JUDGMENT OF THE COURT (Fifth Chamber)

3 October 2002 *

In Case C-394/01,

French Republic, represented by G. de Bergues and F. Million, acting as Agents, with an address for service in Luxembourg,

applicant,

v

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

defendant,

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

* Language of the case: French.

THE COURT (Fifth Chamber),

composed of: P. Jann, President of the Chamber, S. von Bahr (Rapporteur), M. Wathelet, C.W.A. Timmermans and A. Rosas, Judges,

Advocate General: J. Mischo,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 11 June 2002,

gives the following

Judgment

1 By application lodged at the Court Registry on 8 October 2001, the French Republic, under the first paragraph of Article 230 EC, requested the annulment of Commission Decision 2001/882/EC of 25 July 2001 on the State aid implemented by France in the form of development assistance for the cruise vessel *Le Levant*, built by Alstom Leroux Naval for operation in Saint-Pierre-et-Miquelon (OJ 2001 L 327, p. 37, hereinafter 'the contested decision').

Applicable legislation

2 Council Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding (OJ 1990 L 380, p. 27), the application of which was extended by Council Regulation (EC) No 3094/95 of 22 December 1995 on aid to shipbuilding (OJ 1995 L 332, p. 1), lays down specific rules applying to aid in that sector, which constitutes an exception to the general prohibition set out in Article 92(1) of the EC Treaty (now, after amendment, Article 87(1) EC).

3 Article 4(1) of Directive 90/684 provides that production aid in favour of shipbuilding and ship conversion may be considered compatible with the common market provided that the total amount of aid granted does not exceed a common maximum ceiling, defined in the article.

4 Article 4(7) of Directive 90/684 states:

'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 [concerning 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.'

Background

5 The course of the pre-litigation procedure as evidenced by points 1 to 3 and 12 of the grounds of the contested decision may be set out as follows.

6 From an article published in *Lloyds List*, the Commission learned in late 1998 that the cruise vessel *Le Levant*, built by Alstom Leroux Naval in France at a contract price of FRF 228.55 million, had been financed by means of tax concessions available to investors financing the building of the vessel. That aid had not been notified to the Commission.

7 By letter of 2 December 1999, the Commission informed the French authorities 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* of 5 February 2000 (OJ 2000 C 33, p. 6), and interested persons were invited to submit their comments.

8 The French Republic submitted observations in that regard by letters of 12 January 2000, 14 June 2000, 30 April 2001 and 11 June 2001.

9 The characteristics of and background to the aid, as set out in point 5 of the grounds for the contested decision, are 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 a company (hereinafter 'Company X'). The vessel was subsequently leased to the Compagnie des Iles du Levant (hereinafter 'CIL'), which is a subsidiary of a French company registered in Wallis and Futuna (a French overseas territory). The investors were authorised to deduct from their taxable income the amounts thus invested. These tax concessions, with a total estimated value of FRF 78 million, enabled CIL to

operate the vessel on attractive terms. The investors had the obligation to sell back their shares to Company X after five years, i.e. at the beginning of 2004. CIL in turn was to buy the shares from the company at a price which would enable the value of the aid to be passed on to it. CIL was also required to operate the vessel for a minimum of five years, essentially to and from St-Pierre-et-Miquelon (a French overseas territory located off the east coast of Canada), for 160 days a year.

The contested decision

10 In point 16 of the grounds for the contested decision, the Commission stated that the aid in question was to be assessed in the light of Article 4(7) of Directive 90/684, given that it concerned aid for shipbuilding granted as development assistance in 1996 under an aid scheme established by the so-called 'Loi Pons' and approved by the Commission in 1992.

11 The Commission made clear, in point 17 of the grounds of the contested decision, that it needed to verify the 'development' content of the aid at issue and satisfy itself that it fell within the scope of the agreement referred to in Article 4(7) of Directive 90/684. It recorded, in point 21 of those grounds, that the aid met the criteria laid down in that agreement, but stated in the following point that the aid did not meet the development criterion.

12 The main arguments developed by the Commission to support its conclusion that the contested aid did not constitute development assistance are set out in points 22 to 33 of the grounds for the contested decision.

13 The Commission observed that it was clear from the information submitted by the French authorities that the key point was that their estimates of the economic benefits of the contested aid were based on the assumption that the vessel would call at Saint-Pierre-et-Miquelon 50 times per season over the 160 days from late May to the end of October, during which time climatic conditions permit cruising in the area concerned.

14 However, the Commission found that the reality was very different and observed that the French authorities had indicated in their letter of 30 April 2001 that only nine and 11 cruises had started from or finished in Saint-Pierre-et-Miquelon in 1999 and 2000, respectively. As a result, according to the Commission, of the 100 stopovers initially estimated, only 11 — that is, 11% — had been made during those two years.

