JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

12 May 2011 *

In Joined Cases T-267/08 and T-279/08,

Région Nord-Pas-de-Calais (France), represented by M. Cliquennois and F. Cavedon, lawyers,

applicant in Case T-267/08,

Communauté d'agglomération du Douaisis (France), represented by M.Y. Benjamin and D. Rombi, lawyers,

applicant in Case T-279/08,

v

European Commission, represented by C. Giolito and B. Stromsky, acting as Agents,

defendant,

* Language of the case: French.

originally, application for annulment of Decision C (2008) 1089 final of the Commission of 2 April 2008 concerning State aid C 38/2007 (ex NN 45/2007) implemented by France in favour of Arbel Fauvet Rail SA, and then application for annulment of Decision C (2010) 4112 final of the Commission of 23 June 2010 concerning State aid C 38/2007 implemented by France in favour of Arbel Fauvet Rail,

THE GENERAL COURT (Eighth Chamber),

composed of L. Truchot (Rapporteur), President, M.E. Martins Ribeiro and H. Kanninen, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 11 November 2010,

gives the following

Judgment

Facts

1 Arbel Fauvet Rail ('AFR') is a manufacturer of railway rolling-stock for industrial use whose registered office is in Douai, France.

2 On 4 July 2005, this company obtained two advances from the Région Nord-Pas-de-Calais ('the NPDC Region') and the Communauté d'agglomération du Douaisis ('the CAD'), of an amount of EUR 1 million each, at an annual interest rate of 4.08 %, to be repaid in six-monthly instalments over a three-year period starting on 1 January 2006.

3 In response to a complaint, the Commission of the European Communities requested information from the French authorities about those measures. The French authorities replied to these requests by letters dated 27 April and 24 October 2006 and 30 January and 6 June 2007 respectively.

4 By letter of 12 September 2007, the Commission informed the French Republic that it had decided to initiate the formal investigation procedure provided for by Article 88(2) EC ('the decision initiating the procedure').

5 The decision initiating the procedure was published in the *Official Journal of the European Union* of 24 October 2007 (OJ 2007 C 249, p. 17). The Commission invited interested parties to submit their comments on the measures at issue.

6 The Commission received comments from the French authorities by letters of 12 October and 18 and 19 December 2007. It received no comments from the interested parties.

7 By Commission Decision C (2008) 1089 final of 2 April 2008 concerning State aid C 38/2007 (ex NN 45/2007) implemented by France in favour of AFR (OJ 2008 L 238, p. 27, 'the original decision'), the Commission decided that the advances granted by the NPDC Region and the CAD constituted State aid. As this was a loan granted to a firm in difficulty without any guarantee of repayment being given, the Commission

took the view that the amount of this aid was equal to the difference between the interest rate actually applied and the interest rate at which the beneficiary company could have obtained the same loan on the open market.

8 The Commission considered that the State aid which the French Republic implemented for AFR was incompatible with the common market. It therefore ordered recovery of the aid by the French Republic, with interest, from the beneficiary.

Procedure and new developments in the course of proceedings

9 By applications lodged at the Registry of the Court on 11 and 17 July 2008 respectively, the NPDC Region and the CAD brought actions in Cases T-267/08 and T-279/08 respectively, originally applying for annulment of the original decision.

10 In its reply, the NPDC Region applied for Cases T-267/08 and T-279/08 to be joined. The Commission expressed no objection and the CAD declared itself in favour of this application.

11 By order of the President of the Sixth Chamber of the General Court of 19 February 2009, pursuant to Article 50(1) of the Rules of Procedure of the Court, Cases T-267/08 and T-279/08 were joined for the purposes of the oral procedure and the judgment.

12 On 23 June 2010, the Commission withdrew the original decision on the ground that it was not properly reasoned as regards calculation of the amount of the aid, in view of Joined Cases T-102/07 and T-120/07 *Freistaat Sachsen and Others* v *Commission* [2010] ECR II-585 ('*Biria*').

13 The original decision was replaced by Decision C (2010) 4112 final of the Commission of 23 June 2010 concerning State aid C 38/2007 (ex NN 45/2007) implemented by France in favour of AFR ('the contested decision'), by which the Commission confirmed that this aid was incompatible with the common market and ordered recovery of the aid by the French Republic, with interest, from the beneficiary.

14 On 23 August 2010, in their comments submitted in response to the adoption of the contested decision, the NPDC Region and the CAD stated that, notwithstanding the withdrawal of the original decision, they did not intend to abandon their initial applications, and they applied to alter their heads of claim so that the actions would also relate to the contested decision.

15 On 27 September 2010, the Commission replied to the comments submitted by the applicants on 23 August 2010. It withdrew its head of claim seeking an order for costs against the applicants and requested that each party bear its own costs.

16 Following modification of the composition of the chambers of the General Court, the Judge-Rapporteur was assigned to the Eighth Chamber, to which this case was therefore also assigned.

17 On hearing the report of the Judge-Rapporteur, the General Court (Eighth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure under Article 64 of the Rules of Procedure of the Court, put written questions to the applicants and to the Commission, to which they replied within the prescribed period.

18 At the hearing on 11 November 2010, the oral arguments of the parties were heard and they answered the Court's oral questions.

Forms of order sought by the parties

19 In Case T-267/08, the NPDC Region claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

20 In Case T-279/08, the CAD claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

21 In Cases T-267/08 and T-279/08, the Commission contends that the Court should:

— dismiss the applications as unfounded;

— order each party to bear its own costs.

Law

A — *The procedural consequences of the withdrawal of the original decision and of its replacement by the contested decision*

22 As stated in paragraphs 12 and 13 above, the original decision was withdrawn and replaced by the contested decision after the originating applications had been lodged. The applicants applied to alter their initial heads of claim so that their actions sought the annulment of the contested decision.

23 It must be observed that, where a decision is, during the proceedings, replaced by another decision with the same subject-matter, this is to be considered a new factor allowing the applicant to adapt its heads of claim and pleas in law. It would not be in the interests of the due administration of justice and the requirements of procedural economy to oblige the applicant to make a fresh application to the Court. Moreover, it would be inequitable if the institution in question were able, in order to counter criticisms of a decision contained in an application to the European Union judicature,

to amend the contested decision or to substitute another for it and to rely in the proceedings on such an amendment or substitution in order to deprive the other party of the opportunity of extending their original pleadings to the later decision or of submitting supplementary pleadings directed against that decision (see Case T-228/02 *Organisation des Modjahedines du peuple d'Iran* v *Council* [2006] ECR II-4665, paragraph 28 and the case-law cited).

24 It is therefore appropriate in the present case, first, to consider that the applicants' initial requests seeking annulment of the original decision have become devoid of purpose as a result of the withdrawal of that decision by the contested decision, so that there is no longer any need to adjudicate on the applications, and, second, to allow the applicants' new requests referred to in paragraph 14 above, to consider that their actions seek annulment of the contested decision and to allow the parties to reformulate their claims, pleas in law and arguments in the light of that new factor, which implies, for them, the right to submit supplementary claims, pleas in law and arguments.

B — *The application for annulment of the contested decision*

25 Case T-267/08 consists of seven pleas in law. The first plea in law alleges infringement of the obligation to state reasons. The second plea in law alleges infringement of the rights of defence, of the principle that both parties should have the right to be heard and of the principles of equality, sound administration, respect for the constitutional identity of the Member States and the protection of legitimate expectations. The third plea in law alleges a manifest error of assessment concerning failure to take into consideration the specific legal features of the aid contributor. The fourth plea in law alleges infringement of Article 107(1) TFEU. It consists of two parts which concern, respectively, an error of assessment regarding the source of the funds and an error of classification of AFR as a firm in difficulty. The fifth plea in law alleges an error of assessment regarding AFR's supposed advantage from the repayable advances. The sixth plea in law alleges an error of assessment of the amount of the aid. The seventh

plea in law alleges infringement of the rights of defence in the course of the contentious procedure and misuse of powers.

26 Case T-279/08 consists of four pleas in law. The first plea in law alleges infringement of the rights of defence and of the principle that both parties should have the right to be heard. The second plea in law alleges infringement of the obligation to state reasons. The third plea in law alleges an error of assessment concerning the definition of a firm in difficulty. The fourth plea in law alleges an error of assessment concerning the concept of State resources.

27 In addition, the CAD raised a fifth plea in law, during the hearing, alleging that the Commission had committed a manifest error of assessment concerning the absence of sureties guaranteeing repayment of the advances.

1. *The admissibility of the fifth plea in law in Case T-279/08*

(a) Arguments of the parties

28 At the hearing, the CAD claimed that the Commission had committed a manifest error of assessment in considering that the repayable advances at issue had been granted without any guarantee being lodged for their repayment. In fact, payment of the advance by the CAD was subject to the irrevocable merger of AFR and Lormafer, a company controlled by the company Arbel SA. This merger amounted to a guarantee, in view of the resulting increased scope for recovery of debts for creditors.

29 The Commission maintained at the hearing that this plea, having been raised belatedly, must be rejected as inadmissible. In the alternative, it put forward the argument that the payment condition invoked by the CAD cannot be legally equivalent to a guarantee and that the payment of the advances at issue was not conditional on the creation of any guarantee.

30 In response to the claim of inadmissibility raised by the Commission, the CAD maintained that the argument at issue appeared in paragraph 30 of its application and that the condition invoked was explained in the minutes of the resolution of the CAD Council of 24 June 2005, which form Annex A.2 to its application.

(b) Findings of the Court

31 It should be borne in mind that, pursuant to Article 44(1)(c), read in conjunction with Article 48(2), of the Rules of Procedure, an application must state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based and that no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

32 In the present case, the applicant, contrary to its claims, did not raise this plea in its application. Paragraph 30 of the application states only that the advance at issue was granted by the CAD 'under certain conditions', without claiming that, among those conditions, the irrevocable merger of AFR and Lormafer amounted to a guarantee and that the Commission had therefore committed a manifest error of assessment in considering that there were no sureties guaranteeing repayment of the advances. Moreover, the minutes of the resolution of the CAD Council, which appear in Annex A.2 to the application, merely define the conditions to which payment of the advance was subject, without mentioning any surety guaranteeing repayment of the advance,

and cannot, in any event, be interpreted as expressing this plea in law. Nor was this plea invoked by the applicant in its request to alter its pleadings, referred to in paragraph 14 above.

