ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
25 June 2002 *

In Case T-34/02 R,

B, resident in Versailles, France, and 255 other applicants, represented by P. Kirch, lawyer, and at the hearing by N. Chahid-Nouraï, lawyer, with an address for service in Luxembourg,

applicants,

v

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

defendant,

APPLICATION for suspension of the operation of Commission Decision 2001/882/EC of 25 July 2001 on the State aid implemented by France in the

* Language of the case: French.

form of development assistance for the cruise vessel 'Le Levant' built by Alstom Leroux Naval for operation in Saint-Pierre-et-Miquelon (OJ 2001 L 327, p. 37),

THE PRESIDENT OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

makes the following

Order

Legal background

1 Article 87(1) EC provides:

'Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.'

2 Article 87(3)(e) EC provides that 'such other categories of aid as may be specified by decision of the Council acting by a qualified majority on a proposal from the Commission' may be considered to be compatible with the common market.

3 It was on the basis of that provision, formerly Article 92(3)(d) of the EC Treaty, that the Council adopted Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding (OJ 1990 L 380, p. 27, hereinafter 'the Seventh Directive').

Seventh Directive

4 Article 1(d) of the Seventh Directive defines aid as:

'... State aid within the meaning of Articles 92 [now, after amendment, Article 87 EC] and 93 [now Article 88 EC] of the [EC] Treaty, including not only aid granted by the State itself but also that granted by regional or local authorities and any aid elements contained in the financing measures taken by Member States in respect of the shipbuilding or ship repair undertakings which they directly or indirectly control and which do not count as the provision of risk capital according to standard company practice in a market economy.

Such aid may be considered compatible with the common market provided that it complies with the criteria for derogation contained in this Directive.'

5 Article 4(1) of Chapter II of the Directive, which concerns 'Operating aid', provides that '[p]roduction aid in favour of shipbuilding and ship conversion may be considered compatible with the common market provided that the total amount of aid granted in support of any individual contract does not exceed, in grant equivalent, a common maximum ceiling...'.

6 Article 4(7) of the Seventh Directive reads as follows:

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

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

7 In its letter [SG(89) D/311] to the Member States dated 3 January 1989, the Commission states that Member States which grant aid to ship building and ship repair in the form of development assistance to a developing country must comply with the provisions of the OECD Agreement, namely:

'(i) aid must not be granted for the building of vessels intended to operate under flags of convenience;

(ii) if the aid cannot be classified as OECD official development assistance, the aid donor must confirm that it is granted under an intergovernmental agreement;

(iii) the aid donor must give appropriate assurances that the real owner is resident in the beneficiary country and that the beneficiary company is not a non-operational subsidiary of a foreign company;

(iv) the beneficiary must undertake not to sell the ship without prior government approval.'

Regulation No 659/1999

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

9 Article 4(4) of the Regulation provides that the Commission is required to initiate a formal investigation procedure in respect of alleged aid, where a preliminary examination raises doubts as to its compatibility with the common market. Under Article 6(1) of the Regulation the Commission shall call upon the Member State concerned and upon other interested parties to submit comments within a prescribed period.

10 Article 14 of Regulation No 659/1999, which concerns recovery of aid, provides:

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

...

3. Without prejudice to any order of the Court of Justice of the European Communities pursuant to Article [242] of the Treaty, recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision. To this effect and in the event of a procedure before national courts, the Member States concerned shall take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to Community law.'

The contested decision

11 At the end of 1998, the Commission learned from an article in the press 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.

12 By letter dated 2 December 1999, the Commission informed France that it had decided to initiate the procedure laid down in Article 88(2) EC. That decision was published in the *Official Journal of the European Communities* on 5 February 2000 (OJ 2000 C 33, p. 6, hereinafter 'the decision to initiate the procedure'). In the letter the Commission expressed its doubts as to whether the conditions laid down in Article 4(7) of the Seventh Directive were fulfilled. It also invited interested parties to submit their comments within one month from the date of publication.

13 By letter dated 13 July 2001, the EURL Le Levant 114, one of the single-member limited liability undertakings ('EURLs') involved in the operation to finance the vessel (see paragraphs 23 to 29 below), asked the Commission for details of its position regarding the identification of the recipients of the aid under review. It asked the Commission, in particular, to confirm that it was not one of the parties concerned. Receiving no reply from the Commission, the EURL Le Levant 114 repeated its request by letter dated 19 July 2001. In its reply dated 24 July 2001, the Commission stated that it was well past the expiry date for the parties to submit observations.

