficiary of the aid since it is currently responsible only for operating the vessel, at its own risk, on behalf of the vessel's joint owners (private investors hold 99,73 % of the shares, with the rest being held by CIL).

It will buy the vessel at its market value, but only if certain economic, legal and financial conditions are met. They also argued that, since the relevant legal framework was the Shipbuilding Aid Directive, the aid should be regarded as aid to shipbuilding and that in previous similar cases (and notably in its decision relating to Renaissance Financial <sup>(5)</sup>) the Commission had considered the aid beneficiary to be the shipyard.

### IV. COMMENTS FROM FRANCE

- (12) France transmitted its comments by letters of 12 January 2000, 14 June 2000, 30 April 2001 and 11 June 2001. The letter of 14 June 2000 was concerned with the comments of interested parties and provided additional information. The letter of 30 April 2001 clarified the movements of the vessel and contained a new estimate of the financial benefits to the islands, while the letter of 11 June 2001 explained the contractual arrangements between the investors, CIL and the organising financial institution [...].
- (13) In their initial comments, the French authorities had stressed that, because of climatic conditions, the vessel clearly had to be operated away from Saint-Pierre-et-Miquelon waters in winter. Although no guarantee had been given, priority would be given to recruiting crew members who were Saint-Pierre-et-Miquelon residents. There would, in any case, be benefits in terms of indirect job creation on the islands as a result of the vessel's stopovers there. On the basis of 50 visits a year (passenger reception, embarkation and disembarkation, ship supplies, etc.), such benefits would represent an additional 11 or 12 jobs. Other jobs might also be created by infrastructure projects and by dint of the fact that other cruise operators seemed interested in visiting the islands. The French authorities also argued that, in assessing the proportionality of the aid, account should be taken of the fact that, although CIL was obliged to operate the vessel for only five years in the area, it could be used for much longer given the interest in Arctic cruises, so that any assessment should be based on a minimum of ten years. Finally, they reaffirmed the importance of the project given the high level of unemployment on the islands and the need for economic diversification away from fishing.

<sup>(4)</sup> OJ C 279, 25.10.1995, p. 3; State aid C 8/95.

<sup>(5)</sup> Case C-37/98 (OJ L 292, 13.11.1999, p. 23).

(14) In further observations concerning the comments received from CIL's legal representatives, the French authorities indicated that the original estimate of 55 jobs related to direct employment on board the vessel, whereas the additional 11 or 12 jobs were part-time jobs in 1999 and, like the estimate of 55 direct jobs, were based on the operation of the vessel to and from the islands for 160 days a year. In their most recent letter, the French authorities confirmed that the ship had visited the islands less often than envisaged and that the economic impact was thus lower than expected but that there had in any case been positive economic effects for the islands.

(15) On the matter of the aid beneficiary, the French authorities disagreed with CIL's legal representatives. They pointed out that the objective of the Loi Pons was to help operators develop their overseas activities by compensating them for the particular handicaps they faced in that regard. In the case at issue, the operator would be able to acquire ownership of the vessel on attractive terms (at a price that would allow the value of the aid to be passed on to CIL). The French authorities also pointed out that the Commission had agreed in the past not to challenge such projects carried out in overseas territories. Thus, in a similar procedure initiated in 1995, the Commission had indicated in its letter SG(97)D/500 of 23 January 1997 that the application of the law was limited solely to vessels intended for the overseas departments. Consequently, vessels such as the *Club Med II* or, more recently, the *Tahiti Nui* will be able to continue to benefit from Article 4(7) of the Shipbuilding Directive if they are assigned mainly to the overseas territories. The French authorities also pointed out that, in the Renaissance Financial case (C-37/98) <sup>(6)</sup>, the Commission had taken the same line.

#### V. ASSESSMENT OF THE AID

(16) The aid granted for the vessel in question must be assessed in the light of Article 4(7) of the Council Directive of 21 December 1990 on aid to shipbuilding given that it concerns aid for shipbuilding granted as development assistance in 1996 under an aid scheme (the Loi Pons) approved in 1992.