33 Furthermore, the applicant does not seek to maintain that this plea is based on matters of law or of fact which came to light in the course of the procedure.

34 Consequently, in accordance with the provisions of the Rules of Procedure referred to in paragraph 31 above, the plea alleging a manifest error of assessment concerning the absence of sureties guaranteeing repayment of the advances, raised during the hearing, must be rejected as inadmissible.

35 For the sake of completeness and even if the argument may be regarded as amplifying a submission made previously and, as such, considered admissible (see, to that effect, Case 306/81 *Verros* v *Parliament* [1983] ECR 1755, paragraph 9, and Case C-301/97 *Netherlands* v *Council* [2001] ECR I-8853, paragraph 169), it must, in any event, be dismissed. The condition to which the payment of the advance granted by the CAD was made subject, namely the merger between AFR and Lormafer, does not put the CAD in a privileged position in relation to AFR's other creditors. It does not constitute either a commitment made to the CAD by a third party or the assignment of an asset as a preference for the CAD. Therefore it cannot be regarded as amounting to a guarantee of repayment of the advance. Therefore the Commission did not commit a manifest error of assessment in that regard.

2. *The first plea in law in Case T-267/08 and the second plea in law in Case T-279/08, alleging infringement of the obligation to state reasons*

(a) Arguments of the parties

36 The NPDC Region maintains that the statement of grounds of the contested decision is defective. It points out, first of all, that the Commission undertook a joint, overall assessment of the aid granted to AFR, which it regarded as a single grant of aid and not as two separate grants of aid made by the NPDC Region on the one hand and by the CAD on the other hand.

37 It asserts that the statement of reasons is incorrect so far as concerns the aid granted by the CAD, since, in paragraph 18 of the original decision, the Commission stated that this aid had been granted by the municipalities in the CAD. Yet the CAD is a public institution with administrative and budgetary autonomy, legally separate from its constituent towns and communities; contractual relationships may be established with it and it is endowed with its own powers and tax system. The statement of reasons relating to the aid allegedly granted by those municipalities has no bearing on the issue, which means that the statement of reasons concerning the aid granted by the CAD therefore has no legal basis. The correction of the error in paragraph 18 of the original decision, implemented by the Commission in paragraph 27 of the contested decision, does not remove this procedural defect, since the Commission has not accounted for this change of description.

38 Therefore, the statement of reasons concerning the regional share of the aid must also be regarded as having no legal basis, by application of the principle that the statement of reasons is indivisible.

39 Alternatively, if the Court were to view the statement of reasons as divisible, it would follow that inadequate reasons have been given in regard to the regional share of the aid, since the assessment of AFR's circumstances was made on the basis of total aid of EUR 2 million. The assessment of the concept of advantage for the undertaking has therefore been made on the wrong bases.

40 The CAD claims that inadequate reasons were given for the contested decision, as they were for the original decision, so far as concerns the method used to calculate the amount of the aid, based on an increase of 800 basis points in the reference interest rate ('the risk premium'). The Commission merely referred to the original decision and to its Communication 2008/C 14/02 on the revision of the method for setting the reference and discount rates (OJ 2008 C 14, p. 6, 'the 2008 Communication on the reference rates'). However, first, the original decision was withdrawn on the ground that inadequate reasons were given for the calculation of the risk premium and, second, merely referring to the applicable provisions, without any details specific to the circumstances in question which would make it possible to determine the relevance of the analysis, is, according to the case-law, insufficient, since it does not enable the Court to check the validity of the method used for setting the default interest.

41 In its reply, the CAD also maintains that the Commission undertook a joint, overall analysis of the mechanism of the repayable advances granted to AFR, whereas in reality there were two separate advances.

42 The Commission contends that these pleas should be dismissed.

(b) Findings of the Court

43 According to settled case-law, the scope of the duty to state reasons depends on the nature of the measure in question and on the context in which it was adopted. The

statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure, so as to enable the persons concerned to ascertain the reasons for it so that they can defend their rights and ascertain whether or not the measure is well founded and to enable the European Union judicature to exercise its power of review. It is not necessary for the statement of reasons to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. In particular, the Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned and it is sufficient if it sets out the facts and the legal considerations having decisive importance in the context of the decision (see Case T-349/03 *Corsica Ferries France* v *Commission* [2005] ECR II-2197, paragraphs 62 to 64 and the case-law cited).

44 Furthermore, when a decision has been adopted in a context with which the interested party is familiar, it can be reasoned in a summary manner (Case 73/74 *Papiers Peints and Others* v *Commission* [1975] ECR 1491, paragraph 31, and Case C-301/96 *Germany* v *Commission* [2003] ECR I-9919, paragraphs 89 and 92).

45 In addition, according to the case-law, the obligation to state reasons is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the contested measure (Case C-17/99 *France* v *Commission* [2001] ECR I-2481, paragraph 35; Case T-406/06 *Evropaïki Dynamiki* v *Commission* [2008] not published in the ECR, paragraph 47; and Case T-89/07 *VIP Car Solutions* v *Parliament* [2009] ECR II-1403, paragraph 63). Claims and arguments intended to deny that the measure is well founded are thus irrelevant in the context of a plea alleging the lack or inadequacy of a statement of reasons (Case T-68/03 *Olympiaki Aeroporia Ypiresies* v *Commission* [2007] ECR II-2911, paragraph 79, and *Biria*, paragraph 210).

The first plea in law in Case T-267/08

46 The NPDC Region puts forward the argument, in essence, that the statement of grounds of the contested decision is defective because it reveals that the Commission considered the repayable advance granted by the CAD to have been granted by the municipalities in the CAD.

47 However, as the original decision was withdrawn, the NPDC Region cannot properly rely on an alleged defect in the statement of grounds for the original decision as against the contested decision. In any case, paragraphs 16, 17 and 27 of the contested decision clearly and unequivocally identify the CAD, and not its constituent municipalities, as the authority which granted one of the two repayable advances at issue; therefore this plea must be dismissed as lacking any factual basis.

The second plea in law in Case T-279/08

48 This plea is divided into two parts. The first part concerns inadequate reasons given for the method used to calculate the amount of the aid. The second part relates to a defect in the statement of grounds, arising from a joint, overall assessment of the aid granted to AFR.

— The first part, alleging inadequate reasons given for the method used to calculate the amount of the aid

49 In the contested decision, the Commission explained its method for calculating the amount of the aid in the following terms:

'(49) In the case of aid granted in the form of loans to firms in difficulty, the aid element is made up of the difference between the interest rate actually applied and the interest rate at which the beneficiary company could have obtained the same loan on the open market.

(50) In accordance with the 1997 Notice on the method for setting the reference and discount rates, the Commission sets reference rates which are supposed to reflect the average level of interest rates charged on the market for medium and long-term loans backed by normal security. The Notice also states that the reference rate is a floor rate which may be increased in situations involving a particular risk (for example, an undertaking in difficulty or where the security normally required by banks is not provided) and that, in such cases, the premium may amount to 400 basis points or more. The 1997 Notice on the method for setting the reference and discount rates does not make it clear whether different risk premiums can be treated as cumulative if distinct risks are being taken into account. Although accumulation is not precluded, the Commission must state in its decision the reasons for the method used to aggregate the different risk premiums, applying an analysis of financial market practice. …

(51) In 2004, [a] firm of auditors … conducted a study … on behalf of the Commission ('the study'). On the basis of empirical research, the study identifies the premiums seen on the market for different categories of risks relating to undertakings or to transactions (with variable collateral). The study shows clearly that the simultaneous presence of different aspects of risk (the borrower's creditworthiness, collaterals) takes the concrete form of increases which have to be added to the base rate.

(52) Following the study, the Commission's approach to calculating the aid element of the loans was refined and explained in its 2008 Communication on the revision of the method for setting the reference and discount rates … ("the 2008 Communication on the reference rates"). That communication reflects the

method recommended by the study and provides for the addition of different premiums to the base rate, according to both the creditworthiness of the undertaking and the collateral offered.

(53) However, the determination of the aid element of the measures refers to the concept of State aid and, as the Court of Justice has consistently held, "the concept of State aid must be applied to an objective situation, which falls to be appraised on the date on which the Commission takes its decision".

…

(54) Consequently, the Commission considers that the appropriate method for determining the aid element is the method stated in the 2008 Communication on the reference rates and proposes to examine the measures at issue in the light of that communication.

(55) The 2008 Communication on the reference rates provides that the premium which makes it possible to rule out the presence of State aid in the case of a firm in difficulty offering low collateralisation is equivalent to 1 000 basis points.

(56) As section 5.1.3 has shown, the Commission considers that AFR was a firm in difficulty at the time the (aid) measures were granted. The Commission observes in addition that no surety was offered in support of the repayable advances and that the collateralisation can therefore be considered low.

(57) Therefore, the aid element is equivalent, theoretically, to the difference between the base rate increased by 1 000 points and the rate at which the measure was granted. However, taking into account that it took the view in its original decision of 2 April 2008 that the applicable premium was 800 basis points, that the aid beneficiary did not contest that decision and that no competitor of the beneficiary called the legality of the initial decision into question, and having regard to all the circumstances of the present case, the Commission is of the opinion that there is no need to give a larger increase here.

(58) The Commission concludes that the aid element is equivalent to the difference between the applicable reference interest rate increased by 800 basis points and the interest rate at which the measure was granted.'

50 The statement of reasons for the method used by the Commission to calculate the amount of the aid is not confined, contrary to the CAD's claims, to mere references to the 2008 Communication on the reference rates and the original decision. The contested decision includes a detailed description of the chosen calculation method, that is, the use of a reference rate with a flat-rate increase linked to AFR's difficult position and to the absence of any securities guaranteeing the repayable advances.