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

15 In point 5 of the contested decision, the aid is described as follows:

'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 [*business secret*]. The vessel was then leased to [la Compagnie des Iles du Levant ("CIL")], which is a subsidiary of the French company Compagnie des Iles 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 right and obligation to sell back their shares to [*business secret*] after five years, i.e. at the beginning of 2004. CIL in turn has the right and obligation to buy the shares from [*business secret*] 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.'

16 It is apparent from point 6 of the contested decision that 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.

17 In this case, the aid 'granted for the vessel in question' is assessed in the light of Article 4(7) of the Seventh Directive, 'given that it concerns aid for shipbuilding

granted as development assistance in 1996 under an aid scheme (the Loi Pons) approved in 1992' (point 16 of the contested decision).

18 The Commission considers that the project meets the criteria for aid to development, as defined by the OECD and interpreted by the Commission (see paragraph 7 above). However, it believes that the development criterion, — which the Commission must ensure is met (Case C-400/92 *Germany* v *Commission* [1994] ECR I-4701) — is not satisfied in this case (points 22 to 33 of the contested decision).

19 The Commission, finding that the aid in question has been unlawfully implemented and is not consistent with the Seventh Directive, declares it to be incompatible with the common market. It concludes that the aid 'must therefore be recovered with interest' (point 34 of the contested decision).

20 In point 35 of the contested decision, the Commission states that 'the immediate beneficiaries of the quantifiable aid' are the investors 'receiving the tax concessions'. It continues the analysis in point 36, pointing out that CIL will be 'the main final beneficiary of the aid' only once the ship has been sold to it, in 2004, at an advantageous price. As for the shipyard, the Commission considers that '[it] can be said to have benefited indirectly in that the aid enabled it to obtain an order that it might not otherwise have won' (point 37 of the contested decision).

21 In point 39, it is stated that it is the investors, 'as the direct beneficiaries and current owners of the vessel, which should repay the aid' and which 'have... benefited and continue to benefit from the tax concessions as owners of a vessel which was bought on attractive terms'. In point 40, the Commission points out

that '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' but that 'since this transfer will not take place before mid-2003, the operator CIL cannot be considered liable to repay the aid at this stage'.

22 The operative part of the decision reads as follows:

'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 [the Seventh Directive] 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....

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.'

Details of the financing operation

23 As is apparent from the documents before the Court, the operation in question consists in the provision of financing for the vessel *Le Levant* by investors, natural persons, through EURLs, constituted exclusively for that purpose and united in joint ownership of the vessel. The investors' interest in joining that operation lies in the opportunity they are given to deduct from their taxable income the cost of their investment and the expenses related to its purchase (financial interest) and to its possession (depreciation) and also, possibly, the losses incurred in operating the vessel.

24 It was in December 1996 that a bank formed the joint ownership of the vessel *Le Levant* divided into 740 joint ownership shares. The joint owners were originally CIL, which had two shares, and the bank, which had 738. CIL is the manager of the joint property and, as such, is indefinitely jointly and severally liable for the business's debts.

25 In the course of a public call for investors launched by the bank, natural persons purchased the shares in the vessel which were initially held by the bank, through EURLs set up for the purpose. According to their articles, the object of the EURLs is to purchase the shares, to take out a mortgage loan in order to finance a share in the purchase price of the vessel, to operate the vessel directly in joint ownership and to resell those shares, pursuant, in particular, to the irrevocable undertaking to sell agreed by the bank or any company taking the place of the bank. A total of 738 shares were sold in that way to 281 EURLs, each of which was required to buy at least two shares.

26 In the year in which they acquired the shares, the EURLs had financial requirements in respect of, first, the purchase price of the shares in the vessel — the purchase price of two shares, the minimum investment, amounted to FRF 636 216 — and, second, the payment of sundry costs. Those financing requirements were covered by the initial capital, which was the investor's initial contribution of FRF 50 000 for two shares, the share of CIL's deposit of guarantee set up with each EURL as security for its sound management, and a medium-term loan granted by the bank at a fixed rate of 8%, covering the balance of the financing requirements.

27 During the operational stage, the EURLs' cash requirements — consisting of any negative operating results (but only up to a certain limit), the financial costs relating to the bank loan, the loan repayment instalments and the management

costs — are covered by annual capital increases made by the partners in the EURLs and financed by the tax savings they make. In fact, each investor uses the tax saving from the preceding year to finance the capital increase of his EURL.