(17) Under Article 4(7) of the Shipbuilding Directive, aid 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 that Agreement (hereinafter referred to as the 'OECD criteria'). The Commission must verify the particular development content of the proposed aid and satisfy itself that it falls within the scope of the said Agreement.

(18) 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 (for the purposes of the Directive, 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.

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

(20) In addition, as indicated above, the Commission must also verify that the project has a genuine development content. In Case C-400/92 concerning German development aid for the Chinese company Cosco, the Court established 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).

#### Application of the criteria to the present case

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

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

<sup>(6)</sup> See footnote 5.

- Saint-Pierre-et-Miquelon is on the list of countries eligible for development aid annexed to the Commission letter SG(89)D/311 to Member States,
  - the operator (and eventual owner) is registered in Wallis et Futuna. This is not the 'recipient 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 appears not to be 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 and then buys it from the investors in mainland France and continues to operate it,
  - the aid intensity exceeds 25 %.
- (22) However, the development criterion is not met in this case. The key point is that the French estimates of the economic benefits are based on the assumption that the vessel will call in at Saint-Pierre-et-Miquelon 50 times per season (over the 160 days from late May to the end of October during which climatic conditions in the area permit cruising). The figure of 50 port visits is clearly stated in a table estimating the economic benefits for the islands.
- (23) The reality is very different. According to information submitted by the French authorities in their letter of 30 April 2001, nine cruises were undertaken in 1999 and 11 in 2000 which included Saint-Pierre-et-Miquelon in their itinerary (as starting/finishing point). Since the cruises either departed or arrived in Saint-Pierre, there were only 11 stopovers in the port of Saint-Pierre in the 1999 and 2000 seasons combined, and not 100 as initially estimated by the French authorities.
- (24) According to the same letter, 18 cruises to or from Saint-Pierre were planned for 2001, including include five new mini-cruises that both arrive and depart from Saint-Pierre. This gives a total of 12 stopovers at the port of Saint-Pierre in 2001 compared with the 50 initially estimated.
- (25) On the basis of the figures for 1999 and 2000, the Commission has concluded that the assumptions underlying the calculation of the economic benefits for Saint-Pierre-et-Miquelon were wrong. It has therefore recalculated the estimated economic benefits, using the French figures but taking into account the much lower number of port visits.
- (26) With regard to the direct economic benefits, the French estimates are that spending linked to operation of the vessel would be FRF 10,8 million per annum. Local spending by passengers is estimated at FRF 1,2 million per annum. In both cases, the data are based on 50 port visits a year. However, as indicated above, the vessel visited the port only 5,5 times a year in 1999 and 2000. It plans to make 12 visits this year.
- (27) Given the nature of the economic benefits envisaged in the calculations (food, equipment, port fees, etc.), it can be assumed that they are proportional to the number of visits to the port. The benefits are put at FRF 12 million a year on the basis of 50 visits. Assuming that the economic calculations made by France are correct with regard to the impact of the ship's visits and taking into account the number of visits in 1999 and 2000, the benefit to the islands would amount to 5,5/50 or 11 % of the initial estimates. For 2001, the benefits would be 12/50 or 24 % of the initial estimates.
- (28) Over each of the last two years, the real benefits would therefore have been 11 % of FRF 12 million, i.e. FRF 1,32 million. According to the French authorities, some 760 passengers embarked or disembarked at Saint-Pierre in each of these two years. Assuming an economic impact of FRF 1,32 million, this would imply spending of FRF 1 700 per person, which seems reasonable given that passengers are not likely to spend more than one night on the islands before or after a cruise.
- (29) For 2001, the benefits can be estimated at 24 % of FRF 12 million, i.e. FRF 2,88 million. For the next two years, the cruise schedule is not known. Taking the figure for 2001, the total economic benefit to Saint-Pierre-et-Miquelon over the five years 1999-2003 would be 1,32 + 1,32 + 3 x (2,88), i.e. FRF 11,28 million. Since the total value of the aid is FRF 78 million, this is almost seven times greater than the economic benefit to the islands.
- (30) As far as direct jobs are concerned, the French authorities have stated that priority would be given to employing residents of Saint-Pierre-et-Miquelon among the 55 crew. However, the only information that has been provided is that four former fishermen from the islands have been trained to work on the ship. The presumption must be that the crew does not to any large extent come from the islands.

