

OPINION OF ADVOCATE GENERAL
JACOBS

delivered on 13 December 2001¹

1. In the present case France asks for the annulment of Commission Decision 2000/513/EC of 8 September 1999 on aid granted by France to Stardust Marine² ('the contested decision').

('CDR'), described in the decision as a hive-off vehicle for non-performing assets of CL, to the French pleasure boat chartering firm Stardust Marine ('Stardust'). The CL group operates in the banking sector. At the material time CL and its subsidiaries were owned and controlled by the French State.³

2. The case turns on the interpretation of the phrase 'aid granted by a Member State or through State resources in any form whatsoever' in Article 87(1) EC. The two central issues are first, whether the resources of public undertakings are always State resources, and secondly, whether measures of public undertakings are always attributable to the State.

Background

3. The contested decision concerns various financing measures granted first by two subsidiaries of Crédit Lyonnais ('CL') and then by the Consortium de Réalisation

4. Whilst aid granted by France to CL is not directly at issue, it is none the less necessary to start with some background information about the events at CL during the 1990s. From 1992 onwards CL experienced considerable financial difficulties which led the French State in 1994 to grant aid in the form of a capital increase of FRF 4.9 billion and the creation of a first hive-off vehicle for non-performing property assets worth about FRF 40 billion. In 1995 the French State set up a second hive-off vehicle, the above-mentioned CDR, which purchased nearly FRF 190 billion of assets from CL including those hived off in 1994, the losses being covered by State guarantee. Those measures were the subject of a first decision, Decision

1 — Original language: English.

2 — OJ 2000 L 206, p. 6.

3 — See below at paragraph 31.

95/547/EEC of 26 July 1995,⁴ in which the Commission approved on certain conditions the State aid in question, provided that the net cost to the State did not exceed FRF 45 billion. CL's situation deteriorated further and by a second decision of 26 September 1996⁵ the Commission approved FRF 4 billion of emergency aid. Finally, by Decision 98/490/EC of 20 May 1998⁶ the Commission approved additional restructuring aid of a value between FRF 53 and 98 billion provided that France complied with certain undertakings and conditions.⁷

5. Stardust was set up in 1989. Its main business was bareboat (crewless) charters of multi-owner yachts which it managed. It benefited from the incentives created by the 1986 'Pons' law authorising tax-exempt investments in the French overseas territories and departments, where a large part of its fleet was located. The French authorities have provided the Commission with the following table about the evolution of Stardust's activity and results⁸.

4 — OJ 1995 L 308, p. 92.

5 — OJ 1996 C 390, p. 7.

6 — OJ 1998 L 221, p. 28.

7 — A lively (albeit perhaps not entirely neutral) account of the events is given by K. Van Miert, *Le Marché et le Pouvoir*, Éditions Racine, Bruxelles, 2000, p. 81-98.

8 — At paragraph 93 of the decision, cited in note 1.

Trends of Stardust's activities and results

(million FRF)

	31.12.90 11 months	31.12.1991 12 months	31.12.1992 12 months	31.12.1993 12 months	30.6.1995 18 months	30.6.1996 12 months	30.6.1997 12 months
Turnover	10.4	25.9	53.2	117.5	291.7	178.4	134.9
Operative result	0.7	4.1	9.9	6.7	- 110.7	- 43.4	- 21.9
Financial result	- 0.3	- 2.7	- 6.8	- 18.1	- 49	- 30.2	- 6.6
Exceptional result	- 0.2	- 0.2	- 0.2	- 3.7	- 199.9	- 71.9	52.7
Net result	0.3	0.4	2.1	- 15.9	- 361.2	- 146.9	24.1

Source: French authorities

6. Stardust's expansion⁹ appears not to have been achieved through self financing¹⁰ but as a result of financial assistance in various forms from the CL group and

later from CDR. The French authorities have provided the Commission with the following table representing the evolution over time of the commitments of the CL group and CDR.¹¹

9 — Compare the turnover in 1990 and for the eighteen months ending on 30 June 1995.

10 — The above table shows that from 1990 to 1992 profits were not large and from 1993 onwards Stardust made losses.

11 — At paragraph 28 of the decision. The heading of that table in the English translation of the decision published in the Official Journal of the European Communities is not correct.

Evolution of the exposure of the CL group and of CDR in relation to Stardust

(million FRF)

	31.12.1993	31.12.1994	31.12.1995	31.12.1996	30.6.1997
Holding in Stardust	8	44	156	324	496
Percentage	27 %	52 %	83 %	99 %	
Current account			127		
Loans to Stardust	320	410	225	228	0
Subtotal	328	454	508	552	496
Off-balance-sheet commitments	42	117	162	181	181
Unpaid contributions of capital				83	
Total	370	571	670	816	677

(1) Until the end of 1998, CDR was wholly owned by Crédit Lyonnais.

Source: French authorities

7. The following chronology of events emerges from the two tables and the contested decision.

8. *Between 1989 and 1992* Stardust expanded rapidly. In 1992 it achieved a turnover of FRF 53.2 million and an operative result of FRF 9.9 million. The bank SBT-Batif ('SBT'), a subsidiary of Altus Finance ('Altus') which was itself a subsidiary of CL, was Stardust's sole banker. SBT granted not only direct loans to Stardust, but also financing to investors wishing to acquire shares in the boats managed by Stardust or guarantees to those investors. That practice entailed the risk that, in the event of Stardust's insolvency, SBT (and thus the CL group) as the firm's creditor and the boats' owners' creditor or guarantor would lose twice.

9. *In 1993* Stardust's turnover more than doubled. In spite of an operating profit of FRF 6.7 million, it incurred a net loss of FRF 15.9 million. According to an ambitious business plan of October 1993 Stardust was to become the leader on the European market for small cruise boats: 1993 to 1994 was to be the 'take-off' period which would be followed by stable growth as from 1995; the fleet would increase from 218 boats in 1993 to 355 in 1996 and the target was a turnover in excess of FRF 300 million in 1996. It appears from the table at paragraph 6 that from its foundation to 31 December 1993 the CL group granted Stardust loans of at least FRF 320 million.