28 CIL was to be responsible, for seven years, for operating, maintaining and handling the technical and commercial management of the vessel on behalf of the joint owners. Furthermore, CIL gave an undertaking to the investors to achieve a minimum gross operating result and to make good any losses which were higher than estimated. For that purpose, CIL receives a financial consideration.

29 The bank gave an undertaking to the investors to purchase the EURLs' shares before 15 December 2003. Furthermore, each EURL undertook to transfer its shares to the bank before 29 February 2004. At the same, CIL undertook to repurchase all the shares from the bank before 31 January 2004 and the bank undertook to transfer them to CIL before 29 February 2004.

Procedure

30 On 8 October 2001, the French Republic brought an action before the Court of Justice for annulment of the contested decision, but did not lodge an application for suspension of operation. The case, listed under number C-394/01, is pending before the Court of Justice. In its application, the French Republic raises a single plea relating to the assessment of the 'development' content of the aid in question.

31 On 20 February 2002, the EURL Le Levant 001 and 274 other EURLs, and also B and 255 other natural persons, brought an action before the Court of First Instance for annulment of the contested decision. That case was listed under number T-34/02.

32 By order of the President of the Court (Fifth Chamber, Extended Composition) of 30 April 2002, Case T-34/02 was suspended until a final ruling was given by the Court of Justice in Case C-394/01.

33 By a separate document lodged on 23 April 2002, B and 255 other natural persons (hereinafter 'B and Others' or 'the applicants') lodged an application for:

— suspension of operation of the decision until the Court of First Instance has considered the application for suspension and given a ruling thereon,

— suspension of operation of the decision until a ruling is given on the substance of the action for annulment.

34 In a letter enclosed with the application for interim relief, the applicants' representative requested confidentiality of treatment and non-disclosure of certain information.

35 In the light of the application for protective measures lodged by the applicants pursuant to Article 105(2) of the Rules of Procedure of the Court of First Instance, seeking suspension of operation pending a final decision in the action for interim relief, the Commission was asked to submit its observations on that request and to state whether, as required under Article 3 of the contested decision, the French authorities had informed the Commission of the measures

which they had taken to comply with the contested decision and, if so, to say what those measures were. The Commission lodged its observations on 7 May 2002.

36 On the same day, the applicants submitted additional observations.

37 As regards the application for suspension of operation of the contested decision until a ruling on the merits of the action for annulment, the Commission lodged its observations on 22 May 2002, after requesting and receiving an extension of the period initially prescribed. In its observations, the Commission commented on the request for confidential treatment and non-disclosure of certain information.

38 The parties presented oral argument at the hearing on 13 June 2002. During the hearing, the applicants' request for confidential treatment in the proceedings for interim relief was granted.

Law

39 Under the combined provisions of Article 242 EC and Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision 93/350/ECSC, EEC, Euratom of 8 June 1993 (OJ 1993 L 144, p. 21), the Court of First Instance may, if it considers that the circumstances so require, order the suspension of the operation of the contested measure.

40 Article 104(2) of the Rules of Procedure provides that an application for interim measures shall state the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for. Those conditions are cumulative, so that an application for interim measures must be dismissed if any one of them is absent (order of the President of the Court of Justice of 14 October 1996 in Case C-268/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I-4971, paragraph 30; orders of the President of the Court of First Instance in Case T-73/98 R *Prayon-Rupel* v *Commission* [1998] ECR II-2769, paragraph 25, and Case T-198/01 R *Technische Glaswerke Ilmenau* v *Commission* [2002] ECR II-2153, paragraph 50).

Arguments of the parties

Prima facie case

41 As a preliminary point, the applicants state that it is inconsistent to hold that aid declared incompatible with the common market is aid to shipbuilding and to designate as the actual beneficiaries of the alleged aid — who are, as such, required to repay it — 'private investors' (point 5 of the contested decision), through whom the economic advantage allegedly identified has passed. The applicants repeatedly maintain that they act as private investors and that they are not undertakings within the meaning of the judgment in Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21.

42 As regards the 11 pleas raised in the main action in support of their claim that the contested decision is unlawful, the applicants put forward the following nine pleas.

43 The first plea alleges infringement of the combined provisions of Articles 3(1)(g) EC, 5 EC, 87 EC and 211 EC and also of several fundamental rights. The Commission exceeded its powers by adopting a decision the effect of which is to require a Member State to recover from private individuals, and not from 'undertakings', the amount of alleged State aid without necessarily restoring undistorted competition.

44 By the second plea, the applicants claim infringement of certain fundamental principles of Community law relating to the rights of the defence and the right to a fair hearing under Article 88(2) EC, and, accordingly, Article 14(1) of Regulation No 659/1999, and also of the principles laid down in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The Commission had not allowed interested third parties effectively to submit their observations prior to the adoption of the contested decision.