51 First, the calculation method explained by the Commission refers to Commission Notice 97/C 273/03 on the method for setting the reference and discount rates (OJ 1997 C 273, p. 3, 'the 1997 Notice on the reference rates') and to the 2008 Communication on the reference rates.

52 Secondly, the reasons given for the contested decision are based on an in-depth analysis of AFR's financial position — whose validity constitutes a separate question from that of compliance with the obligation to state reasons — and of the absence of sureties.

53 Thirdly, as regards the reasons given for the premium applicable to the reference rate in the light of the cumulative risks resulting from AFR's financial position and from the absence of sureties, the contested decision relies, pursuant to the Court's case-law (*Biria*, paragraph 218), on an analysis of financial market practice, carried out in October 2004 by a firm of auditors on behalf of the Commission on the basis of empirical research into the premiums seen on the market for different categories of risks relating to undertakings or to transactions.

54 The reference to the original decision in paragraph 57 of the contested decision was intended only, as an adjunct to mentioning that the other circumstances of the present case were taken into account, to provide reasons for the Commission's setting the risk premium at 800 basis points. The Court is of the opinion that adequate reasons have been given for setting the risk premium at that level.

55 It follows from the foregoing that the first part of this plea must be dismissed as unfounded.

— The second part, alleging a defect in the statement of grounds, arising from the 'joint, overall' assessment of the advances granted to AFR

56 First, in the contested decision, the Commission clearly distinguished, when it presented the support measures in question in paragraph 17, the repayable advance granted by the NPDC Region on the one hand from the repayable advance granted by the CAD on the other hand.

57 Secondly, although paragraph 16 of the contested decision referred to a 'jointly granted repayable advance', that fact cannot be considered to constitute a defect in the statement of grounds. Indeed, it was also made clear, in paragraph 17 of the contested decision, that the advance granted by the CAD was subject, according to the information provided by the French authorities to the Commission, to the condition that a similar repayable advance be granted, on the same terms, by the NPDC Region.

58 Thirdly, although, in the contested decision, the Commission undertook a joint assessment of the classification of the advances at issue as State aid, of the determination of the amount of the advances and of their compatibility with the common market, that fact does not constitute *per se* an infringement of the obligation to state reasons. Since the advances were granted, first, on the same conditions as to the interest rate, the manner in which repayment was to be made and the absence of sureties, and, second, to the same beneficiary, a joint statement of reasons satisfied, in the present case, the purpose of the obligation to state reasons, namely the need to disclose clearly and unequivocally the reasoning followed by the institution which adopted the measure, so as to enable the persons concerned to ascertain the reasons for it and to enable the competent Court to exercise its power of review.

59 Therefore the second part of this plea must be dismissed.

60 In the light of the foregoing, the entire second plea in law in Case T-279/08, alleging infringement of the obligation to state reasons, must be dismissed.

3. *The second plea in law in Case T-267/08, alleging infringement of the rights of defence, of the principle that both parties should have the right to be heard and of the principles of equality, sound administration, respect for the constitutional identity of the Member States and the protection of legitimate expectations, and the first plea in law in Case T-279/08, alleging infringement of the rights of defence and of the principle that both parties should have the right to be heard*

(a) Arguments of the parties

61 The NPDC Region claims that respect for the rights of defence, applicable in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, obtains in the context of proceedings relating to State aid not only for the person to whom the decision is addressed, but also for the authority allocating the aid. Yet the Commission did not call on either the standing committee of the NPDC Regional Council, which decided to allocate the aid, or the President of the Regional Council, who had the power to implement it. Nor did the French Republic ask these elected Regional Council authorities for explanations, as it established contacts solely with the Regional Council's administrative authorities. Moreover, the decision-making and administrative authorities of the NPDC Region had no access to the documents in the matter and were not included among the persons to whom the evidence, the observations of the French Republic or the Commission's questions about the aid at issue were sent. The Commission ought either to have approached the NPDC Region directly or have asked the French Republic to refer the matter officially to its legal representative, namely the President of the Regional Council, so that he could submit his comments to it.

62 In proceeding as it did, the Commission contravened the principles of sound administration and of respect for the constitutional identity of the Member States by undermining local authorities' freedom of administration, which is guaranteed by the French Constitution of 4 October 1958.

63 The failure to reopen the formal investigation procedure prior to the adoption of the contested decision, when the latter relied on a different method for calculating the amount of the aid from the method used in the original decision, also constitutes an infringement of the rights of defence and of the NPDC Region's right to information as an interested person, as well as its right to be heard. The French Republic's rights of defence were also infringed.

64 Furthermore, the Commission, in basing its arguments, in the contested decision, not only on new considerations, but also on the supposed inadequacy of the documents provided to it by the French authorities concerning the recovery plan implemented by AFR, contravened the principle of the protection of legitimate expectations. This principle requires, according to the case-law, that the Commission does not base its final decision on the absence of information which, in the light of what was said in a provisional decision, the parties could not have formed the view that they were under a duty to make available to it. In the present case, there was actually no provisional decision, since the Commission merely substituted the contested decision for the original decision, without the slightest regard for formalities and in total secrecy. Therefore, neither the NPDC Region nor the French Republic was in a position to produce information which could have appeared to them that they were under a duty to make available.

65 The Commission also contravened the principle of equality between the parties affected by the aid, since the complainant who initiated the procedure was viewed as an interested party under Article 108(2) TFEU, whereas the local authority which granted the aid referred to in the complaint was viewed only as an interested third party, not eligible to take part in the procedure.

66 The CAD criticises the Commission for not having consulted the CAD, the NPDC Region or AFR, when, according to the case-law, respect for the rights of defence requires that the interested parties must be afforded the opportunity to make their views known and to comment on the documents submitted by the European Union

administration, even in the absence of any rules concerning the proceedings in question. Consulting the French Republic alone was inadequate.

67 It also maintains that it must be established that the statement of objections was worded sufficiently clearly to enable interested persons properly to identify the conduct complained of by the Commission.

68 The CAD adds that the failure to reopen a formal investigation procedure prior to the adoption of the contested decision constituted an infringement of the rights of defence, of the principle that both parties should have the right to be heard and of the right to a fair hearing by the Commission. It was not given the opportunity to make its views known, since the Commission did not inform it of the reassessment of the advances at issue or of the use of a method for calculating the amount of the aid which differed from the method used as grounds for the original decision.

69 The Commission disputes the merits of the applicants' arguments.

(b) Findings of the Court

70 According to settled case-law, respect for the rights of defence is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of European Union law which must be guaranteed even in the absence of specific rules. That principle requires that the person concerned be afforded the opportunity during the administrative procedure to make known in an effective manner his views on the truth and relevance of the facts, charges and circumstances relied on by the Commission (Case 234/84 *Belgium*

v *Commission* [1986] ECR 2263, paragraph 27, and Case T-65/96 *Kish Glass* v *Commission* [2000] ECR II-1885, paragraph 32).

71 As to the rights of infra-State bodies which have granted State aid, the administrative procedure regarding State aid is opened only against the Member State concerned. Only the Member State concerned, as the addressee of the contested decision, may rely on true rights of defence (Case T-291/06 *Operator ARP* v *Commission* [2009] ECR II-2275, paragraph 35). Infra-State bodies which grant aid, such as the applicants, like the undertakings receiving the aid and their competitors, are considered only to be interested parties in this procedure, for the purpose of Article 108(2) TFEU (see, to that effect, Case T-158/96 *Acciaierie di Bolzano* v *Commission* [1999] ECR II-3927, paragraph 42).

72 In addition, it is settled case-law that, during the assessment phase referred to in Article 108(2) TFEU, the Commission has a duty give the parties concerned notice to submit their comments (Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, paragraph 22; Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 16; and Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 59).

73 With regard to that duty, the Court of Justice has ruled that the publication of a notice in the Official Journal is an appropriate means of informing all the parties concerned that a procedure has been initiated (Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 17), while also pointing out that the sole aim of this communication is to obtain from persons concerned all information required for the guidance of the Commission with regard to its future action (Case 70/72 *Commission* v *Germany* [1973] ECR 813, paragraph 19, and Case T-266/94 *Skibsværftsforeningen and Others* v *Commission* [1996] ECR II-1399, paragraph 256).

74 This case-law in essence confers on the parties concerned the role of information sources for the Commission in the administrative procedure instituted under Article 108(2) TFEU. It follows that, far from enjoying the same rights of defence as those which individuals against whom a procedure has been instituted are recognised as having, the parties concerned have only the right to be involved in the administrative procedure to the extent appropriate in the light of the circumstances of the case (Joined Cases T-371/94 and T-394/94 *British Airways and Others* v *Commission* [1998] ECR II-2405, paragraphs 59 and 60, and Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission* [2003] ECR II-435, paragraph 125).

75 Accordingly, an applicant may not plead infringement of the principle of sound administration on the ground that the Commission did not specifically solicit the applicant's comments regarding the aid investigation procedure (Case T-354/99 *Kuwait Petroleum (Netherlands)* v *Commission* [2006] ECR II-1475, paragraph 82). Nor does the Commission have any duty to forward the observations or the information which it has received from the government of the Member State concerned to the interested parties.

76 In the present case, the applicants claim that the Commission has contravened their rights of defence, the principle that both parties should have the right to be heard and the right to sound administration, firstly by failing to ask them directly for an explanation or to ask the French Republic to refer the matter to their legal representative so that he could submit his comments, secondly by failing to give them access to the documents in the case and thirdly because they were not included among the persons to whom the evidence, the observations of the French Republic or the Commission's questions about the aid at issue were sent.

77 The CAD also claims that, in addition to its own rights of defence, those of the NPDC Region and of the aid recipient, AFR, were infringed, since their comments were not obtained. In that respect, it is relevant that the CAD's only legal interest in bringing proceedings is to secure observance of its own procedural rights (see, by analogy,

Order in Case T-41/00 *British American Tobacco International (Holdings)* v *Commission* [2001] ECR II-1301, paragraphs 18 and 19, and Case T-411/06 *Sogelma* v *AER* [2008] ECR II-2771, paragraph 101). Since the CAD has no legal interest in bringing proceedings in order to secure observance of the NPDC Region's and the aid beneficiary's rights of defence, the allegation of infringement of those rights is inadmissible in so far as it is made by the CAD.