10. *In 1994 and the first half of 1995* (the firm's accounts were drawn up after 18 months on 30 June 1995) the turnover again substantially increased and totalled FRF 291.7 million. The firm however recorded dramatic losses of FRF 361.2 million. According to the French authorities those losses were due chiefly to:

- fraud by the head of the firm;
- poor commercial strategy and inappropriate management;
- one-off exceptional events such as the losses due to Stardust's involvement in the America's Cup, estimated by the French authorities at FRF 45 million;
- losses connected with Stardust's initial activities relating to the sale and management of 'Scorpio' class boats, due partly to the taking of ill-judged risks.

11. According to the contested decision the following happened between January 1994 and June 1995:

- between January 1994 and December 1994 the CL group must have granted

to Stardust new loans of at least FRF 90 million since its claims in that category rose from FRF 320 to 410 million (see the table at paragraph 6);

— in October 1994 a recapitalisation of Stardust subscribed by the CL group through Altus took place which consisted in incorporating into the firm's capital claims totalling FRF 37 million held by CL through SBT ('the first recapitalisation'); if I understand the decision and the tables correctly, the CL group as the biggest creditor also acquired control over Stardust through that conversion of debt into capital;

— at the beginning of 1995 Stardust was transferred to CDR, the already mentioned hive-off vehicle for the non-performing assets of Crédit Lyonnais; moreover, the conseil d'administration (administrative board) of Stardust removed the head of the firm;

— in April 1995 CDR made a capital injection of FRF 112 million, the entire funds being allocated to repayment of outstanding exposure of SBT in respect of Stardust ('the second recapitalisation').

12. *In the financial year 1995/96* Stardust's turnover was lower (FRF 178.4 million) and the firm again incurred considerable losses of FRF 146.9 million. In the language of the Commission decision, in July 1995 CDR blocked an interest-free current account of FRF 127.5 million owed by Stardust to CDR ('the advance on current account'), and on 26 June 1996 CDR subscribed a recapitalisation of Stardust of FRF 250.5 million ('the third recapitalisation').

13. *In the financial year 1996/97* Stardust's turnover was FRF 134.9 million and it made net profits of FRF 24.3 million. On 5 June 1997 an extraordinary shareholders' meeting approved the sale of 99% of the capital of Stardust to FG Marine for FRF 2 million. The same meeting approved a recapitalisation of FRF 89.5 million ('the fourth recapitalisation') which also took the form of the conversion of debt owed to CDR. As explained by the French authorities, the amount of the last injection was dictated by the negative value of Stardust, confirmed by the negative price offered by the purchaser, prior to the recapitalisation.

The contested decision and the application for annulment

14. On 20 June 1997 a competitor of Stardust (who had wished to acquire Star-

dust and had submitted a higher bid than FG Marine) complained to the Commission about the recapitalisations of Stardust and several anomalies concerning its sale. Following an exchange of correspondence with the authorities and various meetings, on 8 September 1999 the Commission adopted the contested decision.

15. In the contested decision the Commission considered, first, that CDR sold Stardust to FG Marine in circumstances which did not meet the conditions of transparency, openness and absence of discrimination required by the Commission in order to rule out the possibility of aid.¹² The Commission accepted however that elements determining the price of an undertaking may include factors subject to considerable uncertainty such as the guarantees offered by a bidder, off balance-sheet risks of a bid or the value of intangibles such as goodwill. The fact that the complainant submitted a bid to CDR which was on the face of it higher than the successful bid for Stardust was therefore not in itself sufficient evidence that the transaction involved aid to the buyer. In view of the off balance-sheet risks and the uncertainties relating to the market value of Stardust the Commission was unable to conclude that Stardust or FG Marine benefited from aid in the form of the sale price.¹³

16. The Commission considered, second, that the assistance in the form of financing and bank guarantees granted by the State to Stardust through the CL group and then CDR contained 'elements of aid' since it was not consistent with the normal actions of a private investor operating under market economy conditions. The aid had taken the form of non-repayable financing in the form of a recapitalisation by CL, followed by an advance on current account and recapitalisations in the form of debt write-offs by CDR after Stardust had been hived off in 1995.¹⁴ The aid was unlawful as it had not been notified. It was also incompatible with the common market since the only possible exemption for such aid under Article 87(3)(c) was not applicable: it was not restructuring aid, but aid which was designed to permit and support the rapid growth of an unprofitable firm.¹⁵ The aid amounted to a non-adjusted nominal total of FRF 496.2 million. The recapitalisations starting in October 1994 were however merely conversions of debt into capital and resulted from the aid granted previously. They did not increase CL's commitments to Stardust. Since 1994 was the last year in which CL's commitments to Stardust increased, the value of the aid had to be adjusted to October 1994.¹⁶

12 — See *XXIIIrd Report on Competition Policy 1993*, Brussels, Luxembourg 1994, at paragraph 402.

13 — At paragraph 116 of the contested decision.

14 — At paragraph 114.

15 — At paragraph 115.

16 — At paragraphs 84 and 114 and note 14.

17. For those reasons the Commission adopted the following decision:

18. According to the French Government Stardust went into liquidation after the adoption of the contested decision.

'Article 1

The capital increases of FRF 44.3 million injected into Stardust Marine in October 1994 by Altus Finance and FRF 112 million injected by CDR in April 1995, the advance on current account of FRF 127.5 million granted by CDR from July 1995 to June 1996, the recapitalisations of FRF 250.5 million in June 1996 and of FRF 89 million in June 1997 by CDR constitute State aid within the meaning of Article 87(1) of the Treaty. The aid, amounting to a discounted value at 31 October 1994 of FRF 450.4 million, cannot be declared compatible with the common market under Article 87(2) and (3) of the Treaty...

19. In support of its application of 17 December 1999 for the annulment of the contested decision France raises five pleas in law:

- (1) the Commission misinterpreted the concept of 'aid granted by a Member State or through State resources' in Article 87(1) EC;
- (2) in finding that the assistance by SBT and Altus to Stardust was granted in circumstances which would not have been acceptable to a private investor operating under normal market economy conditions, the Commission committed a manifest error of assessment;

Article 2

France shall require Stardust to repay to the State or to CDR the sum of FRF 450.4 million corresponding to the State aid content of the measures in question, discounted to 31 October 1994. The amount to be repaid shall bear interest from that date...'

- (3) the decision contains internal contradictions, in particular as regards the grantor of the aid;
- (4) the decision infringes the principle of legal certainty in that it conflicts with

key aspects of the earlier decisions of 26 July 1995 and 20 May 1998 on the aid granted by France to CL;

- (5) the Commission infringed the rights of defence of the French Government, since during the entire procedure it created the impression that it was not investigating the measures adopted by SBT and Altus before the hive-off to CDR.