45 The third plea alleges infringement of Article 87(1) EC inasmuch as private individuals are designated by the contested decision as the 'beneficiaries' of the alleged State aid who are required to repay it. However, that provision of the EC Treaty refers only to 'undertakings' within the meaning of Community competition law, that is to say, economic traders operating in a market.

46 By the fourth plea, the applicants claim infringement of Article 4(7) of the Seventh Directive, since that provision applies only to shipyards or ship operators and in no circumstances to private investors who have made a financial investment.

47 The fifth plea alleges infringement of the principle of protection of legitimate expectations, in that the Commission allowed the private investors to entertain the reasonable belief that they would not be affected by the contested decision.

48 The sixth plea consists of the claim that the principle of legal certainty has been infringed, since, in the contested decision, the Commission did not provide data from which it would be possible to calculate and, consequently, to be aware of the exact amount of the aid to be recovered from the private investors.

49 The seventh plea relates to the infringement of Article 14 of Regulation No 659/1999, since recovery of the alleged aid is contrary to the abovementioned general principles of Community law.

50 The eighth plea alleges material inaccuracies with regard to the relations between CIL and the private investors and the obligations relating to the operation of the vessel, and also manifest errors of assessment of the facts concerning the evaluation of the amount of the alleged aid, the terms of repurchase of the vessel by CIL and the evaluation of the financial and social repercussions of the operation.

51 Finally, in the ninth plea it is claimed that the duty to state reasons, established in Article 253 EC, has not been fulfilled, in that the contested decision does not define the relevant market and the competitive advantage enjoyed by the private investors, nor does it specify the method used to calculate the 'development' content of the aid.

52 As it confirmed at the hearing, the Commission, although it denies that the pleas are well founded, does not dispute that they are not, prima facie, wholly unfounded.

Urgency and balancing of interests

53 As a preliminary point, the applicants claim that they are all in the same position. They therefore risk suffering damage of the same kind if the contested decision is implemented. The amounts corresponding to the tax concessions might be recovered by withdrawing the tax relief previously granted in respect of the financing operation, and then sending a tax adjustment notice to the natural persons involved in the operation, requiring them to repay immediately the tax savings made in connection with the operation, and at least those made initially when they joined the operation. However, recovery of those funds would immediately and irremediably jeopardise the balance of the financial operation set up and, accordingly, would endanger the EURLs, which are an essential element of it. The tax concession received by the private investors is financially linked to the underwriting of the annual capital increase in the EURL, which alone is capable of maintaining its strict financial balance.

54 In those circumstances, the condition relating to urgency may be assessed in relation to a 'class', 'category' or 'group' of persons possessing the same characteristics, as has already been held in the orders of the President of the Court of Justice in Case 154/85 R *Commission* v *Italy* [1985] ECR 1753, Case 293/85 R *Commission* v *Belgium* [1985] ECR 3521, and Case C-195/90 R *Commission* v *Germany* [1990] ECR I-2715.

55 After pointing out that pecuniary and non-pecuniary damage have more serious harmful consequences when suffered by natural persons than when suffered by legal persons, the applicants submit that the immediate implementation of the contested decision will cause four separate kinds of damage.

56 Firstly, the applicants would suffer the pecuniary damage resulting from repayment of the initial tax deductions, which would cause an immediate financial imbalance. In that regard, they claim that, as a rule, individuals do not have liquid assets enabling them to settle unexpected debts straight away.

57 Secondly, the operation of the contested decision would cause non-pecuniary damage. If it were implemented, they would have reason to bring dual proceedings before the French and European courts, which would cause problems, waste time and require considerable resources. Furthermore, it would be particularly hard if the sums were claimed in the form of a tax adjustment, which is a procedure usually prompted by the wrongful conduct, if not fraud, of the taxpayer. Finally, in individual cases involving the death of a shareholder, the persons entitled would be required to re-examine the deceased's estate, an operation which by its very nature is emotionally upsetting.

58 Thirdly, implementation of the contested decision would jeopardise the very survival of the EURLs, since the capital increases could no longer be financed by the tax savings made by their sole members. As is apparent from the order of the President of the Court of First Instance in Case T-88/94 R *Société commerciale des potasses et de l'azote and Entreprise minière et chimique* v *Commission* [1994] ECR II-401, paragraph 33, as a rule, the dissolution of a company undeniably constitutes serious and irreparable damage for it. The same applies to its shareholders.