78 It follows from the case-law cited in paragraphs 70 to 75 above that interested parties, such as the applicants, cannot rely on the rights of defence as such, but have only the right to a fair hearing and to be involved in the procedure to the extent appropriate in the light of the circumstances of the present case. The infringement of the rights of defence, of the principle that both parties should have the right to be heard and of the right to sound administration alleged by the applicants must therefore be examined solely in the light of the infringement of the applicants' right to a fair hearing and to be involved in the procedure.

79 In that connection, the Commission, by publishing an invitation to submit comments pursuant to Article 88(2) EC on the procedure concerning non-notified State aid by France to AFR in the Official Journal of 27 October 2007, consisting of the publication of the decision initiating the procedure and a summary of the latter, acquainted all the interested parties with the commencement of a procedure.

80 In respect of the CAD's claim that the statement of objections was not worded sufficiently clearly to enable interested persons properly to identify the conduct complained of by the Commission, it should be borne in mind that, under Article 6 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1), where the Commission decides to initiate the formal investigation procedure, it is permissible for its decision merely to summarise the relevant issues of fact and law, to include a preliminary assessment as to the aid character of the State measure in question and to set

out its doubts as to the measure's compatibility with the common market (Joined Cases T-269/99, T-271/99 and T-272/99 *Diputación Foral de Guipúzcoa and Others* v *Commission* [2002] ECR II-4217, paragraph 104, and Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 *TV 2/Denmark and Others* v *Commission* [2008] ECR II-2935, paragraph 138).

81 Thus, a decision to initiate the procedure must give interested parties the opportunity effectively to participate in the formal investigation procedure, during which they will have the opportunity to put forward their arguments. For that purpose, it is sufficient for the parties concerned to be aware of the reasoning which has led the Commission to conclude provisionally that the measure in issue might constitute new aid incompatible with the common market (Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309, paragraph 138, and *Diputación Foral de Guipúzcoa and Others* v *Commission*, paragraph 105).

82 In the present case, in the decision initiating the procedure, the Commission set out clearly the considerations on the basis of which it provisionally concluded that the repayable advances at issue constituted State aid (paragraphs 8 to 15 of the decision initiating the procedure) and the reasons why it held that there were doubts regarding the compatibility of that aid with the common market (paragraphs 16 to 20 of that decision).

83 Furthermore, in respect of the NPDC Region's and the CAD's allegation of failure to reopen the formal investigation procedure following the withdrawal of the original decision, according to the case-law, the procedure for replacing an illegal measure may thus be resumed at the very point at which the illegality occurred, and the Commission is not required to recommence the procedure by going back further than that precise point (see, to that effect, Case C-458/98 P *Industrie des poudres sphériques* v

Council [2000] ECR I-8147, paragraph 82 and the case-law cited, and Case T-301/01 *Alitalia* v *Commission* [2008] ECR II-1753, paragraphs 99 and 142). In the present case, the inadequate statement of reasons which led to the withdrawal of the original decision does not date from the commencement of the procedure, which was not unlawful in any way. Since the Commission had the details it needed for the required new analysis, as far as calculating the risk premium was concerned, through *Biria*, it therefore had no obligation to recommence the preparatory inquiries in the case.

84 Since the applicants' right to a fair hearing and to be involved in the procedure was observed when the original decision was adopted, the withdrawal of that decision on the grounds that its statement of reasons was inadequate and the adoption of a new decision replacing it therefore did not require the formal investigation procedure to be reopened. Furthermore, even if it were admissible for the NPDC Region to allege infringement of the French Republic's rights of defence, it has not provided any information to show that this failure to reopen the formal investigation procedure constitutes such an infringement.

85 The addition of further evidence to the contested decision, relating to the recovery measures taken by AFR, cannot call this fact into question. As the Commission points out, such an addition is intended to respond in more detail to the arguments expounded by the applicants in their applications. Therefore it cannot be maintained that the addition of further evidence contravenes the applicants' right to a fair hearing, since this addition on the contrary shows the observance of this right. In any event, the applicants gave no information which, had the Commission taken it into account, might have changed the Commission's conclusion in the contested decision. For such an infringement of the right to a fair hearing to result in an annulment it must, however, be established that, had it not been for that irregularity, the outcome of the procedure might have been different (Case 259/85 *France* v *Commission* [1987] ECR 4393, paragraphs 12 and 13, and Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraphs 30 and 31).

86 It follows from the foregoing that the Commission has not contravened the applicants' right to a fair hearing and to be involved in the procedure or the right to sound administration or the principle that both parties should have the right to be heard.

87 The NPDC Region's allegation of infringement of the principle of equality must also be dismissed. As far as concerns review of State aid, regional or local infra-State bodies which grant aid, such as the applicants, in fact have the same procedural rights as potential complainants. The latter are considered only to be interested parties in this procedure, with whom the Commission is not required to conduct an exchange of views and arguments (*Commission* v *Sytraval and Brink's France*, paragraph 59, and Case T-95/03 *Asociación de Estaciones de Servicio de Madrid and Federación Catalana de Estaciones de Servicio* v *Commission* [2006] ECR II-4739, paragraph 140).

88 In addition, as regards the NPDC Region's allegation relating to respect for the constitutional identity of the Member States, it is possible that an infra-State body enjoys a legal and factual status which makes it sufficiently autonomous in relation to the central government of a Member State, with the result that, by the measures it adopts, it is that body and not the central government which plays a fundamental role in the definition of the political and economic environment in which undertakings operate (Case C-88/03 *Portugal* v *Commission* [2006] ECR I-7115, paragraph 58, and Joined Cases C-428/06 to C-434/06 *Unión General de Trabajadores de la Rioja and Others* v *Juntas Generales del Territorio Histórico de Vizcaya* [2008] ECR I-6747, paragraph 48). However, under the procedure for reviewing State aid, the role of interested parties other than the Member State concerned is confined to that outlined in paragraph 74 above. Accordingly, they cannot themselves lay claim to an exchange of arguments with the Commission such as that initiated in regard to that Member State (Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraph 82). This allegation must therefore be dismissed as unfounded.

89 Finally, the allegation of breach of the principle of the protection of legitimate expectations put forward by the NPDC Region (see paragraph 64 above) is no more convincing.

90 According to the case-law, in carrying out the procedure involving review of State aid the Commission must take account of the legitimate expectations which the parties concerned may entertain as a result of what was said in the decision to initiate the procedure (Case T-6/99 *ESF Elbe-Stahlwerke Feralpi* v *Commission* [2001] ECR II-1523, paragraph 126). Subsequently, it must not base its final decision on the absence of information which, in the light of what was said in that decision, the parties concerned could not have formed the view that they were under a duty to make available to it (Case T-25/04 *González y Díez* v *Commission* [2007] ECR II-3121, paragraph 125).

91 In the present case, paragraph 18 of the decision initiating the procedure is worded as follows:

'At this stage, the Commission doubts whether the compatibility conditions for restructuring aid laid down in the Guidelines are fulfilled. Accordingly, it notes that:

— the French authorities did not present it with a restructuring plan consistent with points 34 to 37 of the Guidelines,

— the Commission was not made aware of any compensatory measures designed to prevent any excessive distortion of competition that may be caused by the aid (points 38 to 42 of the Guidelines).'

92 The decision initiating the procedure therefore includes particulars showing that the Commission doubted the compatibility of the measures at issue, given the absence of a restructuring plan consistent with points 34 to 37 of the Communication from the Commission on the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 2004 C 244, p. 2, 'the Guidelines').

93 The interested parties and the French Republic therefore knew that it was for them to demonstrate the existence of such a restructuring plan, on which the grant of aid was conditional, in order to establish the compatibility of the aid granted. Therefore there is no breach of the principle of the protection of legitimate expectations in that regard.

94 It follows from all the foregoing that these pleas in law must be dismissed in their entirety.

4. *The third plea in law in Case T-267/08, alleging a manifest error of assessment for failing to take into consideration the specific legal features of the aid contributor*

(a) Arguments of the parties

95 The NPDC Region claims that the failure to state adequate reasons with regard to the granting of aid to AFR by the CAD as a public institution is evidence of an error in relation to the proper foundation of the grounds for the contested decision. The Commission, in wrongly considering that the aid was granted by the municipalities in the CAD, did not take into account the specific legal features of the aid contributor. It

omitted to take a view on half the aid granted, of which the specific method of funding was not examined, even though the effects of aid are inseparable from its method of funding.

96 The Commission contends that the NPDC Region's arguments should be dismissed.

(b) Findings of the Court

97 First of all, since the original decision has been withdrawn, the applicant cannot properly plead that it contains a manifest error of assessment relating to the identification of one of the aid contributors. Furthermore, even if this argument is also put forward against the contested decision — since the latter holds, notably in paragraphs 16, 17 and 27, that the CAD was the authority which granted one of the two repayable advances at issue — the Commission did not make any manifest error of assessment in that decision.

98 The argument, which is separate from the previous one, that the specific method of funding the aid granted by the CAD was not taken into account is indissociable from the first part of the fourth plea in law in Case T-267/08 and will be examined in that context.

99 Accordingly, the allegation of failure to take into consideration the specific legal features of the CAD must be dismissed as unfounded.

5. *The first part of the fourth plea in law in Case T-267/08, alleging an error of assessment regarding the source of the funds, and the fourth plea in law in Case T-279/08, alleging an error of assessment concerning the concept of State resources*

(a) Arguments of the parties

100 The NPDC Region puts forward the argument that the Commission made an error of assessment regarding the source of the funds at issue, since those funds did not come from the municipalities in the CAD, as the Commission stated in the original decision, but from the CAD itself, which is a public institution of intercommunity co-operation. Therefore, the Commission wrongly considered that the advance granted by the CAD came from State resources, whereas conurbation committees have their own resources. Those resources rely partly on mandatory fiscal or parafiscal contributions and also come from economic services provided by these public institutions.