The first plea: the measures in favour of Stardust were not granted by a Member State or through State resources

20. Article 87(1) EC applies to 'any aid granted by a Member State or through State resources in any form whatsoever'.

21. In the contested decision the Commission states that before 1995 France granted aid to Stardust 'through' CL¹⁷ and that the resources granted by CL, a public undertaking, through its subsidiaries SBT and Altus to Stardust were 'State resources'

within the meaning of Article 87(1) EC.¹⁸ In a footnote the Commission states that 'according to the case-law on State aid, the resources of a public undertaking like Crédit Lyonnais are State resources within the meaning of Article 87 of the Treaty.'¹⁹ As regards the measures granted by CDR between 1995 and 1997 the Commission quotes a passage from Decision 98/490 which states that CDR's resources are State resources within the meaning of the Treaty not only because CDR is the wholly-owned subsidiary of a public undertaking but also because it is financed by a participating loan guaranteed by the State and its losses are borne by the State.²⁰

22. The French Government submits in essence that the measures in favour of Stardust cannot be regarded as granted by a Member State or through State resources within the meaning of Article 87(1) EC merely because they were granted by publicly owned undertakings.

23. In its view, first, the contested decision in fact regards only the measures taken by SBT and Altus before October 1994 as aid. An assessment of the resources used to finance the measures taken by CDR is therefore not necessary. Second, SBT and Altus used exclusively their own resources and the deposits of their clients and not therefore 'State resources' within the mean-

18 — At paragraph 37.

19 — See note 7.

20 — At paragraph 39.

17 — At paragraph 22.

ing of the Court's case-law. Third, the Commission's wide interpretation of the concept of 'State resources' infringes Article 295 EC in that it discriminates against public undertakings, and in particular against public banks. Fourth, the measures granted by SBT and Altus were not imputable to the State, since SBT and Altus took their decisions in total independence from CL and *a fortiori* from the French State. Finally, and in any event, the Commission failed to give reasons for its view that the measures in favour of Stardust were granted through State resources.

24. The Commission replies in essence that CL, SBT and Altus are public undertakings controlled by the State, that measures taken by such undertakings are always imputable to the State and that their funds are by definition State resources.

The measures in issue

25. In order to assess whether measures within the meaning of Article 87(1) are involved, it is necessary first to identify the measures which the contested decision actually regards as aid.

26. Under the chronology set out above four groups of measures may be distinguished:

- the loans and guarantees granted by SBT and Altus to Stardust and its clients before October 1994;
- the first recapitalisation granted by Altus in October 1994;
- the second, third, and fourth recapitalisation of April 1995, June 1996 and June 1997 and the advance on current account of July 1995 granted by CDR;
- the sale of Stardust to FG Marine in June 1997.

27. The contested decision clearly acknowledges that the sale of Stardust in 1997 did not contain aid to Stardust or its buyer.²¹ The decision is however inconsistent as to which of the other three groups of measures contains aid, referring at times to measures prior to October 1994 and at other times to measures subsequent to that date. Thus Article 1 of the operative part states that the capital increases injected into

²¹ — At paragraph 116.

Stardust by Altus in October 1994 and the measures taken by CDR between 1995 and 1997 constitute State aid. Most of the relevant statements in the decision suggest however that only the loans and guarantees granted before October 1994 are the aid in issue,²² and in the course of the proceedings before the Court both the French Government and the Commission accepted that the decision should be regarded as treating as aid only the measures taken by SBT and Altus before October 1994. I will therefore limit my analysis to the loans and guarantees granted by SBT and Altus to Stardust and its clients before October 1994.

The funds of SBT and Altus as 'State resources'

28. The French Government submits that the funds used by SBT and Altus were not 'State resources'. In its view, resources of public undertakings are not automatically State resources. In the present case, SBT and Altus never received any specific public funds and financed the measures in favour of Stardust exclusively through their own resources and deposits of their clients. CL received State aid only on 30 June 1994 and thus at a time when the measures at issue had already been granted.

22 — See, for example, paragraphs 27, 38, 50, 53, 55, 58, 95, 100 to 103 and the heading of Section V(ii) of the contested decision.

30. For the concept of public undertaking it is convenient to rely on Article 2(1)(b) of Commission Directive 80/723/EEC, as amended ('the Transparency Directive'),²³ which defines public undertakings as 'any undertaking over which the public authorities may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it'. In the present case the French State owned about 80% of the shares and almost 100% of the voting rights of CL. CL in turn owned 100% of Altus and Altus owned about 97% of SBT, the remaining 3% being held by CL. The French State appointed the chairman and 12 of the 18 members of CL's administrative board (conseil d'administration). CL's chairman also chaired the administrative board of Altus, whose members were appointed by CL's administrative board. It is clear therefore that at the material time CL, SBT and Altus were public undertakings within the meaning of the Transparency Directive.

31. Both parties are moreover aware that according to the Court's case-law, and in

23 — Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings, as well as on financial transparency with certain undertakings, OJ 1980 L 195, p. 35, as most recently amended by Commission Directive 2000/52/EC of 26 July 2000, OJ 2000 L 193, p. 75.

particular its recent judgment in *Preussen-Elektra*, only advantages granted directly or indirectly through State resources may be regarded as aid within the meaning of Article 87(1) of the Treaty.²⁴ It is also accepted that before 30 June 1994 the French authorities did not allocate any particular funds from the State budget to the CL group and that the loans and guarantees in favour of Stardust and its clients were financed exclusively through the CL group's own resources and the deposits of its clients.

32. The issue is thus whether a public undertaking's resources are State resources within the meaning of Article 87(1) EC.