59 Fourthly, the operation would not withstand the disappearance of the EURLS, which form the basis of the financial mechanism, unless the applicants agreed to continue with a financing operation which would be loss-making for them and, as such, contrary to their financial interests. The implementation of the contested decision would therefore deprive them of the opportunity of carrying out an

attractive financial operation and would even require them to suffer a loss when the vessel was resold. In that respect, they point out that the loss of an opportunity has already been held to constitute serious and irreparable damage (*Commission* v *Belgium*, cited above, paragraphs 20 and 23).

60 Furthermore, if the operation were to terminate as a consequence of the contested decision being implemented, the legitimate objective of development in overseas departments and territories, an objective validated by the French and Community authorities, could no longer be pursued.

61 The applicants state that the pecuniary damage is irreparable since, as it cannot be quantified, it could not be the subject of subsequent financial compensation if the contested decision were annulled (order of the President of the Court of First Instance of 7 July 1998 in Case T-65/98 R *Van den Bergh Foods* v *Commission* [1998] ECR II-2641, paragraph 65). It is impossible to determine accurately the tax relief to be granted, which depends on the future financial situation of each of the applicants. Similarly, it is impossible to determine in advance the price for which the vessel could actually have been sold at the end of the five years of joint ownership. Finally, unlike undertakings (legal persons), natural persons are subject to the vagaries of life, which would make any hope of compensation, on an unspecified date in the future, for the damage suffered as a result of the contested decision — if it were to be implemented immediately — fraught with problems and uncertainty. As regards the principles, in the case of the first decision ordering recovery of State aid from private investors, the balance between the interests of the citizens and that of the Community public authorities should be protected by granting suspension of operation as a matter of principle when the financial interests of natural persons are involved.

62 As regards the balancing of the interests of the applicants, on the one hand, and of the public interest and that of third parties on the other, there are grounds for concluding that the requested suspension of operation should be granted.

63 The Commission considers that the condition relating to urgency is not fulfilled.

64 As its main argument, it maintains that it has in no sense been established that the implementation of the contested decision is imminent. It points out, in particular, that, in a letter dated 19 October 2001, the French authorities informed the Commission of the difficulties it was experiencing in implementing the contested decision. In the same letter, the French authorities put forward several proposals designed to alleviate the effects of recovery, which were rejected by letter dated 29 January 2002 from the Commission's Directorate-General for Competition. Since then, the Commission has received no further information from the French authorities.

65 Furthermore, the Commission points out that, in the letter which he sent to the Registry of the Court of First Instance on 7 May 2002, the applicants' legal adviser stresses 'the fact that the tax may be recovered at any moment', which confirms that none of the applicants has yet been confronted with the first stage in the recovery procedure.

66 Since it is not possible to know with certainty, from any of the documents in the present case, when the Member State concerned will actually implement the contested decision, the current nature of the damage (order of the President of the Court of First Instance of 7 November 1995 in Case T-168/95 R *Eridania and Others* v *Council* [1995] ECR II-2817, paragraph 35) cannot be established.

67 In any event, the recovery procedure is broken down into several stages and only at the end of them might the applicants actually be presented with the notice for recovery of the tax relief which they have received. It is clear, in particular, that, especially with regard to the preliminary decision to withdraw the tax relief, the

national legal system provides appropriate legal remedies, including applications for suspension of operation. The danger of the applicants suffering the damage they claim to dread is therefore eliminated.

68 Alternatively, the Commission disputes, first of all, that the damage allegedly suffered may be established by reference to a 'class', 'category' or 'group' of persons possessing the same characteristics, without the slightest reference being made to their personal situation. None of the applicants' references to the case-law is relevant. In any event, the position of each of the private investors, sole members of the EURLs, and the damage which those investors would incur if the contested decision were implemented, cannot be regarded as identical for all the applicants.

69 The Commission also denies that each of the types of damage which B and Others would suffer if operation of the contested decision were not suspended, is serious and irreparable, in particular because it has not been established that they are unable to withstand the alleged financial damage.

70 In its pleadings and at the hearing, the Commission also stressed that there was a case for attributing non-contractual liability to the organisers of the '*Le Levant*' project, namely the bank concerned and the Compagnie des Iles du Ponant, as well as the CIL in its capacity as manager of the joint ownership.

71 As regards the balancing of the interests involved, it clearly leans in favour of dismissing the application for suspension.