101 The NPDC Region, basing its argument on Articles L. 4331-1 to L. 4331-3 of the Code général des collectivités territoriales français (General Code of French Regional and Local Authorities) detailing the revenue available to the regions, points out that the aid which it granted itself also came from resources which were not exclusively fiscal or parafiscal in nature.

102 The NPDC Region also criticises the Commission for having deduced, in the contested decision, that the State was to be held responsible for the advances granted to AFR merely because they were granted by regional or local authorities. According to the case-law, the Commission is required to review the criterion of whether the State is responsible on a case-by-case basis, which it did not do, since it held that the advances at issue had been granted by the municipalities in the CAD.

103 The CAD maintains that conurbation committees have a wide variety of resources, including revenue which is separate from the various taxes, such as income from their moveable and immoveable assets, sums which they receive from public administrative authorities, associations or individuals in exchange for services rendered, and the proceeds of gifts and bequests made to them. That revenue, which is not the result of mandatory contribution imposed by the law of the Member State, does not constitute State resources. The Commission should have analysed the origin of the resources which were used to fund the repayable advance, in order to establish whether this advance was taken from State resources or from the CAD's other resources.

104 The CAD also claims that the repayable advance granted was not an additional burden on it, but a future receipt, since this was a loan of money subject to repayment attracting interest at a rate of 4.08 %, corresponding to the Community reference rate at the time of the grant.

105 The Commission contends that these pleas should be dismissed.

(b) Findings of the Court

106 It should be recalled at the outset that, according to the case-law of the Court of Justice, for a measure to be categorised as State aid within the meaning of the Treaty, each of the four cumulative conditions laid down in Article 107(1) TFEU must be fulfilled. First, there must be an intervention by the State or through State resources; second, the intervention must be liable to affect trade between Member States; third, it must confer an advantage on the recipient; fourth, it must distort or threaten to distort competition (see Case C-169/08 *Presidente del Consiglio dei Ministri* v *Regione Sardegna* [2009] ECR I-10821, paragraph 52 and the case-law cited).

107 The applicants dispute, by their pleas, that the first of those criteria, according to which, for advantages to be capable of being classified as aid within the meaning of Article 107(1) TFEU, they must, first, be granted directly or indirectly through State resources and, second, be imputable to the State (see Case C-345/02 *Pearle and Others* v *Hoofdbedrijfschap Ambacht* [2004] ECR I-7139, paragraph 35 and the case-law cited, and Case T-442/03 *SIC* v *Commission* [2008] ECR II-1161, paragraph 93 and the case-law cited), is satisfied.

108 Intervention by a Member State or through State resources is not necessarily effected by the central State authority of the respective Member State. It may equally be effected by an authority situated below the national level. According to settled case-law, a measure adopted by a regional or local authority and not the central authorities can constitute aid if the conditions laid down by Article 107(1) TFEU are satisfied (Case 248/84 *Germany* v *Commission* [1987] ECR 4013, paragraph 17, and *Portugal* v *Commission*, paragraph 55). In other words, measures adopted by intra-state entities (decentralised, federated, regional or other) of the Member States, whatever their status and description, fall, in the same way as measures taken by the federal or central authority, within the ambit of Article 107(1) TFEU, if the conditions of that provision are satisfied (Joined Cases T-103/00 and T-92/00 *Diputación Foral de Álava and Others* v *Commission* [2002] ECR II-1385, paragraph 57).

109 As regards the concept of State resources, it should be noted that it follows from the case-law of the Court of Justice that Article 107(1) TFEU covers all the financial means by which the public authorities 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 at issue are not held permanently by the public authorities, the fact that they remain constantly under public control, and therefore available to the competent national authorities, is sufficient for them to be categorised as State resources (see, to that effect, Case C-83/98 P *France* v *Ladbroke*

Racing and Commission [2000] ECR I-3271, paragraph 50, and Case C-482/99 *France* v *Commission* [2002] ECR I-4397, paragraph 37).

110 It follows from the case-law cited in paragraph 108 above that the fact that the advances were granted by the NPDC Region and by the CAD, therefore by regional or local authorities and not the central authorities, is not, in itself, such as to render Article 107(1) TFEU inapplicable to these measures. The condition that the measures concerned are imputable to the State is therefore satisfied.

111 Furthermore, it follows from the case-law cited in paragraph 109 above that the possible funding of the disputed measures from the NPDC Region's and the CAD's own resources which do not come from fiscal or parafiscal contributions is no more apt to prevent these measures being classified as State aid. The decisive criterion as far as concerns State resources is public control, and Article 107(1) TFEU encompasses all financial means, whether they result from mandatory contributions or not, which the public sector can actually use to support undertakings.

112 Furthermore, the CAD's argument that the advance granted does not constitute a burden, but a future receipt, since this is a loan of money subject to repayment attracting interest, must be rejected. Any interest which an undertaking might have to pay in return for a loan cannot wholly undo the advantage gained by that undertaking (see, to that effect, Case C-256/97 *DM Transport* [1999] ECR I-3913, paragraph 21). There is in fact a burden on the CAD's budget, since the latter could have obtained a more favourable rate of yield if it had lent this sum under normal market conditions or if it had held or invested it elsewhere. In such a situation, the aid amounts to the difference between the interest which would have been paid if the interest rate corresponding to normal market conditions had been applied and the interest which was actually paid (Case T-16/96 *Cityflyer Express* v *Commission* [1998] ECR II-757, paragraph 53). The lawfulness of the Commission's assessment of whether there is such an advantage for the aid beneficiary, given the operative interest rate and AFR's financial

position, will be examined in the context of the fifth plea in law in Case T-267/08, alleging an error of assessment regarding the advantage AFR would supposedly gain from the repayable advances.

113 Finally, since the original decision has been withdrawn, the CAD cannot properly submit that it contains an error relating to the identification of one of the aid contributors. Furthermore, even if this argument is also put forward against the contested decision — since the latter holds, notably in paragraphs 16, 17 and 27, that the CAD was the authority which granted one of the two repayable advances at issue — the Commission did not commit any error in analysing the funding of the measure at issue.

114 It follows from all the foregoing that the first part of the fourth plea in law in Case T-267/08, alleging an error of assessment regarding the source of the funds, and the fourth plea in law in Case T-279/08, alleging an error of assessment concerning the concept of State resources, must be dismissed.

6. *The second part of the fourth plea in law in Case T-267/08, alleging an error of classification of AFR as a firm in difficulty, and the third plea in law in Case T-279/08, alleging an error of assessment concerning the definition of a firm in difficulty*

(a) Arguments of the parties

115 The NPDC Region claims that the Commission committed an error of assessment in classifying AFR as a firm in difficulty within the meaning of point 10(a) of the Guidelines and, in the alternative, of point 11 of the same guidelines.

116 In respect of the classification of AFR as a firm in difficulty within the meaning of point 10(a) of the Guidelines, the Commission confined its analysis to AFR's financial results, given in the summary table in paragraph 15 of the contested decision and cover the period from 31 December 2001 to 31 December 2004, although the aid was granted on 4 July 2005. The Commission did not take into consideration the early positive results of the recovery plan drawn up by AFR, which could already be seen in the first half of 2005, when the advance was granted. Thus, turnover was EUR 45 million at 31 December 2005, almost double the turnover for the previous financial year, which was EUR 22.7 million. Losses went from EUR 14.3 million at 31 December 2003 to EUR 8.1 million at 31 December 2005. Twelve supply contracts were concluded between 4 March 2004 and 30 June 2005, totalling EUR 61 608 790. The cumulative amount from those contracts represented EUR 31 805 650 over the course of the first half of 2005. The Commission took no account of this recovery dynamic or of the fact that the fall in turnover for the year 2004 resulted from a strategy of repositioning on the market for the most highly technical wagons with significant added value.

117 This restructuring plan was presented in detail to the Commission by the French authorities in a letter of 24 October 2006. If it considered that it was not sufficiently informed as to the content of the plan, the Commission should have requested further information in that regard, in accordance with its powers of investigation under Regulation No 659/1999. Generally speaking, the Commission conducted its preliminary investigation by making every effort to discount any evidence likely to prove that AFR was no longer, by the time the repayable advances were granted, a firm in difficulty.

118 The NPDC Region states that it and the CAD granted the repayable advances concerned because of this recovery dynamic, as the debates that took place within the institutions at the time demonstrate. By declaring the advances at issue incompatible with the provisions of the Treaty, even though those advances were intended to maintain the competitiveness of an innovative business developing forward-looking products, the contested decision failed to have regard to the perspectives mentioned by the Member of the Commission responsible for competition when it introduced, on 7 July 2008, the text which became Commission Regulation (EC) No 800/2008

of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles [107 TFEU and 108 TFEU] (OJ 2008 L 214, p. 3, 'the General Block Exemption Regulation'), the objectives of which were to allow Member States to grant aid targeted at creating jobs, boosting competitiveness and improving the environment, irrespective of whether the Commission was involved at all.

119 The NPDC Region claims that the Commission did not carry out an analysis of the economic context and the competitive environment in which AFR was developing at the time the repayable advances were granted, and in particular of the prospects for development of the road-rail transport sector. It relies, first, on a study carried out by the 'Route Roulante 2006' association, dating from 8 September 2005, which is said to reveal that AFR could become involved in a rolling-road project because of the lower cost of its products, and, second, on a study conducted by AFR which is said to demonstrate the firm's efforts to improve the technical quality and the manufacturing costs of its products.

120 In addition, the Commission omitted to take into account the fact that a subsidy of EUR 1.5 million had been granted to AFR under the European Regional Development Fund (ERDF) on 5 November 2004, with the first payment made in November 2005, which could not have been implemented if it had been ascertained that AFR was showing the signs of a firm in difficulty within the meaning of European Union competition law.

121 According to the NPDC Region, the Commission also made an error of assessment by classifying, in the alternative, AFR as a firm in difficulty as provided for in point 11 of the Guidelines, since not all the relevant signs were taken into account.

122 Finally, the NPDC Region maintains that the substitution of the contested decision for the original decision confirmed that the Commission, during the administrative

procedure, failed to fully assess the economic context in which the repayable advances were granted. The adoption of the contested decision cannot overcome the illegality of the original decision, since the Commission failed to undertake a new review of the relevant facts in sufficient depth and detail and merely 'papered over' the cracks in a defective analysis.