33. It seems that the Court has not yet expressly decided that question. *Commission v France*²⁵ concerned aid financed by the operating surplus accumulated by the French Caisse Nationale du Crédit Agricole. *Van der Kooy*²⁶ concerned preferential tariffs granted to glasshouse growers by a gas-supplying firm partially owned by

the Netherlands State. In both cases the Court found that State aid was involved. At that time the Court assumed however that financing through State resources was not a constitutive element of the concept of State aid²⁷ and therefore did not examine whether State resources were involved.²⁸ In two judgments concerning aid granted by Italy²⁹ the public undertakings ENI and IRI had granted assistance to other undertakings. They had however both received special capital funds from the State which they could use for that purpose.³⁰ It was therefore again not necessary for the Court to decide whether the resources of public undertakings are always State resources.³¹ *Ecotrade and Piaggio*³² concerned an Italian Law which allowed certain insolvent industrial undertakings to be placed under extraordinary administration and to be granted special protection from execution by creditors by way of derogation from the ordinary rules of insolvency. In order to explain why State resources might be involved, the Court mentioned as potentially affected creditors 'public classes of creditors', 'the State or public bodies' and 'public authorities'.³³ The Court refrained however from stating expressly that financ-

24 — Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 58 of the judgment with further references. It will be noted that at paragraph 59 of the judgment the Court uses the somewhat imprecise term 'transfer' of State resources. That term fails however to encompass State aid granted for example in the form of a State guarantee or a waiver of revenue (see the case-law discussed below at paragraphs 39 and 40).

25 — Case 290/83 [1985] ECR 439.

26 — Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others v Commission* [1988] ECR 219.

27 — See in particular paragraphs 13 and 14 of Case 290/83, cited in note 25.

28 — See for further details my Opinion in *PreussenElektra*, cited in note 24, paragraphs 122 to 126 and 168 to 171.

29 — Case C-303/88 *Italy v Commission* [1991] ECR I-1433; Case C-305/89 *Italy v Commission* [1991] ECR I-1603.

30 — See paragraph 10 of Case C-303/88 and paragraphs 12 and 15 of Case C-305/89, both cases cited in the previous note.

31 — See paragraph 14 of Case C-303/88 and paragraph 16 of Case C-305/89.

32 — Case C-200/97 [1998] ECR I-7907; Case C-295/97 [1999] ECR I-3735.

33 — See paragraphs 38, 41 and 43 of the judgment in *Ecotrade*, cited in the previous note.

ing through reduced earnings of public undertakings must be viewed as financing through State resources.³⁴

34. The only relevant authority so far is therefore the Court of First Instance's judgment in *Air France*.³⁵ In that case the aid was financed through the resources of the public bank Caisse des Dépôts et Consignations and the balance produced by deposits with and withdrawals from that bank. The Court of First Instance held that Article 87(1) covered 'all the financial means by which the public sector may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector'. Moreover the Caisse belonged to the public sector and it was sufficient that it used funds 'which were permanently at its disposal'.³⁶

35. The French Government criticises that judgment. In its view it relies on too extensive an interpretation of the concept of State resources and infringes Article 295 EC in that it discriminates against public undertakings, and in particular against public banks. If all measures granted by a public undertaking in favour of another undertaking were to be viewed as measures granted through State resources, it would

be necessary — in order to decide whether a given measure constitutes aid — to assess in each case whether a private investor or creditor would have adopted an identical measure. In view of the difficulties of that type of private market test, the Member States would have to notify a vast number of purely commercial transactions of public undertakings to the Commission. Those notifications would cost money and time and cause uncertainty for clients who would in consequence prefer to do business with private undertakings.

36. The Commission refers to the contested decision where it states:

'The Commission does not normally have any reason to consider that, where Crédit Lyonnais granted financing, it automatically constitutes aid... The Commission describes such measures as State aid only when it can be established... on the basis of specific facts, that the measures seen in their context fail to comply with the market economy investor principle.'³⁷

34 — See my Opinion in *PreussenElektra*, cited in note 24, paragraphs 172 to 177.

35 — Case T-358/94 *Air France v Commission* [1996] ECR II-2109.

36 — Paragraphs 66 to 67 of the judgment.

37 — At paragraph 37.

37. In my view the resources of public undertakings such as SBT and Altus constitute State resources within the meaning of Article 87(1) of the Treaty, and the French Government's concerns about the consequences of this view can be met.

the funds used for a measure are financed through compulsory contributions (e.g. parafiscal charges) and then distributed according to State legislation they must be regarded as State resources even if they are collected and administered by institutions distinct from (but none the less controlled by) the public authorities.⁴⁰

— The case-law on the concept of State resources

38. It follows from the Court's case-law that State resources are not involved where the public authorities at no stage enjoy or acquire control over the funds which finance the economic advantage in issue. In *Van Tiggele* the State fixed a minimum retail price for gin.³⁸ In *PreussenElektra* the State combined a minimum price for electricity from renewable energy sources with a purchase obligation.³⁹ In those cases the economic advantages for the distributors of gin and for producers of electricity from renewable sources respectively were 'financed' exclusively with funds which at no stage came under the control of the State.

40. Furthermore, State resources within the meaning of Article 87(1) of the Treaty may in fact remain throughout in the hands of the aided undertakings. That is the normal situation where the State grants aid through a waiver of revenue.⁴¹

41. The common denominator of the relevant cases is that the State exercised direct or indirect control over the resources in question despite the fact that the funds did not come from the State budget. In the case of parafiscal charges the funds were first brought under the State's control before they were redistributed to the undertakings concerned. In the case of a waiver of revenue the State renounced funds which it was legally entitled to claim. State resources are therefore those resources which are directly or indirectly under the control or in other words at the disposal of the State.

39. On the other hand, the Court has held that State resources within the meaning of Article 87(1) of the Treaty need not necessarily come from the State budget. Where

38 — Case 82/77 *Van Tiggele* [1978] ECR 25.

39 — Cited in note 24.

40 — Case 173/73 *Italy v Commission* [1974] ECR 709, paragraph 35 of the judgment.

41 — See, for example, Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 14 of the judgment; Case C-83/98 P *France v Ladbroke Racing and Commission* [2000] ECR I-3271, paragraphs 45 to 51.