Findings of the President of the Court

Prima facie case

72 In their observations, the applicants place the greatest stress on the matter of whether private investors and also legal structures without an economic activity may be drawn within the scope of Article 87(1) EC in respect of a financial investment made by them for the sole purpose of qualifying for tax relief.

73 At the hearing, the Commission expressly stated that it does not deny that the pleas raised by the applicants do not appear to be wholly unfounded.

74 With regard to the applicants' main claim, the President of the Court considers that some of the pleas and arguments put forward are reasonable and capable prima facie of raising doubts as to the legality of the contested decision. At this stage, the observations submitted by the Commission at the hearing have been unable to dispel those doubts.

75 In that regard, although it is well established that, in view of the mandatory nature of the supervision of State aid by the Commission under Article 88 EC, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article (Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 14), it is conceivable that, in the

present case, the applicants could reasonably have believed that they would not be regarded as undertakings within the meaning of Community law and that, since they could not be classified as recipients of State aid, they would not be the target of recovery proceedings.

76 On that point, it should be noted that the case-law does not preclude the possibility that the recipients of illegal aid — such as that at issue in this case — may, in order to challenge its repayment, plead exceptional circumstances which legitimately give rise to a legitimate expectation that the aid was lawful (Case C-183/91 *Commission* v *Greece* [1993] ECR I-3131, paragraph 18; Case T-55/99 *CETM* v *Commission* [2000] ECR II-3207, paragraph 122, and Case T-288/97 *Regione autonoma Friuli-Venezia Giulia* v *Commission* [2001] ECR II-1169, paragraph 107).

77 In this case, several matters have been highlighted in the written observations and during the hearing.

78 First of all, in the assessment of the aid set out in the decision to initiate the procedure, in addition to the fact that the Commission makes no reference to the private investors as possible beneficiaries of the financial advantage resulting from the measure under consideration, the wording of that decision suggests that the real beneficiary of the aid in question is CIL.

79 First, it is apparent from the decision to initiate the procedure that '[t]hese tax concessions [granted to the private investors] enabled CIL to operate the vessel on attractive terms'. Second, when the Commission verifies that the OECD criteria (see paragraph 7 above) are met, it states, in respect of the criterion that the recipient undertaking must not be a non-operational subsidiary of a foreign company, that 'the operator (and eventual owner) is registered in Wallis-et-Futuna' and that 'CIL appears not to be a non-operational subsidiary of a foreign company'.

80 Also, the decision to initiate the procedure states that the aid is 'aid related to shipbuilding granted as development assistance in 1996' and that the aid granted in respect of the vessel in question 'must be evaluated in the light of the provisions of Article 4(7) of the [Seventh Directive]'. However, the beneficiaries of the State aid, within the meaning of the Seventh Directive, are shipbuilding and ship repair undertakings (Article 1(d); see paragraph 4 above), or even the shipowners (Article 3 of the Seventh Directive). In that regard, it is not unreasonable for the applicants to have considered that they were not such undertakings.

81 Furthermore, it was pointed out at the hearing that the Commission's previous practice in taking decisions offers an example of cases in which shipyards have been regarded as beneficiaries of a type of State aid similar to that in this case and, therefore, as the entities responsible, if appropriate, for repaying it. Thus, in the decision of 30 March 1999 on State aid which France is planning to grant as development aid in the sale of two cruise vessels to be built by Chantiers de l'Atlantique and operated by Renaissance Financial in French Polynesia (OJ 1999 L 292, p. 23), the Commission took the following view:

'It should be noted that in the event of a breach of this Decision whereby the aid could not be considered to comply with Article 4(7) of the Shipbuilding Directive, it would follow that the aid would have to be regarded as aid to the yard. Therefore, in such an event the Commission would request France to recover the aid from the yard.'

82 Although the Commission's representative states that that consideration did not constitute the necessary support for the decision in question, the fact remains that it helps to crystallise the particular nature of the circumstances giving rise to this dispute and, accordingly, to fuel the applicants' belief that they would not be regarded as the actual beneficiaries of the aid and exposed to a risk of subsequent recovery.

83 Finally, it should be pointed out that the decision to initiate the procedure refers to the 'beneficiary', not to the 'beneficiaries', of the aid.

84 It is possible that these factors, combined together, constitute exceptional circumstances which justify the applicants' confidence that the tax concessions which they received were lawful. Even if they were proved, — which it is for the court adjudicating on the substance to determine, — those exceptional circumstances, which may have led to the conclusion that the applicants would not be regarded as the actual beneficiaries of a financial advantage, should then have led the Commission to desist from requiring recovery of the State aid in question, in accordance with Article 14(1) of Regulation No 659/1999.