- (31) The claims concerning other indirect benefits (the development of infrastructure and the possibility of other cruise operators visiting the islands) have not been and probably cannot be quantified. Moreover, they are not directly relevant to the development character of this particular project or to the proportionality of the aid involved. It is therefore not necessary to take them into account in this assessment.
- (32) Finally, the Commission cannot accept the argument put forward by the French authorities to the effect that a longer period than five years should be taken into account since there is no obligation on CIL to continue operating the vessel to or from Saint-Pierre-et-Miquelon after that period.
- (33) In the light of the foregoing, the Commission therefore concludes that it has not been possible to establish that this project was indeed a development project. The alleged benefits in terms of direct job creation have not been substantiated and are not based on realistic assumptions. Moreover, the alleged direct economic benefits are significantly less than the aid involved, resulting in a clear lack of proportionality between the aid and the intended economic impact.
- (34) The Commission finds that France has unlawfully implemented the aid in question in breach of Article 88(3) of the Treaty. The aid is not consistent with the Shipbuilding Directive and is therefore incompatible with the common market. It must therefore be recovered with interest.

#### Beneficiary of the aid

- (35) There remains the question of which party is the main beneficiary of the aid. This point was mentioned when the procedure was initiated. At that time, the Commission noted that the immediate beneficiaries of the quantifiable aid were the investors receiving the tax concessions. This analysis is still valid.
- (36) According to the French authorities, the investors obtained advantages from the tax concessions and they are still the owners of the vessel under the terms of the joint ownership. They will continue to enjoy these advantages for some five years following the delivery of the vessel (i.e. until the beginning of 2004). The vessel will then have to be sold at a price which, according to the available information, will transfer the aid to the operator CIL. It is thus clear that CIL will be the main final beneficiary of the aid once the ship has been sold to it at an advantageous price.
- (37) 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.

#### Recovery of the aid

- (38) Since the unlawful and incompatible aid has already been granted, it must be recovered in order to restore effective competition and, to that end, interest must be charged from the date on which it was made available to the beneficiary until such time as it is recovered.
- (39) In the light of the above analysis, there is no doubt that it is the investors, as the direct beneficiaries and current owners of the vessel, which should repay the aid. Although it is doubtful whether any of the private individual investors holding the 738 shares 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.
- (40) If 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. Since this transfer will not take place before mid-2003, the operator CIL cannot be considered liable to repay the aid at this stage.
- (41) As for the shipyard, no recovery should take place from it under the current circumstances. In this respect, it is useful to explain why there is a provision on development assistance in the Seventh Shipbuilding Directive. The reason is that it opens up the possibility of granting a higher level of aid than that allowed for other shipbuilding contracts. Such higher levels of aid can be declared compatible if the OECD rules are respected. It is clear from those rules that they are addressed to the aid donor, the shipowner and the developing country, but not to the shipyard. If the OECD's substantive rules, including the development criteria, are breached, it would not be reasonable to accuse the shipyard since it cannot be held responsible for the operation of the ship after delivery,

HAS ADOPTED THIS DECISION:

#### Article 1

The State aid which France has implemented in the form of tax concessions and as development assistance for the cruise vessel *Le Levant*, built by Alstom Leroux Naval for operation in the French overseas territory of Saint-Pierre-et-Miquelon, cannot be regarded as genuine development assistance within the meaning of Article 4(7) of Council Directive 90/684/EEC on aid to shipbuilding and is therefore incompatible with the common market.

*Article 2*

1. France shall 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.

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of this decision. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiaries until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

*Article 3*

France shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it.

*Article 4*

This Decision is addressed to the French Republic.

Done at Brussels, 25 July 2001.

*For the Commission*

Mario MONTI

*Member of the Commission*

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