42. In *Ladbroke* the Court has expressly endorsed that interpretation of the concept of State resources:

‘The judgment in... *Air France*... provides very clear confirmation... that Article [87(1)] of the Treaty covers all the financial means by which the public sector may actually support undertakings, irrespective of whether or not those means are permanent assets of the public sector. Consequently, even though the sums involved in the measure... are not permanently held by the Treasury, the fact that they constantly remain under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as State aid ...’⁴²

— Resources of public undertakings as State resources

43. The distinction in Article 87(1) of the Treaty between aid granted by the State and aid granted through State resources serves to bring within the definition of aid not only aid granted directly by the State,

but also aid granted by public or private bodies designated or established by the State.⁴³ Through their influence on the behaviour of public undertakings the Member States may seek ends other than commercial ones.⁴⁴

44. In my view, it cannot make any difference whether a Member State which wishes to grant aid uses special funds transferred from the budget to public undertakings before the aid is granted or those undertakings’ own resources. In both situations the State uses resources under its control within the meaning of the above case-law and in both situations the economic burden of the measure is ultimately borne by the State. Even where the State acts as proprietor of an undertaking the funds invested or ultimately lost must necessarily be financed through the State budget. Furthermore, in economic terms there is no difference between a measure financed from special funds transferred to a public undertaking before the aid is granted and a measure financed initially through a public undertaking’s own resources where that undertaking at a later stage receives funds from the State. Nor can Community law permit the rules on State aid to be circumvented merely through the creation

43 — Joined Cases C-72/91 and C-73/91 *Sloman Neptun* [1993] ECR I-887, paragraph 19 of the judgment.

42 — Paragraph 50 of the judgment in *Ladbroke*, cited in note 41.

44 — See Recitals 9 and 11 of the Transparency Directive, cited in note 23.

of public undertakings which are in fact charged with allocating aid.⁴⁵

45. Those are presumably the reasons why in most of the cases concerning aid financed through public undertakings the origin of the resources has not been an issue. In *Commission v Belgium*, for example, the aid was granted by the public investment company SRIW.⁴⁶ In *Salomon* the measures in issue had been taken by the public holding company Austria Tabakwerke.⁴⁷ In *BFM and EFIM* some of the measures in favour of BFM had been taken by its owner FEB and by the public State holding EFIM which itself owned FEB.⁴⁸ In *Alitalia* the measures had been taken by the State finance company IRI.⁴⁹ In all those cases neither the parties nor the Community Courts appear to have had any doubts about the public nature of the funds used.

46. In the present case the French Government does not contest that SBT and Altus were publicly owned undertakings over which the public authorities *could* exercise

directly or indirectly a dominant influence within the meaning of the definition contained in Article 2(1)(b) of the Transparency Directive. The question to what extent the acts of the undertakings can be attributed to the authorities will be considered below.

— Non-discrimination under Article 295 of the Treaty

47. As regards Article 295 of the Treaty it is true that equal treatment of private and public undertakings must be ensured. It must however also be recalled that under Article 86(1) of the Treaty the competition rules apply without distinction to both private and public undertakings. The Court has moreover held that the principle of equality presupposes that private and public undertakings are in comparable situations. Private undertakings determine their strategy by taking into account in particular requirements of profitability, whilst decisions of public undertakings may be affected by factors of a different kind. The financial relations between public authorities and public undertakings are therefore of a special kind which differ from those between public authorities and private undertakings.⁵⁰ The danger that Member States might use public undertakings as a vehicle for distributing aid is one

45 — See *Air France*, cited in note 35, paragraph 62 of the judgment.

46 — Case 234/84 [1986] ECR 2263.

47 — Case T-123/97 [1999] ECR II-2925.

48 — Joined Cases T-126/96 and T-127/96 [1998] ECR II-3437; see also Case C-261/89 *Italy v Commission* [1991] ECR I-4437.

49 — Judgment of 12 December 2000 (T-296/97, ECR II-3871).

50 — Joined Cases 188/80 to 190/80 *France, Italy and United Kingdom v Commission* [1982] ECR 2545, paragraph 21 of the judgment.

of the main reasons why Member States must, in accordance with the Transparency Directive, ensure that financial relations between public authorities and public undertakings are transparent.⁵¹

48. If continuous control of the activities of public undertakings on the basis of the Transparency Directive is necessary and justified, it is *a fortiori* necessary for aid measures granted through the funds of public undertakings to be notified to the Commission.

49. As regards the French Government's concern that a vast number of business transactions of public undertakings and in particular of public banks would have to be notified to the Commission, it must be pointed out that Member States need not notify those measures which do not fulfil all the criteria laid down in Article 87(1) of the Treaty. That is now spelt out by Articles 2(1) and 1(a) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 88 (formerly 93) of the Treaty.⁵² Many transactions of commercially active public undertakings may not be imputable to the State⁵³ or may comply with the market economy investor principle.⁵⁴ It seems to me moreover that a

degree of uncertainty for the State and the public undertaking involved in borderline cases is a necessary corollary of the effectiveness of the control of State aid granted through public undertakings.

50. The funds used by SBT and Altus to finance the measures in favour of Stardust were accordingly State resources within the meaning of Article 87(1) of the Treaty.⁵⁵

Imputability to the State

51. The French Government submits that the measures granted by SBT and Altus are not imputable to the French State. Under the Court's case-law it is in its view⁵⁶ not sufficient to establish merely the ownership of the State and thus the State's control over a public undertaking suspected of granting aid: the Commission must assess in the specific circumstances and on the basis of evidence whether a particular measure of a public undertaking is imputable to the State. In the present case SBT

51 — See Article 1 of Commission Directive 80/723, as amended, cited in note 23.

52 — OJ 1999 L 83, p. 1.

53 — See below at paragraphs 51 et seq.

54 — See below at paragraphs 86 et seq.

55 — As regards measures which confer advantages on one group of undertakings at the expense of another group of undertakings, the latter group being composed partly of public undertakings, see paragraphs 174-177 of my Opinion in *PreussenElektra*, cited in note 24.

56 — The French Government refers in particular to *Commission v France*, cited in note 25, and *Van der Kooy*, cited in note 26.

and Altus took their decisions in total independence from CL and *a fortiori* from the French State. In its decisions about aid granted to CL the Commission itself emphasised the absence of control by CL over its subsidiaries and in particular over Altus as one of the main reasons for the financial difficulties of CL.⁵⁷

52. The Commission submits, first, that the French State was omnipresent in CL, SBT and Altus: it directly and indirectly controlled the capital, the voting rights and the appointments of the chairmen and members of their respective administrative boards (conseils d'administration). In the Commission's view that type of potential control suffices to establish the imputability of a measure to the State. The Commission refers also to the definition of public undertakings in the Transparency Directive.⁵⁸ Furthermore, the French Government should not be allowed to rely on its own consistent failure to control the CL group or to maintain that measures worth FRF 450 million were too insignificant to attract the attention of CL's administrative board.