Urgency

85 It is settled case-law that the urgency of an application for interim measures must be assessed in relation to the necessity for an order granting interim relief in order to prevent serious and irreparable damage to the party requesting the interim measure (order of the President of the Court of Justice of 18 October 1991 in Case C-213/91 R *Abertal and Others* v *Commission* [1991] ECR I-5109, paragraph 18; order of the President of the Court of First Instance in Joined Cases T-195/01 R and T-207/01 R *Government of Gibraltar* v *Commission* [2001] ECR II-3915, paragraph 95). It is for the party seeking interim relief to prove that it cannot wait for the outcome of the main proceedings without suffering damage (order in Case T-73/98 R *Prayon-Rupel* v *Commission*, cited above, paragraph 36).

86 It is not necessary for the imminence of the damage to be demonstrated with absolute certainty, it being sufficient to show that damage — especially if its occurrence depends on a series of factors — is foreseeable with a sufficient degree of probability. However, the applicant is required to prove the facts

forming the basis of its claim that serious and irreparable damage is likely (order of the President of the Court of Justice of 14 December 1999 in Case C-335/99 P(R) *HFB and Others* v *Commission* [1999] ECR I-8705, paragraph 67; and order of the President of the Court of First Instance of 15 November 2001 in Case T-151/01 R *Duales System Deutschland* v *Commission* [2001] ECR II-3295, paragraph 188).

87 In the present case, the applicants claim that it is necessary to make an interlocutory order since implementation of the contested decision would expose them to serious and irreparable damage, which would be imminent, given that it was specified that the consequence of the immediate implementation of that decision would be for the French Republic immediately to recover from the private investors the tax concessions which they have received.

88 However, it should be stated that the contested decision was notified to the French Republic on 27 July 2001 and that, on the date on which the main action was brought, 20 February 2002, the applicants did not mention any measure adopted by the French authorities in implementation of the decision in question. In reply to a question from the President of the Court, they confirmed that, as at the day of the hearing, no measure had yet been taken by the French Republic with a view to obtaining repayment of the aid as required under the contested decision.

89 It follows that, as the national authorities have not begun to implement the contested decision, the alleged damage cannot be regarded as imminent.

90 Furthermore, as was stated at the hearing, without serious challenge from the applicants, the national procedure to recover the aid from the applicants has to involve withdrawing the relief granted by the tax authorities, then proceeding to recover the amounts in question. It is not disputed that the decision to withdraw the tax relief and the adjustment decision are measures whose legality may be challenged before the national courts.

91 In that regard, in the letter of 19 October 2001 which they sent to the Commission (see paragraph 64 above), and which is appended to the Commission's observations, the French authorities stated as follows:

'Implementation of the [contested] decision will mean that the French Government will initiate a procedure to withdraw the tax relief from the shareholders concerned. Initially that procedure will be conducted, *inter partes*, with each of the natural persons who receive the tax advantage. At the end of that procedure, it will be declared that the relief will be withdrawn. That administrative decision is subject to appeal for misuse of powers since it entails the withdrawal of an administrative measure creating rights. Applications for suspension of operation may be brought before the national courts.'

92 In that respect, it must be emphasised that, in an action brought before the national courts to challenge the implementing measures taken by the national authorities, B and Others will not be prevented from pleading the illegality of the contested decision. Since they have contested the legality of the contested decision under Article 230 EC, the national court is not bound by the definitive nature of that decision (see to that effect the judgments in Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833, paragraphs 13 to 26; Case C-178/95 *Wiljo* [1997] ECR I-585, paragraphs 20 and 21; and Case C-239/99 *Nachi Europe* [2001] ECR I-1197, paragraph 30). Accordingly, the national court may stay proceedings in order to refer a question to the Court of Justice under Article 234 EC for a preliminary ruling on its validity. In the interest of the proper administration of justice, the national court could also stay proceedings pending disposal of the case on the merits before the Court of First Instance.

93 In the light of the foregoing, it must be concluded that the applicants — who indicated that they intended to use the legal remedies available to them in the French courts, since they maintain that the operation of the decision would

provide them with a reason for bringing proceedings for nuisance initially — have adduced no evidence to demonstrate that the domestic remedies available to them under national law to oppose recovery of the tax concessions do not enable them to avoid serious and irreparable damage (see the orders of the President of the Court of Justice of 6 February 1986 in Case 310/85 R *Deufil* v *Commission* [1986] ECR 537, paragraph 22, and of 15 June 1987 in Case 142/87 R *Belgium* v *Commission* [1987] ECR 2589, paragraph 26; and the order of the President of the Court of First Instance of 6 December 1996 in Case T-155/96 R *Ville de Mayence* v *Commission* [1996] ECR II-1655, paragraph 25).