123 The CAD submits that the Commission did not take the trouble to analyse the general economic context in which its intervention took place, a context characterised by default across much of the metals industry. It points out that the NPDC Region was classified as an Objective 2 area by the legislation applicable to the Structural Funds for the period from 2000 to 2006, which meant that it was an area facing structural difficulties needing support through public subsidies for economic and social conversion.

124 The CAD also claims that AFR provided proof, at the time the advance was granted, of significant commercial activity. AFR submitted to the CAD supply contracts corresponding to a total amount of EUR 30 398 301 over that period. Therefore it did not fit the criteria for a firm in difficulty.

125 A business restructuring plan for AFR was created and submitted by the French authorities to the Commission in two letters dated respectively 27 April and 24 October 2006. This plan was based inter alia on repositioning the company on the market for more technical wagons with better added value. This strategy is said to explain the temporary fall in turnover recorded in 2004. Furthermore, the results of this plan were reflected in a reduction in the company's deficit in 2005, in an increase in turnover from EUR 22.6 million in 2004 to EUR 45 million in 2005 and in an order book worth more than EUR 70 million in 2006. If it considered that it was not sufficiently informed about this recovery in AFR's business, the Commission should have requested further information in that regard, in accordance with its powers of investigation under Regulation No 659/1999. Generally speaking, the Commission

conducted its preliminary investigation by making every effort to discount any evidence likely to prove that AFR was no longer, by the time the repayable advances were granted, a firm in difficulty.

126 Moreover, the contested decision should be viewed in parallel with the Communication from the Commission on the Community guidelines on State aid for railway undertakings (OJ 2008 C 184, p. 13, 'the Guidelines on State aid for railway undertakings'), which recommends certain measures intended to facilitate public subsidies to undertakings in the railway sector.

127 Moreover, according to French case-law, only the information stated in the extract from the Commercial and Companies Register makes it possible to establish whether or not an undertaking is in a difficult economic position.

128 The Commission disputes the merits of the applicants' arguments.

(b) Findings of the Court

129 The first point to be noted here is that, under Article 107(3) TFEU, the Commission has a wide discretion (Case 730/79 *Philip Morris Holland* v *Commission* [1980] ECR 2671, paragraph 17, and Case C-372/97 *Italy* v *Commission* [2004] ECR I-3679, paragraph 83).

130 None the less, in order to exercise that discretion, it may adopt rules of guidance such as the Guidelines which apply in the present case, so long as those rules do not depart from the provisions of the Treaty. Where such a measure has been adopted, the Commission is governed by it (see Case T-171/02 *Regione autonoma della Sardegna* v *Commission* [2005] ECR II-2123, paragraph 95 and the case-law cited).

131 It is therefore for the Court to check that the Commission has observed the rules which it adopted (*Regione autonoma della Sardegna* v *Commission*, paragraph 77).

132 However, since the wide discretion conferred upon the Commission, clarified, where appropriate, by the guidance rules adopted, involves complex economic and social appraisals having to be carried out in a Community context, the Court has limited control over these. It confines its review to determining whether the rules governing procedure and the requirement for a statement of reasons have been complied with, whether the facts are accurately stated and whether there has been any manifest error of assessment or any misuse of powers (see *Regione autonoma della Sardegna* v *Commission*, paragraph 78 and the case-law cited).

133 Although there is no definition in European Union law of what constitutes a firm in difficulty, the Commission assumes, in point 9 of the Guidelines, that a firm is in difficulty 'where it is unable, whether through its own resources or with the funds it is able to obtain from its owner/shareholders or creditors, to stem losses which, without outside intervention by the public authorities, will almost certainly condemn it to going out of business in the short or medium term'.

134 According to point 10(a) of the Guidelines, a firm is, 'in principle and irrespective of its size', regarded as being in difficulty, in the case of a limited liability company, 'where more than half of its registered capital has disappeared and more than one

quarter of that capital has been lost over the preceding 12 months'. Under point 10(c) of the Guidelines, the same applies, whatever the type of company concerned, where the firm fulfils the criteria under its domestic law for being the subject of collective insolvency proceedings.

135 Under point 11 of the Guidelines:

'Even when none of the circumstances set out in point 10 are present, a firm may still be considered to be in difficulties, in particular where the usual signs of a firm being in difficulty are present, such as increasing losses, diminishing turnover, growing stock inventories, excess capacity, declining cash flow, mounting debt, rising interest charges and falling or nil net asset value. In acute cases the firm may already have become insolvent or may be the subject of collective insolvency proceedings brought under domestic law. In the latter case, these Guidelines apply to any aid granted in the context of such proceedings which leads to the firm's continuing in business. In any event, a firm in difficulty is eligible only where, demonstrably, it cannot recover through its own resources or with the funds it obtains from its owners/shareholders or from market sources.'

136 In the present case, the Commission of the European Communities based its arguments for classifying AFR as a firm in difficulty primarily on point 10(a) of the Guidelines. It observed that AFR had had negative capital and reserves since 2001 and had not, at the time the aid was granted, been able to reverse this trend and move back into a positive situation as regards capital and reserves. The Commission relied on the financial data given in paragraph 15 of the contested decision, which are not disputed by the applicants and which show that AFR's capital and reserves were negative at

31 December 2001, amounting to EUR 6.6 million, at 31 December 2002, amounting to EUR 8.7 million, at 31 December 2003, amounting to EUR 23 million, and at 31 December 2004, amounting to EUR 21.09 million.

137 In the alternative, the Commission held, in paragraphs 38 and 39 of the contested decision, that AFR fitted, at the time the aid was granted, the definition of a firm in difficulty given in point 11 of the Guidelines. It based its argument on the continued fall in turnover and on AFR's persistent losses. The financial data given in paragraph 15 of the contested decision, which are not disputed by the applicants, show that AFR's turnover, which was EUR 70 million at 31 December 2001, EUR 42 million at 31 December 2002 and EUR 42.7 million at 31 December 2003, went to only EUR 22.7 million at 31 December 2004. Those data also show that the company's net result was negative, amounting to EUR 10 500 000 at 31 December 2001, EUR 2 083 746 at 31 December 2002, EUR 14 270 634 at 31 December 2003 and EUR 11 589 620 at 31 December 2004.

138 The Commission also observed, in paragraph 39 of the contested decision, that AFR had, in January 2004, been unable to pay by the due date taxes and social security contributions of EUR 4.3 million and that therefore it had needed to ask for a moratorium and an arrangement to clear the debt.

139 Furthermore, the Commission took into account, in paragraph 40 of the contested decision, the facts cited by the French authorities, that are, first, the loans granted to AFR (current account overdraft from a private bank and advance payments from its customers) and, second, the fact that AFR had received various guarantees from a financial institution. However, the Commission held, first, that AFR was, given the fact that it had negative capital and reserves, unable to overcome its difficulties with its own resources, secondly, that AFR's shareholder, despite the support it provided

to the company, was unable on its own to ensure the recovery of its subsidiary, and, thirdly, that the loans and guarantees mentioned above meant at the most that AFR still had some ability to obtain limited amounts of short-term credit, but not sufficient to conclude that it could have resolved its difficulties with funds from market sources.

140 Finally, in the contested decision, the Commission discounted, in paragraphs 42 to 43, the argument that the recovery measures taken by AFR as from 2004 had started to produce positive results in the months before the repayable advances were granted. The Commission held that the results cited were modest and uncertain, that they related to a relatively short period and that they cannot be viewed as solid evidence of a recovery in AFR's financial position, compared to the factors showing that serious difficulties existed, such as the net losses and the negative capital and reserves from 2001 onwards.

141 First of all, the Commission was fully entitled to presume that an undertaking showing negative capital and reserves and net losses was a firm in difficulty according to the criteria set out in point 11 of the Guidelines.

142 As to the data which, according to the applicants, should have been taken into account by the Commission, it is noteworthy that the French authorities informed the Commission, in their letters dated 27 April and 24 October 2006, of the adoption of AFR's restructuring measures. They pointed out, in their letter of 24 October 2006, that the fall in turnover in 2004 was linked to the intention to withdraw from the market in non-technical wagons and that the trend had been encouraging since 2005, with a turnover of EUR 45 million in 2005 and an order book worth more than EUR 70 million at the end of 2006.

143 However, AFR's turnover at 31 December 2005 and the amount of its order book at the end of 2006 are factors which arose after the advances at issue were granted, on 4 July 2005. The case-law states clearly that the question whether a measure constitutes aid within the meaning of Article 107(1) TFEU must be resolved having regard to the situation existing at the time when the measure was implemented. If the Commission took subsequent factors into account, it would be conferring an advantage on Member States which fail in their obligation to give notice at the planning stage of aid which they intend to grant (see *Biria*, paragraph 120 and the case-law cited).

144 Moreover, an improvement in the situation of the beneficiary undertaking during the year in which the measures at issue were granted cannot affect the assessment of the situation of that undertaking at the time at which the measure was granted, in particular because it is not inconceivable that the existence of that guarantee may have influenced that development (see *Biria*, paragraphs 148 and 170).

145 Therefore the Commission did not commit a manifest error of assessment by not taking into account AFR's turnover at 31 December 2005 and the outstanding amount in its order book at the end of 2006.

146 As to the early positive results of AFR's recovery measures implemented as from 2004, cited by the applicants, namely the rise in AFR's turnover for the first half of 2005, its diminishing losses and the outstanding amount of the contracts concluded over the period from 4 March 2004 to 30 June 2005, the Commission was fully entitled to observe, in the contested decision and in its written submissions, that none of those factors, given their modest nature and the fact that they relate to a relatively short period, was capable of rebutting the presumption that AFR, which had shown negative capital and reserves and experienced major losses since 2001, was a firm in difficulty at the time the advances at issue were granted, according to the criteria set out in point 11 of the Guidelines. The same applies to the prospects for development of

road-rail transport cited by the NPDC Region, given that they were incalculable and uncertain. The levels of losses and of financial indebtedness are criteria capable by themselves of establishing that it was a firm in difficulty (see, to that effect, as regards the 1999 Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 1999 C 288, p. 2), Case T-349/03 *Corsica Ferries France* v *Commission* [2005] ECR II-2197, paragraph 191, and *Biria*, paragraph 135).