53. It is established case-law and accepted by both parties that a given measure may be regarded as State aid only if it is

attributable to the conduct of the Member State concerned.⁵⁹

54. That case-law may be explained as follows. The wording of Article 87(1) of the Treaty seems to distinguish between aid granted by a Member State and aid granted through State resources. However, it is now clearly established that 'aid granted by a Member State' must also be granted through State resources. The second alternative in Article 87(1) of the Treaty (aid granted through State resources) thus serves only to preclude circumvention of the State aid rules through decentralised or 'privatised' distribution of aid. That means however that where aid is granted under the second alternative 'through State resources' the measure must be the result of action of the Member State concerned. That is confirmed by the title of the relevant section 'Aids granted by States' which suggests that in all cases the measure must be ultimately imputable to public authorities.

55. In that respect it would in my view go too far to classify autonomous decisions of public undertakings and other entities distinct from public authorities *automatically* as State measures. For example the day-to-

57 — The French Government refers in particular to Decision 98/490, cited in note 6, at p. 65.

58 — See above at paragraph 30.

59 — See *Van der Kooy*, cited in note 26, paragraphs 28 and 35 to 38 of the judgment; *Italy v Commission*, cited in note 29, paragraph 11; *Air France*, cited in note 35, paragraph 55.

day business decisions of a publicly owned brewery taken without any interference by the public authorities should be considered as falling outside the scope of the State aid rules. In that regard it is significant that the Transparency Directive seeks to facilitate the control of aid which is granted 'by' public authorities 'through the intermediary' of public undertakings or financial institutions (Article 1(1)(b)) and that it distinguishes clearly between public authorities and public undertakings (Article 2(1)).

56. It is true that for other purposes the Court interprets the notion of the State more broadly. For example where the question is whether a directive has direct effect and can be invoked against the State — directives imposing obligations normally only on the States to which they are addressed — 'the State' is interpreted very broadly and all public authorities and even public undertakings may be regarded as falling under that concept. But that approach cannot be automatically transposed to the State aid provisions of the Treaty. The concept of the State has to be understood in the sense most appropriate to the provisions in question and to their objectives; the Court rightly follows a functional approach, basing its interpretation on the scheme and objective of the provisions within which the concept features.⁶⁰

57. For the purposes of the State aid rules, in what circumstances is a given measure of a public undertaking attributable to the State?

58. In *Commission v France* the Court held that a solidarity grant offered by the Caisse Nationale du Crédit Agricole to farmers was 'decided and financed by a public body', its implementation was 'subject to the approval of the public authorities', the detailed rules for its grant corresponded to 'those for ordinary aid' and it was 'put forward by the Government as forming part of a body of measures in favour of farmers which were all notified to the Commission'.⁶¹

59. In *Van der Kooy* the Court found, first, that the State held 50% of the shares and appointed half of the supervisory board of Gasunie, second, the Netherlands Government was empowered to approve the tariffs applied by Gasunie and could thus block any tariff which did not suit it and, third, the Netherlands Government had on two occasions successfully exercised its influence over Gasunie in order to seek an amendment of its tariffs. Those factors 'considered as a whole' demonstrated that

⁶⁰ — See M. Hecquard-Théron, 'La notion d'Etat en droit communautaire', *RTDE*, 1990, p. 693.

⁶¹ — Cited in note 25, paragraph 15 of the judgment.

Gasunie did not enjoy full autonomy in the fixing of gas tariffs, but acted 'under the control and on the instructions' of the public authorities. It was clear that Gasunie could not fix the tariff 'without taking account of the requirements of the public authorities'.⁶²

60. In the two cases already quoted concerning measures granted by the Italian holdings ENI and IRI the Court found that the members of their boards of directors and management boards were appointed by decree and that they did not have full freedom of action, since they had to take account of directives issued by a State committee for economic planning. 'Taken as a whole' those factors showed that ENI and IRI operated 'under the control' of the Italian State.⁶³

61. In *Air France* the Court of First Instance found that the measure which was formally carried out by a limited company governed by private law was in reality carried out 'at the decisive instigation of its majority shareholder' the Caisse des Dépôts et Consignations. The Caisse itself was established by law, it was placed under the supervision and guarantee of the legislature, its task was the adminis-

tration of public and private funds composed of compulsory deposits, it was governed by statutory and regulatory rules and its Director-General and directors were appointed by the President of the Republic and the French Government. Those factors were sufficient for it to be held that the Caisse belonged 'to the public sector' and the Commission was accordingly entitled to treat the Caisse as 'a public-sector body whose conduct is attributable to the French State.' The public nature of the Caisse was not called into question by the existence of rules which ensured that the Caisse enjoyed legal autonomy from the political authorities of the State.⁶⁴

62. There seems to be some tension between those cases. In *Commission v France* the Court established *in concreto* that the particular measure at issue had been the result of action of the State. In *Van der Kooy* the Court inferred from the circumstances taken as a whole that the concrete measure in issue must have been the result of State involvement. In the two Italian cases the Court established merely that ENI and IRI operated in general under the control of the State. In *Air France* the Court of First Instance focused on the public or private nature of the Caisse and did not examine whether it took its decisions — in the actual case or even in general — under the decisive influence of the public authorities.

62 — Cited in note 26, paragraphs 36 to 38 of the judgment.

63 — See paragraph 12 of the judgment in Case C-303/88 and paragraph 14 of the judgment in Case C-305/89, both cited in note 29.

64 — See *Air France*, cited in note 35, paragraphs 58 to 62 of the judgment.

63. The intensity of the Court's review may depend on how far the public authorities are likely to be involved. Thus the measure in favour of Air France concerned the largest French carrier and one of the three largest in Europe. Moreover the French State controlled both the undertaking granting the aid and the recipient of the aid (the French State held more than 99 % of the share capital of Air France). In *Commission v France* and in *Van der Kooy* the involvement of the public authorities was perhaps — at least at first sight — less evident.

64. It is not easy to establish a general test to determine whether a given measure of a public undertaking is attributable or imputable to the State.

65. On the one hand, a given financing measure should not be attributable to the State whenever a commercial undertaking in which the State has a shareholding acts on the markets.⁶⁵ It is not sufficient therefore that the body distributing the aid is a public undertaking within the meaning of Article 2(1)(b) of the Transparency Directive. The fact that the public authorities *may* exercise directly or indirectly a dominant influence does not prove that they actually exercised that influence in a given case.

65 — See the Opinion of Advocate General Slynn in *Van der Kooy*, cited in note 26, at p. 250.