94 For the sake of completeness, there are two further reasons for finding that the condition relating to urgency is not fulfilled.

95 First, it should be pointed out that the applicants' argument that the condition relating to urgency may be assessed in relation to a 'class', 'category' or 'group' of persons possessing the same characteristics cannot succeed.

96 Indeed, it should be noted at the outset that the orders of the President of the Court of Justice cited by the applicants do not support their claim, since those cases did not call into question the legality of a Community act and the effects of its implementation, but concerned cases of assessment of general and abstract national regulations in the course of interlocutory proceedings connected with actions for failure to fulfil obligations. As for the order of the President of the Court of First Instance of 2 April 1998 in Case T-86/96 R *Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen and Hapag-Lloyd* v *Commission* [1998] ECR II-641, that confirms, contrary to what the applicants maintain, that the condition relating to urgency must be assessed on the basis of specific evidence in respect of each applicant. In particular, paragraphs 66 and 67 of that order mean

that statements of a general nature are not a sufficient basis on which to evaluate the specific interest of each of the undertakings concerned and that, in that case, 'specific, individual and substantiated evidence' was required.

97 Furthermore, the case-law shows that, where there are several applicants, the judge hearing an application for interim measures examines whether proof of pecuniary damage is adduced in respect of each of them, whether they are natural or legal persons (see, in particular, the orders of the President of the Court in Case C-474/00 P(R) *Commission* v *Bruno Farmaceutici and Others* [2001] ECR I-2909; and the orders of the President of the Court of First Instance of 27 February 2002 in Case T-132/01 R *Euroalliages and Others* v *Commission* [2002] ECR II-777, and of 7 May 2002 in Case T-306/01 R *Aden and Others* v *Council and Commission* [2002] ECR II-2387). Those decisions are based on the duty of the judge hearing an application for interim measures to examine, where there is pecuniary damage, the circumstances peculiar to each case. More specifically in cases involving the recovery of State aid from the beneficiaries, it has been held that 'an adverse effect on the rights of the persons considered to be the recipients of State aid which is incompatible with the common market forms an integral part of any Commission decision requiring the recovery of such aid and cannot be regarded as constituting in itself serious and irreparable damage, whether or not a specific assessment is made of the seriousness and irreparability of the precise prejudice alleged in each case considered' (order of the President of the Court of First Instance of 8 December 2000 in Case T-237/99 R *BP Nederland and Others* v *Commission* [2000] ECR II-3849, paragraph 52).

98 Secondly, the applicants claim that implementation of the contested decision will cause pecuniary and non-pecuniary damage.

99 The pecuniary damage is constituted, first, by the repayment of the sums corresponding to the initial tax allowances, second, by the consequences for the EURLs of the withdrawal of the tax concession, since the capital increases will no

longer be able to be financed by the tax savings made by their sole members, and, third, by the costs of the legal proceedings.

100 The short answer to that point is that the applicants have not established that they would be unable to withstand those three aspects of the same damage by taking out a loan — the amount of which would be perfectly quantifiable — to refund the amounts repayable, to pay the costs relating to the legal proceedings and to meet the financing requirements of the EURLs.

101 As regards the non-pecuniary damage invoked by the applicants — consisting essentially of the problems which would stem from withdrawal of the tax relief —, that is an unavoidable consequence of any proceedings for repayment of State aid following a Commission decision declaring the aid to be illegal and ordering its recovery. In any event, the purpose of proceedings for interim measures is to ensure that the judgment on the substance has full effect. For that objective to be achieved, the measures sought must be urgent in so far as, in order to avoid serious and irreparable harm to the applicant's interests, they must be made and produce their effects before a decision is reached in the main proceedings (order of the President of the Court in Case C-65/99 P(R) *Willeme* v *Commission* [1999] ECR I-1857, paragraph 62). In the present case, it has not been shown in what respect the occurrence of the non-pecuniary damage would jeopardise the objective which the proceedings for interim relief seek to uphold.

102 In the light of the foregoing, it must be concluded that the applicants have not established that the condition relating to urgency has been fulfilled.

103 The application for suspension of the operation of the contested decision must therefore be rejected.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. **The application for interim measures is dismissed.**

2. **Costs are reserved.**

Luxembourg, 25 June 2002.

H. Jung

Registrar

B. Vesterdorf

President