147 In those circumstances, it was not appropriate for the Commission, which was in a position to make a definitive assessment as to AFR's status as an undertaking in difficulty on the basis of the information available to it, to require the French Republic to provide it with further information (see, to that effect, Case C-17/99, paragraph 28).

148 The NPDC Region's argument that the Commission omitted to take into consideration the subsidy received by AFR under the ERDF in November 2005 must also be rejected. The granting of a subsidy under the ERDF, decided by the French authorities in accordance with the division of responsibilities between the Commission and the Member States, resulting inter alia from Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds (OJ 1999 L 161, p. 1) cannot bind the Commission so far as concerns the classification of the beneficiary of this subsidy as a firm in difficulty under the European Union legislation applicable to State aid.

149 As to the CAD's argument based on the Guidelines on State aid for railway undertakings, the latter are not applicable to this case, since AFR does not meet the definition of a railway undertaking given by Article 3 of Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways (OJ 1991 L 237, p. 25).

150 As to the CAD's argument based on the French case-law relating to the definition of a firm in difficulty, it is clear from the case-law of the Court of Justice that the European Union legal order does not, in principle, aim to define concepts on the basis of one or more national legal systems unless there is express provision to that effect (see Case C-103/01 *Commission* v *Germany* [2003] ECR I-5369, paragraph 33 and the case-law cited). The Guidelines include no reference to national legal systems, except so far as concerns the definition of collective insolvency proceedings, which is not at issue in the present case. Therefore it is not appropriate to take French case-law into account in order to determine whether it was lawful for the Commission to classify AFR as a firm in difficulty in the contested decision.

151 Moreover, the classification of the NPDC Region as an Objective 2 area by the legislation applicable to the Structural Funds for the period from 2000 to 2006, cited by the CAD, does not constitute a relevant factor which should have been taken into account by the Commission, in the circumstances of the present case, in order to determine whether AFR was a firm in difficulty. According to the Guidelines, the fact that a firm in difficulty is situated in an assisted area is a matter which the Commission must take into account when it assesses the compatibility of restructuring aid. However, that does not in any way mean that this fact must be taken into consideration when classifying the firm concerned as being in difficulty.

152 As to the NPDC Region's argument alleging infringement of the General Block Exemption Regulation, it should be noted that the NPDC Region does not state which provision of that legislation the Commission has contravened by adopting the contested decision. This allegation must therefore be rejected.

153 It follows from all the foregoing that the Commission did not commit a manifest error of assessment by classifying AFR as a firm in difficulty.

154 Therefore the second part of the fourth plea in law in Case T-267/08, alleging an error of classification of AFR as a firm in difficulty, and the third plea in law in Case T-279/08, alleging an error of assessment concerning the definition of a firm in difficulty, must be dismissed.

7. *The fifth plea in law in Case T-267/08, alleging an error of assessment regarding AFR's supposed advantage from the repayable advances*

(a) Arguments of the parties

155 The NPDC Region claims that aid within the meaning of Article 107 TFEU exists only if the operative rate for the repayment of advances could not be obtained on similar terms on the credit market by the beneficiary of those advances. In the present case, the Commission discounted the information submitted by the French authorities, which would have established that AFR still enjoyed the confidence of banks and of its customers at the time the advances at issue were granted, in the light of 'particular products offered by particular financial institutions', without any analysis of the credit market. Therefore it failed to establish that AFR could not have obtained the funds on the market at a rate similar or close to the rate agreed by the NPDC Region or the CAD. Therefore it has not been established that the advances at issue conferred an advantage on AFR.

156 The NPDC Region states that the Commission failed to demonstrate in what respect the applicants did not behave, in the present case, like private investors. The advances at issue were granted in order to support AFR's recovery plan, taking account of its prospects for development and for recovery. AFR received loans and guarantees, demonstrating its commercial partners' confidence, and the Commission failed to

establish in what respect those loans and those guarantees meant that AFR would not have been able to rely on the market to overcome the difficulties it encountered.

157 The Commission disputes the merits of the NPDC Region's arguments.

(b) Findings of the Court

158 In order to determine whether a State measure constitutes aid, it is necessary to establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions (Case C-39/94 *SFEI and Others* v *La Poste and Others* [1996] ECR I-3547, paragraph 60; *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, paragraph 243; and Case T-163/05 *Bundesverband deutscher Banken* v *Commission* [2010] ECR II-387, paragraph 35).

159 For this purpose, the relevant criterion is that stated in the contested decision, namely whether the undertaking receiving the aid could have obtained the amounts in question on the capital market. In particular, the relevant question is whether a private investor would have entered into the transaction in question on the same terms (*Cityflyer Express* v *Commission*, paragraph 51).

160 In the present case, it must be observed that the Commission based its arguments, in paragraph 28 of the contested decision, on the fact that AFR, in view of its financial position, was unable to obtain funds on the credit market on such favourable terms as those obtained from the applicants, since the advances at issue were granted without any guarantee being lodged for their repayment, whereas the interest rates applied corresponded to those for loans 'backed by normal security'. It is apparent from the

analysis of financial market practice carried out in 2004 on behalf of the Commission by a firm of auditors (see paragraphs 49 and 53 above) and which led to the adoption of the 2008 Communication on the reference rates, that, in circumstances presenting a risk similar to that in the present case, namely a firm in difficulty offering low collateralisation, a premium of 1 000 basis points is added to the reference rate.

161 Moreover, the Commission was fully entitled to discount, in paragraphs 29 to 32 of the contested decision, the information put forward by the French authorities to show that AFR still enjoyed the confidence of its banks and of its customers at the time the advances were granted. A current account overdraft granted by a private bank is a very short-term credit facility, unlike the repayable advances at issue, which have a maturity of three years, and the overdraft is not, therefore, subject to the same risk analyses by creditors. The fact that a debtor can obtain short-term credit is therefore not sufficient to assess whether it could obtain a longer-term loan, the repayment of which will depend on the debtor's ability to survive. The advance payments from AFR's customers were counter-guaranteed by a financial institution, which means that those customers were not incurring any risks in connection with AFR's financial situation and therefore had no reason to subject the payment of these advances to an analysis of the firm's financial soundness along the lines of that which would have been carried out by a creditor considering the possibility of providing an unsecured loan.

162 Therefore, it is clear from the contested decision that the Commission carried out, as it was required to do, an analysis intended to check that the aid beneficiary could not have obtained a loan on similar terms on the credit market. Furthermore, the NPDC Region has not provided any information to show that this analysis was vitiated by a manifest error of assessment.

163 It follows from the foregoing that the fifth plea in law in Case T-267/08 must be dismissed as unfounded.

8. *The sixth plea in law in Case T-267/08, alleging an error of assessment of the amount of the aid*

(a) The first part of the sixth plea in law in Case T-267/08, alleging failure to specify the amount of recoverable aid

Arguments of the parties

164 The NPDC Region maintains that the Commission is required, where it decides to order the recovery of aid, to establish the amount of the aid to be recovered. The case-law holds that the Commission shall make an approximate assessment of the aid, having regard to any special difficulties, but those circumstances are amenable to full review by the European Union judicature. In the present case, the Commission failed in all its duties relating to specifying the amount of the aid, in view of the total lack of any assessment of this amount in the contested decision.

165 The Commission should, if it needed information about the interest rate in force at the time the aid was allocated, have asked the French authorities to provide it or have issued an injunction to the French Republic to that effect. Furthermore, the Commission did not mention any special difficulty in determining the precise value of the aid. The applicant submits that no such difficulties existed, since, first, a period of five years is not an unreasonable amount of time to clearly establish the rates in force when the aid was allocated, in July 2005, and, second, finding out whether an interest rate is lower than market value does not represent an insuperable difficulty for the Commission.

166 The Commission contends that this part of the plea should be dismissed.

Findings of the Court

167 It should be observed that, according to settled case-law, no provision of European Union law requires the Commission, when ordering the recovery of aid declared incompatible with the common market, to fix the exact amount of the aid to be recovered. It is sufficient, in that regard, for the Commission's decision to include information enabling the addressee to work out, without overmuch difficulty, that amount (Case C-480/98 *Spain* v *Commission* [2000] ECR I-8717, paragraph 25; Case C-415/03 *Commission* v *Greece* [2005] ECR I-3875, paragraph 39; and Case C-419/06 *Commission* v *Greece* [2008] not published in the ECR, paragraph 44).

168 In the present case, the contested decision assesses, in paragraph 58, the amount of the State aid constituted by the repayable advances at the difference between the interest actually due under the terms of the repayable advances and the interest that would be due if the reference rate in force at the time the aid was granted, increased by 800 basis points, had been applied.

169 That information enables the French Republic to work out itself, without overmuch difficulty, from the history of the reference rates given on the web site of the Commission's Directorate-General (DG) for Competition, the amount of the aid declared incompatible.

170 It follows that the first part of this plea must be dismissed as unfounded.

(b) The second part of the sixth plea in law in Case T-267/08, alleging incorrect assessment of the risk premium

Arguments of the parties

171 The NPDC Region puts forward the argument that the Commission committed a manifest error of assessment concerning its method for calculating the rate which AFR could have obtained on the credit market, assessed in the original decision at the reference rate in force when the aid was granted, increased by 800 basis points.

172 The NPDC Region accepts that the 1997 Notice on the reference rates provides that the reference rate is a floor rate which may be increased in situations involving a particular risk, but it considers that the Commission has not provided any information to warrant the fact that, in the present case, the increase in the reference rate, which may amount to '400 basis points or more' according to the Notice, was double the amount mentioned in that text.