66. On the other hand, there is a real danger of circumvention of the State aid rules in cases where public undertakings act — openly or covertly, regularly or on an *ad hoc* basis — as a 'relay' or 'vehicle' which the public authorities use in order to intervene in support of certain undertakings or industries.⁶⁶ The involvement of the State does not therefore have to go so far as to constitute an explicit instruction. Instead it will in my view be sufficient to establish on the basis of an analysis of the facts and circumstances of the case that the undertaking in question could not take the decision in question 'without taking account of the requirements of the public authorities'.⁶⁷

67. The facts and circumstances which could be taken into account include in my view for example:

- evidence that the measure was taken at the instigation of the State;
- the scale and nature of the measure (here there might be some overlap with the private investor/creditor test which I will discuss below);

66 — See the Opinion of Advocate General Mancini in *Commission v France*, cited in note 25, at p. 443.

67 — See *Van der Kooy*, cited in note 26, paragraph 37 of the judgment and the Opinion of Advocate General Lenz in Case C-44/93 *Namur-Les Assurances du Crédit* [1994] ECR I-3829, paragraph 44.

- the degree of control which the State enjoys over the public undertaking in question; and
- a general practice of using the undertaking in question for ends other than commercial ones or of influencing its decisions.

from an inquiry of a committee of the French Parliament cited by the Commission that Altus was an 'atypical subsidiary' engaging in unorthodox and risky financial operations, that it was deliberately kept outside the system of internal control of the CL group and that the only hierarchical link between CL and Altus was a weekly meeting between the chairman of CL and the director of Altus.

68. Because of the difficulties of proof and the obvious danger of circumvention a restrictive view should not be taken of the type of evidence to be adduced. Circumstantial evidence (perhaps even press reports) might be relied upon.

70. The French Government adds moreover, first, that the State was not represented in the administrative board, the management or the loan committee of SBT which granted the majority of the loans and guarantees in issue, or in the management or loan committee of Altus.

69. In the present case it is common ground that CL's financial problems of an unprecedented scale⁶⁸ can largely be explained by the lack of effective supervision of CL and its subsidiaries by the French State. As regards the supervision of CL itself there was according to Decision 98/490 a 'serious lack of corporate governance', 'irresponsibility of the decisions taken by the bank's... management', 'a lack of transparency in management and in the company's accounts' and a general 'lack of internal and external controls'.⁶⁹ As regards the subsidiaries of CL it follows

71. Second, Stardust itself was an undertaking of a relatively modest size and the loans and guarantees granted to Stardust and to its clients were in comparison with the totality of the loans and guarantees granted by CL or its subsidiaries also of a modest size. There is therefore no reason to believe (and also no evidence) that the administrative board of CL or the management of CL or a representative of the public authorities knew about those loans and guarantees. There is even less reason to believe that before October 1994 the French State or CL tried to influence SBT's or Altus' decisions on Stardust.

68 — See above at paragraph 4.

69 — See Commission Decision 98/490, cited in note 6, p. 65.

72. Third, CL, SBT and Altus operated in the legal form of ordinary commercial companies governed by private law, in accordance with normal commercial criteria and in a competitive sector. Under French law, according to the French Government, CL, SBT and Altus enjoyed management autonomy from their respective shareholders and the State had no legal means of approving, annulling or modifying the decisions of the management or the administrative board of CL and *a fortiori* of its subsidiaries SBT and Altus.

73. However that may be, I must confess that I can see nothing in the contested decision or the documents before the Court which suggests that SBT's or Altus's decisions on Stardust were directly or indirectly influenced by the French authorities or even known to those authorities. Nor is there anything in the file which suggests that SBT or Altus pursued, with regard to Stardust or in general, ends other than commercial ones. It appears therefore that SBT or Altus took their decisions on Stardust in full commercial autonomy without taking account of any real or assumed requirements of the public authorities.

74. The Commission objects, first, that the concept of aid is an objective concept and that Article 87(1) of the Treaty does not distinguish between State measures by reference to their causes or aims but defines them in relation to their effects.

75. I agree that the questions whether a given State measure confers advantages on certain undertakings and distorts or threatens to distort competition must be resolved solely on the basis of objective criteria and of an analysis of the effects which the measure produces. The present case raises however the preliminary question whether the measures at issue are actually State measures. That question cannot be resolved on the basis of the effects of the measure alone since Article 87(1) of the Treaty does not apply to non-State measures which confer advantages on certain undertakings and distort or threaten to distort competition.

76. The Commission objects, second, that the French authorities were warned as early as 1991 about grave management problems at Altus. In the Commission's view the French Government should not be allowed to rely on its own consistent failure to control CL and its subsidiaries.

77. In my view such a failure cannot constitute State aid, which requires positive intervention by the State. There is admittedly a risk that badly controlled public banks might engage in unsound commercial practices and an indirect risk that in the event of financial difficulties the Member State concerned might wish to grant State aid to those banks. I consider

however that the former risk is not directly of concern to the State aid rules and that the latter, even if it may entail distortions of competition in the banking sector, is not relevant in the present case which is about distortions of competition in the pleasure boat chartering sector.

contains a sufficient statement of reasons and that it complies with the requirements of the Court's case-law.

78. There is therefore no basis for a finding that the loans and guarantees granted by SBT and Altus to Stardust were the result of action attributable to the French State. The Commission's decision must therefore be annulled.

The obligation to state reasons

79. The French Government submits that the decision in any event infringes Article 253 of the Treaty in that the Commission fails to state the reasons for its view that the measures in favour of Stardust were 'granted by a Member State or through State resources' within the meaning of Article 87(1) of the Treaty.

80. The Commission infers in particular from the recent judgment in *Germany v Commission*⁷⁰ that the contested decision

81. It is settled case-law that the reasoning required by Article 253 of the Treaty must show clearly and unequivocally the reasoning of the Community authority which adopted the contested measure so as to enable the persons concerned to ascertain the reasons for the measure and to enable the Court to exercise its power of review. However, the reasoning is not required to go into every relevant point of fact and law: the question whether a statement of reasons satisfies those requirements must be assessed with reference not only to its wording but also to its context and the whole body of legal rules governing the matter in question. That principle, applied to the categorisation of a measure as State aid, requires the Commission to state the reasons for which the measure in question falls within the ambit of Article 87(1) of the Treaty. Even where the circumstances in which the aid has been granted show that it has been 'granted by a Member State or through State resources' the Commission must at least set out those circumstances in the statement of reasons for its decision.⁷¹

70 — Case C-156/98 [2000] ECR I-6857.