15 For the year 2001, the Commission noted that, according to that same letter, 13 cruises to or from Saint-Pierre-et-Miquelon and 5 mini-cruises which had the islands as their point of both departure and arrival had been planned, giving a total of 12 stopovers of the 50 initially estimated, or 24%.

16 On the basis of the figures for 1999 and 2000, the Commission concluded that the assumptions underlying the calculation of the economic benefits for Saint-Pierre-et-Miquelon were wrong. It therefore recalculated the estimated economic benefits, using the figures provided by the French authorities but taking into account the much lower number of port visits actually made.

17 The Commission found that, with regard to the direct economic benefits, the French authorities had estimated that spending linked to operation of the vessel would be FRF 10.8 million per annum and that local spending by passengers would reach FRF 1.2 million per annum, that is, a total of FRF 12 million. The

Commission specified that, for both types of spending, the data were based on an estimate of 50 port visits a year.

18 The Commission assumed, given the nature of the economic benefits envisaged in those calculations, which included, *inter alia*, the sale of food and equipment, as well as port fees, that they were proportional to the number of visits to the port.

19 On the basis of the actual number of stopovers in 1999 and 2000 and the number of stopovers estimated for the following three years, the Commission estimated that the economic benefits from 1999 to 2003, assuming that the economic calculations made by the French authorities were correct with regard to the impact of the ship's visits, would be FRF 11.28 million, apportioned as follows:

— for 1999 and 2000, the economic benefits should have been 11% of FRF 12 million per year, that is to say, FRF 1.32 million per year;

— for 2001, the benefits could be estimated at 24% of FRF 12 million, that is to say, FRF 2.88 million.

— for 2002 and 2003, since the cruise schedule is not known, the economic benefits were calculated by extrapolating from the figure for 2001, that is, 24% of FRF 12 million per year, that is to say, FRF 2.88 million per year.

20 Since the total value of the contested aid is FRF 78 million, the Commission described it as almost 7 times greater than the anticipated economic benefit to the islands of Saint-Pierre-et-Miquelon.

21 As far as direct jobs are concerned, the Commission observed that the French authorities had stated that priority would be given to employing residents of Saint-Pierre-et-Miquelon among the 55 crew members. However, according to the Commission, the only information which was provided was that four former fishermen from the islands had been trained to work on the ship. The Commission therefore concluded that the crew did not to any large extent come from the islands.

22 The Commission pointed out that the claims concerning other indirect benefits had not been quantified.

23 The Commission also considered that it could not accept the argument put forward by the French authorities to the effect that a longer period than that from 1999 to 2003 should be taken into account, since there is no obligation on CIL to continue operating the vessel to or from Saint-Pierre-et-Miquelon after that period.

24 The Commission concluded that it had not been established that the project covered by the contested aid was a development project. It stated, first, that the alleged benefits in terms of direct job creation had not been substantiated and were not based on realistic assumptions. Second, it observed that the alleged direct economic benefits were significantly less than the aid, resulting in a clear lack of proportionality between the aid and the intended economic impact.

25 The Commission found that the French Republic had unlawfully put to use the contested aid, in breach of Article 88(3) EC. It added that the aid was not consistent with Directive 90/684 and was therefore incompatible with the common market and must therefore be recovered, with interest.

Forms of order sought

26 The French Republic, which puts forward a single plea in support of its action, claims that the Court should annul the contested decision and order the Commission to pay the costs.

27 The Commission contends that the action should be dismissed as unfounded and the French Republic be ordered to pay the costs.

The plea

28 By its sole plea, the French Government disputes the Commission's conclusion that the contested aid is not development assistance. It considers that the Commission could have rejected the classification as development assistance only through errors of fact, errors of law and manifest errors of assessment, which should result in the annulment of the contested decision.

29 That plea is put forward in two parts. First, as regards the information relating to job creation, the Commission did not take into account the correct number of

employees who are residents of Saint-Pierre-et-Miquelon. Secondly, the Commission's assessment of the economic benefits was incorrect.

Information relating to job creation

Arguments of the parties

30 The French Government maintains that the project covered by the contested aid achieved its job creation objectives. The Commission was mistaken in stating that only four former fishermen had been trained to work on the ship in question and that the crew did not to any large extent include residents of Saint-Pierre-et-Miquelon. According to the French Government, 12 crew members were recruited in the islands and 17 in the West Indies.