173 It disputes the Commission's reference, in the original decision, to Commission Decision 2007/492/EC of 24 January 2007 on the State aid C 38/2005 (ex NN 52/2004) implemented by Germany for the Biria Group (OJ 2007 L 183, p. 27), as a basis for the increase of 800 basis points in question. The situations in question are not similar, contrary to the Commission's assertion. In the Biria case, the aid granted consisted of a silent participation totalling more than EUR 2 million to the end of 2010, which was a long-term participation, whereas, in the present cases, the relevant sum was a repayable advance of EUR 2 million where the risks were shared between two separate

bodies and which was granted for a period of three years — in other words, it was short-term, since the 1997 Notice on the reference rates defines medium- to long-term loans as five- to ten-year loans. Moreover, in the Biria case, the undertaking concerned was considered to be insecure, because it had adopted an insolvency plan, whereas AFR did not adopt such a plan but adopted and implemented a recovery plan.

174 The NPDC Region considered that the Commission cannot, in any event, determine the rate which an undertaking could obtain on the credit market solely on the basis of a single decision, the facts of which, in addition, differ from AFR's circumstances. Such an approach would be detrimental to the principles of predictability and of legal certainty. It would render the Commission's decision-making in this sphere arbitrary. In the absence of any precise framework, the Commission was in a position to misuse the discretionary power conferred on it to set the amount of the increases in the reference rate, inter alia by implementing an increase high enough to prevent the amount of the aid falling under the *de minimis* rules.

175 According to the NPDC Region, the Commission itself recognised the failings of its method for setting and updating the reference rate in its 2008 Communication on the reference rates, which repealed and replaced the 1997 Notice on the reference rates.

176 Furthermore, the NPDC Region added, in answer to a written question from the Court, that it disputed the new method of calculation used in the contested decision, on the ground that the Commission did not explain whether the calculation basis used was the one-year Euribor rate, the three-month money market rate or any other basis of calculation.

177 The Commission disputes the merits of the NPDC Region's arguments.

Findings of the Court

178 With the exception of the argument in paragraph 176 above, the reasoning expounded by the NPDC Region in this second part of the plea relates to the calculation method set out by the Commission in the original decision, and not to the method which appears in the contested decision. The NPDC Region did not reformulate this plea in its request to alter its pleadings following the withdrawal of the original decision and the adoption of the contested decision.

179 However, the method used by the Commission for setting the risk premium in the contested decision differs from the one used in the original decision. As stated in paragraphs 49 to 55 above, this method is based inter alia, unlike the one in the original decision, on an analysis of financial market practice as regards risk premiums where there are cumulative risks linked to the creditworthiness of the undertaking and to the collaterals offered.

180 The NPDC Region has, in answer to a written question from the Court, maintained this second part of its plea, 'inasmuch as the reasons stated by the Commission for the validity of the calculation method which it used to assess the aid elements remain unconvincing'.

181 The NPDC Region's arguments confuse issues relating to the formal statement of reasons with the assessment of the substance of the case. The obligation to state reasons is an essential procedural requirement, as distinct from the question of the

substantive legality of the contested measure, according to the case-law cited in paragraph 45 above. The adequacy of the statement of reasons has been established during examination of the first plea in law in Case T-267/08 and of the second plea in law in Case T-279/08.

182 As to the NPDC Region's argument, in paragraph 176 above, that the basis of calculation was not explained by the contested decision, it must be noted that the calculation basis chosen, namely the applicable reference rate, was clearly and precisely explained by the 1997 Notice and the 2008 Communication on the reference rates, both published in the Official Journal, to which the contested decision refers. Thus the 1997 Notice on the reference rates, applicable at the date when the advances were granted and until 1 July 2008, explains that the reference rate is deemed to be equal to the average of the indicative rates recorded in the preceding September, October and November, and that it is adjusted again in the course of the year if it differs by more than 15 % from the average of the indicative rates recorded over the last known three months, with the indicative rate itself defined, for France, as the five-year interbank swap rate plus a premium of 0,75 point (75 basis points). The 2008 Communication on the reference rates, applicable from 1 July 2008, explains that the base rate is calculated on the basis of the 1-year IBOR rates and establishes precisely the manner in which the base rate is to be updated. Since the history of the reference rates is given, as was noted in paragraph 169 above, on the Commission's 'DG Competition' web site, the reference rate applicable in the present case can easily be worked out. This allegation must therefore be dismissed as unfounded.

183 Therefore the second part of this plea must be dismissed.

184 It follows that the sixth plea in law in Case T-267/08, alleging failure to specify the amount of recoverable aid, must be dismissed in its entirety.

9. *The seventh plea in law in Case T-267/08, alleging infringement of the rights of defence in the course of the contentious procedure and misuse of powers*

(a) Arguments of the parties

185 The NPDC Region puts forward the argument that the Commission took advantage of the adoption of the contested decision to substantiate its analysis, to introduce additional details surreptitiously and thus to deal with the written submissions it had made in connection with the contentious procedure. By including new information relating to the recovery measures planned by AFR and to the method for setting the amount of the aid in the contested decision, the Commission was aiming to negate the effectiveness of the action introduced by the NPDC Region, and this constituted infringement of the rights of defence and misuse of powers.

186 The Commission contends that this plea should be dismissed.

(b) Findings of the Court

187 According to the NPDC Region, the Commission, by including new information in the contested decision intended to deal with its written submissions, was aiming to negate the effectiveness of its action, and this constituted infringement of the rights of defence in the course of the contentious procedure and misuse of powers.

188 It is appropriate, first of all, to examine the legality of the Commission's withdrawal of the original decision.

189 In that regard, it is helpful to recall the case-law regarding withdrawal of administrative acts conferring individual rights or similar advantages upon the addressee. The Court of Justice has acknowledged that the European Union institutions are entitled, subject to the principles of the protection of legitimate expectations and of legal certainty (see Case C-500/99 P *Conserve Italia* v *Commission* [2002] ECR I-867, paragraph 90 and the case-law cited) and on condition that they do so within reasonable time-limits (Case T-25/04 *González y Díez* v *Commission* [2007] ECR II-3121, paragraph 97), to withdraw, on the ground that it is unlawful, a decision granting a benefit to its addressee.

190 That entitlement for the European Union institutions to withdraw an unlawful decision must apply *a fortiori* where it is a question of an unlawful measure which does not create rights, such as the contested decision. In such cases, the Commission is not precluded from withdrawing the decision by considerations relating to the protection of the legitimate expectations and vested rights of the person to whom the decision was addressed (see, to that effect, Case T-227/95 *AssiDomän Kraft Products and Others* v *Commission* [1997] ECR II-1185, paragraph 41). The Commission stated the reasons for the withdrawal to the requisite legal standard in paragraphs 8 to 12 of the contested decision.

191 The Commission was therefore entitled to withdraw the original decision.

192 In respect of the addition of new information to the contested decision, it must be stated that, so far as concerns the information relating to the recovery measures taken by AFR, the Commission has added it with the intention of responding in more detail than in the original decision to the arguments submitted by the applicants in connection with their court proceedings. That consideration of arguments submitted by the

applicants themselves cannot constitute an infringement of the rights of defence in the course of the contentious procedure.

193 So far as concerns the new statement of reasons relating to the method for setting the risk premium, it is true that this method was not the subject of an exchange of arguments during the contentious procedure relating to the original decision. On the other hand, it was the subject of an exchange of arguments before the Court, since the applicants were invited to submit their observations on the contested decision. Indeed, that hearing allowed one of the two applicants, the CAD, to raise a complaint relating to the legality of the new statement of reasons, which was considered in paragraphs 49 to 55 above. The principle that both parties should have the right to be heard before the Court has therefore been observed.

194 Accordingly, the allegation of infringement of the rights of defence during the contentious procedure must be rejected as unfounded.

195 The NPDC Region also puts forward the argument that the introduction of new information into the contested decision is intended to negate the effectiveness of its action and constitutes misuse of powers.

196 According to the case-law, the concept of misuse of powers refers to cases where an administrative authority has used its powers for a purpose other than that for which they were conferred on it (Case C-331/88 *The Queen* v *Minister for Agriculture, Fisheries and Food and Secretary of State for Health, ex parte Fédération européenne de la santé animale (Fedesa) and Others* [1990] ECR I-4023, paragraph 24, and Case C-400/99 *Italy* v *Commission* [2005] ECR I-3657, paragraph 38). A decision may amount to misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken for such a purpose (see Case T-387/08

Evropaïki Dynamiki v *Commission* [2010] not published in the ECR, paragraph 159 and the case-law cited).

197 In the present case, the NPDC Region has not submitted any information likely to establish that the Commission used its power to withdraw a decision and adopt a new one for purposes other than those of rectifying the illegality of the original decision and of ruling on the existence of State aid and its compatibility with the common market.

198 The allegation of misuse of powers must therefore be rejected.

199 Accordingly, this plea in law must be dismissed in its entirety.

200 It follows from all the foregoing that the present applications must be dismissed as unfounded.

Costs

201 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. However under the first paragraph of Article 87(3), where the circumstances are exceptional the General Court may order that the costs be shared or that each party bears its own costs.

202 In the present case, the Commission did not contend that the applicants should be ordered to pay the costs.

203 Furthermore, the Commission acknowledged that the original decision, to which the present applications initially related, was unlawful because it was inadequately reasoned and that it withdrew the decision on that ground.

204 Accordingly, the Commission must be ordered to bear all the costs, with the exception of those incurred by the applicants after notification of the decision to withdraw the original decision, which must be borne by the applicants.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. Declares that there is no longer any need to adjudicate on the applications for annulment of Decision C (2008) 1089 final of the Commission of 2 April 2008 concerning State aid C 38/2007 (ex NN 45/2007) implemented by France in favour of Arbel Fauvet Rail SA;

2. Dismisses the actions;

3. Orders the European Commission to pay the costs, save those incurred by Région Nord-Pas-de-Calais and the Communauté d'agglomération du Douaisis after they were sent Decision C (2010) 4112 final of the Commission of 23 June 2010 concerning State aid C 38/2007 (ex NN 45/2007) implemented by France in favour of Arbel Fauvet Rail and withdrawing Decision C (2008) 1089 final.

Truchot Martins Ribeiro Kanninen

Delivered in open court in Luxembourg on 12 May 2011.

[Signatures]

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