71 — See in that sense Case C-156/98, cited in the previous note, paragraphs 96 to 98 with further references to the case-law.

82. In the contested decision the Commission states that CL was the body 'through which the aid was granted'.⁷² In the corresponding footnote the Commission adds that '[a]ccording to the case-law on State aid, the resources of a public undertaking like Crédit Lyonnais are State resources within the meaning of Article 87 of the Treaty.' The Commission states also that the 'support provided went beyond the normal prudence required of a banker and constitutes aid because the public resources used to that end by Crédit Lyonnais constituted State resources within the meaning of Article 87 of the Treaty'⁷³ and that 'the resources granted by Crédit Lyonnais, a public undertaking, through its subsidiaries SBT and Altus are State resources within the meaning of Article 87(1) of the Treaty'.⁷⁴ The Commission refers finally to the 'constant assistance granted to Stardust by the State through the Crédit Lyonnais group'.⁷⁵

83. I consider that those statements explain why the Commission considered that the resources of SBT and Altus were State resources.

84. Nowhere does the Commission explain however why it considers that the loans and guarantees granted by SBT and Altus

to Stardust before October 1994 were imputable to the French State. Moreover none of the circumstances mentioned in the decision suggests that that might have been the case.

85. The contested decision therefore also infringes Article 253 of the Treaty.

In the alternative: the second plea invoking an erroneous application of the private investor principle

86. Since I consider that the decision should be annulled on the basis of the first plea I will address the issues raised by the second plea only in the alternative and only briefly.

87. The French Government submits in essence that the Commission misapplied the market economy investor principle, first, because it assessed the loans and guarantees granted by SBT and Altus to Stardust and its clients *ex post* and not in the context of 1990, 1991, 1992, 1993 and 1994 when they were granted and, second, because its analysis of the behaviour of SBT and Altus was too restrictive and failed to

72 — At paragraph 22.

73 — At paragraph 27.

74 — At paragraph 37.

75 — At paragraph 83.

take into account several relevant aspects such as the perspectives of the market for pleasure boat charters or the fraudulent behaviour of the head of Stardust.

88. The Commission submits in essence that it assessed the financing in the context in which it was granted before 1995 and that the three elements which it took into account were sufficient to support its conclusion that a private investor operating under identical conditions would not have granted such financing to Stardust. Those elements were that

— SBT and Altus granted financing not only to Stardust, but also to investors wishing to acquire shares in boats managed by Stardust which exposed them not only to Stardust but also to its clients;

— SBT and Altus took risks in the form of loans and guarantees more than twice the amount of the balance sheet total;

— SBT and Altus acted as sole banker to Stardust.

89. It is settled case-law that in order to determine whether measures such as the ones at issue constitute aid for the purposes of Article 87(1) of the Treaty, it is necessary to consider whether in similar circumstances a private investor of a comparable size might have provided capital of such an amount⁷⁶ or in other words whether the recipient undertaking received an economic advantage which it would not have obtained under normal circumstances.⁷⁷ It is also established that the comparison must be made in relation to the attitude which a private investor would have had under normal market conditions at the time of the grant of the loans and guarantees in question, having regard to the information available and developments foreseeable at that time.⁷⁸

90. In the contested decision the Commission explicitly mentions on several occasions the principle that the measures in issue must be analysed in the context in which they were granted and not *ex post*.⁷⁹ Throughout the decision there is however no analysis of the context of the years (1990 to 1994) when the loans and guarantees were actually granted. In reality the Commission infers from the fact that at the end of 1994 the exposure of SBT and Altus reached double the balance sheet of Star-

76 — Case C-305/89, cited in note 29, paragraph 19 of the judgment.

77 — Case C-342/96 *Spain v Commission* [1999] ECR I-2459, paragraph 41.

78 — Case T-16/96 *Cityflyer Express v Commission* [1998] ECR II-757, paragraph 76 of the judgment.

79 — See for example paragraphs 22, 25, 27 and 103 of the contested decision.

dust that *all* the decisions on Stardust taken by SBT and Altus during the previous years were necessarily incompatible with the private investor principle.

91. In that regard the Commission argued in its defence that it could not assess the context of 1992, 1993 and 1994 because in the course of the investigation the French Government had not provided the necessary background information. Confronted by that Government with a list of documents which it had transmitted in the course of the investigation to the Commission, the Commission admitted in its rejoinder that it was actually given a considerable amount of detailed information about the support granted by SBT and Altus to Stardust and the activities of Stardust between 1990 and 1994.

92. In my view the Commission misapplied the private investor principle in that it failed to examine the loans and guarantees granted by Stardust in the context of the time in which they were granted despite the fact that it possessed detailed information about the periods in question.

93. I must confess that I also have doubts as regards the three elements taken into account by the Commission. First, as regards the fact that SBT and Altus were

Stardust's sole banker, it is not unusual for a relatively small undertaking to have only one bank. Second, I accept that the two other elements (extent of the risk in comparison with the balance sheet, off-balance-sheet commitments) are of relevance. However, in the light of the Court's case-law⁸⁰ it seems at first sight to be too restrictive to apply those criteria absolutely and unconditionally to the exclusion of others such as the characteristics of the pleasure-boat market, the tax scheme underlying the Stardust business concept, the possible fraudulent behaviour of the head of Stardust or the potential rewards which SBT and Altus could expect to receive in the event of a successful expansion of the 'start-up' Stardust. However, since the Commission failed in any event to examine the measures in the context in which they were taken it is not necessary for me to pursue that question.

94. The contested decision would therefore in any event have to be annulled because the Commission misapplied the private investor principle.

95. Since I conclude that the French Government's first and second pleas are well founded, it is not necessary to examine the other pleas, which arise only in the further alternative.

⁸⁰ — Joined Cases C-329/93, C-62/95 and C-63/95 *Germany and Others v Commission* [1996] ECR I-5151, paragraph 36 of the judgment.

Conclusion

96. For the above reasons I consider that

- (1) Commission Decision 2000/513/EC of 8 September 1999 on aid granted by France to Stardust Marine should be annulled;
- (2) the Commission should be ordered to pay the costs.