31 The Commission replies that it was not mistaken and that the information relating to the 12 crew members allegedly recruited in Saint-Pierre-et-Miquelon is new. It was not at all apparent from the information provided during the pre-litigation procedure and is therefore inadmissible in the present proceedings. As regards the 17 crew members recruited in the West Indies, that information is not relevant in a case concerning development in Saint-Pierre-et-Miquelon.

32 In its reply, the French Government admits that it did not immediately inform the Commission of the origin of crew members taken on after its letter of 12 May 1999 to the Commission, in which it stated that four former fishermen were undergoing training.

Findings of the Court

33 It must be recorded that the French Government did not, at the stage of the pre-litigation procedure, provide the Commission with the information regarding the recruitment of 12 crew members resident in Saint-Pierre-et-Miquelon, which was included in its application.

34 It must be recalled in that regard that, according to settled case-law, the legality of a decision concerning aid is to be assessed in the light of the information available to the Commission when the decision was adopted (see, *inter alia*, Case C-288/96 *Germany* v *Commission* [2000] ECR I-8237, paragraph 34). As the Advocate General observes in point 20 of his Opinion, a Member State cannot rely before the Court on elements of fact which were not put forward in the course of the pre-litigation procedure laid down in Article 88 EC (Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 31, and Case C-382/99 *Netherlands* v *Commission* [2002] ECR I-5163, paragraphs 49 and 76).

35 It follows that the French Government cannot, before the Court, rely on the argument relating to the number of crew members alleged to be resident in Saint-Pierre-et-Miquelon, which it raised for the first time at the time of its application.

36 The first part of the plea must therefore be dismissed as inadmissible.

Economic benefits

37 The French Government breaks down the second part of its plea into four sections.

The first section, relating to the period from 2001 to 2003

Arguments of the parties

38 First, the French Government claims the Commission made an error of law in assessing the economic benefits of the contested aid over the period 2001 to 2003 by extrapolating from the figures for the years 1999 and 2000. That error is all the more serious since, during those first two years, the vessel in question was affected by technical damage.

39 The Commission replies that the French Government's complaint is founded on an incorrect reading of the contested decision, which clearly shows that the Commission did not base its calculations for the period 2001 to 2003 on the figures for the years 1999 and 2000, but on the estimates provided for the year 2001.

Findings of the Court

40 In that regard, suffice it to note that, in point 29 of the grounds of the contested decision, the Commission used the estimate provided for 2001 as a basis for evaluating the economic benefits for the period 2001 to 2003. The Commission therefore rightly maintains that the French Government's reading of the contested decision is contrary to the wording expressly used therein.

41 It follows that the argument of the French Government concerning the first section of the second part of the plea must be rejected as unfounded.

The second section, relating to the period of operation of the vessel

Arguments of the parties

42 Secondly, the French Government states that the Commission was mistaken in its view that the estimates of economic benefit assumed a period of 160 days a year spent in the area of Saint-Pierre-et-Miquelon. It maintains that the initial undertaking in that regard applied to only 130 days and that that objective had been exceeded by five days in 2001 and had almost been reached in 1999 and 2000.

43 The Commission replies that that argument cannot be reconciled with the facts of the present case. It maintains that the only evidence provided on that point by the French authorities is set out in their letters of 12 May 1999 and 14 June 2000,

which make reference only to 160 days, not 130 days, and which relate to the term of operation of the vessel, not to the time spent in the area of Saint-Pierre-et-Miquelon.

44 The French Government acknowledges in its reply that the number of days which it had mentioned was 160 and not 130, but maintains that that was merely a slip of the pen.

45 The Commission, in its rejoinder, disputes the explanation put forward by the French Government.

Findings of the Court

46 In that regard, it should be observed that the French Government admits that it made reference to a period of 160 days, not 130 days, in its correspondence with the Commission.

47 It must be observed, as the Commission maintains in its rejoinder, that those references cannot be considered slips of the pen, since the French Government clearly made reference twice in that correspondence to a commitment to operate the vessel in the area in question for 160 days.

48 The argument of the French Government under the second section of the second part of the plea must therefore be rejected as unfounded.

The third section, regarding the economic situation

Arguments of the parties

49 Third, the French Government maintains that the Commission should in any event have taken account of the situation in the islands, and in particular their size and economic prospects, in order to assess the benefit of the contested aid. In its reply, it draws attention to the problems of restructuring and economic diversification of the islands of Saint-Pierre-et-Miquelon and adds that the challenge to the contested aid can only further jeopardise the extremely precarious economic equilibrium of those islands. It also contends that the Commission has in the past not objected to such projects relating to an overseas territory, and it cites as an example Commission Decision 1999/719/EC of 30 March 1999 on State aid which France is planning to grant as development aid in the sale of two cruise vessels to be built by Chantiers de l'Atlantique and operated by Renaissance Financial in French Polynesia (OJ 1999 L 292, p. 23).

50 The Commission replies that the assessment which it carried out in the contested decision takes account of the information provided by the French authorities on the effect on job creation and on the direct benefits of operation of the vessel in question. It maintains that the information relating to indirect benefits for infrastructure development and to the possible entry of other operators had not been quantified and did not concern the contribution of the contested aid to development.

51 As regards the point that the challenge to the contested aid can only further jeopardise the economic equilibrium of Saint-Pierre-et-Miquelon, the Commission points out that Directive 90/684 authorises certain types of aid for the benefit of developing countries. It is in the nature of the cases envisaged that such countries will be experiencing economic difficulties, but those are not in themselves sufficient to establish that a particular aid contributes to 'develop-

ment'. The Commission adds that its past acceptance of other projects of the kind concerning French overseas territories has no bearing on the contested aid. It merely demonstrates that the Commission is not *a priori* opposed to that type of aid, provided that the conditions set out in Article 4(7) of Directive 90/684 are satisfied.

Findings of the Court

52 In that regard, it must be noted that the French Government limits itself to describing the economic and financial problems confronting the islands of Saint-Pierre-et-Miquelon, without establishing that the Commission erred in fact or in law in its assessment of the contested aid. As the Commission rightly observed, the existence of such problems is not sufficient to qualify aid to shipbuilding and ship conversion as 'development assistance to a developing country' within the meaning of Article 4(7) of Directive 90/684.

53 Moreover, as the Commission points out, the fact that it was able in the past to accept other projects of the same kind relating to French overseas territories has no bearing on the assessment of the contested aid, which must be evaluated on its merits.

54 The argument of the French Government under the third section of the second part of the plea must therefore be rejected as unfounded.

The fourth section, relating to the number of stopovers and the amount of economic benefit

Arguments of the parties

55 Fourth, the French Government states that the figure of 100 stopovers used by the Commission in its assessment of economic benefit for 1999 and 2000 — that is, 50 stopovers a year — was put forward not by it but rather by the Commission. The French Government merely made reference to 50 calls at port. Each stopover entails two calls, that is, one on arrival and the other on departure of the vessel. In addition, according to the latest available figures, the economic benefit of the contested aid amounted to EUR 492 000 in 1999, EUR 349 000 in 2000 and EUR 821 000 in 2001, that is to say, more than EUR 1 600 000 during the first three years of the vessel's operation.

56 The Commission maintains that that line of argument is without substance and, in any event, inadmissible.

57 The Commission is surprised at the definition of calls put forward by the French Government, which it considers contrary to the concept of stopover as defined in French language dictionaries. It maintains that the terms 'stopover' and 'call' are synonymous, so that a stopover is equivalent to one call, and not two. In addition, the definition of calls at issue was used by the French Government for

the first time in its reply. It was not set out at any stage of the procedure leading to the adoption of the contested decision, although the Commission, throughout the preparatory inquiries, clearly pointed out the importance it attached to the number of stopovers. The definition thus proposed is therefore inadmissible.

58 The Commission also examines the new figures put forward in the reply regarding the economic benefits of the contested aid. It observes that they consist of data which postdate the contested decision and are therefore inadmissible. In any event, it disputes the relevance of the new figures, which are neither explained nor justified.

Findings of the Court

59 In that regard, it should at the outset be recalled that the meaning of the word 'call' put forward by the French Government does not appear to be supported by the definition of that term as it appears in French language dictionaries.

60 In addition, it is clear in any event that the French Government's argument concerning the alleged number of calls per stopover, as well as the new figures it put forward regarding the economic benefits of the contested aid, were presented for the first time at the stage of the reply. That Government made no earlier mention of them, in particular during the pre-litigation procedure. However, as the documents in the case make clear, it could not have been unaware of the importance the Commission attached to the number of stopovers in its assessment of the economic benefits of the contested aid and the quantification of those benefits.

61 Therefore, in accordance with the settled case-law of the Court, as cited in paragraph 34 of the present judgment, it must be held that the French Government's line of argument developed in the fourth section of the second part of the plea and put forward belatedly is inadmissible.

62 Since none of the four sections of the argument put forward by the French Government to support the second part of its plea has been upheld, the whole of that part is rejected.

63 In light of the foregoing considerations, the sole plea raised by the French Government, and therefore the whole of the action, must be dismissed.

Costs

64 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the French Republic has been unsuccessful in its sole plea, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the French Republic to pay the costs.**

Jann von Bahr Wathelet

Timmermans Rosas

Delivered in open court in Luxembourg on 3 October 2002.

R. Grass P. Jann

Registrar President of the Fifth Chamber