Commission Decision of 20 July 2005 on the State aid implemented by France for two cruise ships with a view to the development of French Polynesia (notified under document number C(2005) 2731) (Only the French text is authentic) (Text with EEA relevance) (2006/219/EC)

COMMISSION DECISION

of 20 July 2005

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(Text with EEA relevance)

(2006/219/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having regard to Council Regulation (EC) No 1540/98 of 29 June 1998 establishing new rules on aid to shipbuilding[1],

Having called on interested parties to submit their comments pursuant to the provisions cited above[2] and having regard to their comments,

Whereas:

I. PROCEDURE

(1) By Decision 1999/719/EC[3], the Commission approved development aid for the construction of two cruise ships, *R3* and *R4*. The aid was authorised on condition that the ships would be deployed solely in French Polynesia for at least five years.

(2) By letter dated 3 October 2002, France informed the Commission that the French authorities had agreed that the two ships could be operated, to some extent, outside French Polynesia.

(3) By letter dated 2 April 2003, the Commission informed France that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the aid in question.

(4) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union*[(4)]. The Commission invited interested parties to submit their comments on the aid.

(5) The Commission received comments from one interested party. It forwarded them to France, which was given the opportunity to react; its comments were received by letter dated 15 September 2003.

(6) Other letters were received from France dated 11 June 2003, 13 October 2003, 10 February 2004, 24 March 2004, 3 June 2004 and 10 May 2005.

II. DETAILED DESCRIPTION OF THE MEASURE

(7) The two almost identical passenger cruise ships *R3* and *R4*, delivered in May and September 1999, were built by Chantiers de l'Atlantique, a shipyard situated in France. They were eligible for French development aid as they were intended to support tourism in French Polynesia (hereinafter FPO), a territory eligible for development aid according to OECD and EU shipbuilding rules.

(8) The original owners of the ships *R3* and *R4* were private investors in France. They received a tax deduction based on their investment in the ships under a tax aid scheme allowing tax concessions on investments in French departments and territories[(5)], the *Loi Pons*. In Decision 1999/719/EC, the aid element was estimated to be 41,6 % of the value of the ships.

(9) Under the scheme introduced by the *Loi Pons*, the owners of *R3* and *R4* undertook to rent out the ships at an attractive rate for five years to Renaissance Financial and to sell the ships for a below#market price to Renaissance Financial after five years.

(10) The aid to the operator was thus to be provided via the owners, both on a year#by#year basis and as a one#off gain at the end of the five#year period. The condition for approving the aid, as stated in Decision 1999/719/EC, was that, in order to ensure the ‘development’ content, the vessels would be used exclusively in FPO for at least five years. This condition relating to the use of the ships expired in May and September 2004.

(11) Renaissance Financial went bankrupt in September 2001. In agreement with the owners (the French private investors), the agreement between Renaissance Financial and the owners as regards the ships *R3* and *R4* was terminated at the end of 2001.

(12) The owners of the ships therefore needed to find a new operator. Only P&O Princess Cruises (P&O PC) made an offer for both ships. Consequently, in August 2002 the owners signed an agreement with P&O PC whereby the latter would rent the ships for three years and then buy them. At the time, P&O PC was an independent listed company but in April 2004 it was taken over by Carnival Corporation and split into two subsidiaries (P&O Cruises and Princess Cruises).

(13) The ship *R3* was renamed *Pacific Princess* and operates all over the Pacific Ocean, including Australia and Alaska. The ship *R4* was renamed *Tahitian Princess* and is based in Tahiti, FPO. Most of its cruises take place between the islands of FPO but visits are also made to areas outside FPO, such as the Cook Islands and the Samoan Islands. The ships are operated by Princess Cruises.

(14) Even though these new arrangements, contrary to the condition imposed by Decision 1999/719/EC, provided for operation of the ships outside FPO, the French tax authorities agreed to this solution by deciding that the tax benefits under the *Loi Pons* could be maintained.

(15) According to Article 16 of Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty[(6)], the Commission may, in the case of misuse of aid, open the formal investigation procedure. It informed France of this possibility by letter of 18 October 2002, but France did not react.

(16) Given the clear conditions imposed by the Commission in Decision 1999/719/EC and the fact that it transpired that both ships were at least partially used outside FPO, the Commission took the view in its decision to open the formal investigation procedure that the condition laid down in its 1999 decision was no longer met, causing it to suspect that there may have been a misuse of State aid.

III. COMMENTS FROM INTERESTED PARTIES

(17) European Corporate partners (ECP), which is a limited company and one of the joint owners of *R3*, submitted comments in a letter dated 16 July 2003. It considers that, despite the change in use of the ships, the conditions for their deployment are still met. Princess Cruises has undertaken to spend USD 4 million locally in order to develop tourism and, as far as possible, to employ local workers. The annual financial benefit for FPO will, according to ECP, amount to EUR 30 million. ECP also stated that Princess Cruises aims at a more upmarket segment than Renaissance Financial did, and this should lead to higher spending locally. Moreover, it claims that a multiplier of 2,5 should be applied to measure the full positive impact on FPO. Finally, as regards the ‘development’ content, it stresses that spending in regions outside FPO that are also eligible for development aid should likewise be taken into account when estimating the overall development effect of the ships.

(18) ECP also claims that it was *force majeure* (events of 11 September 2001) which made it necessary to change the operator and to modify the conditions for the operation of the ships. Lastly, it considers that the principle of proportionality should lead the Commission to conclude that the solution which was found with P&O PC was the best in view of the difficult circumstances obtaining.

IV. COMMENTS FROM FRANCE

(19) France essentially is of the opinion that the conditions imposed by Decision 1999/719/EC are met even in view of the new use of the ships, since the development effect for FPO in particular and for other areas eligible for development aid in general is in keeping with the fundamental objectives of the decision. France also considers it essential that, although the two ships are now used very differently from each other, they should be assessed together.

(20) France further justifies its approval of the new use of the ships with the following arguments:

(21) The number of ports of call in areas eligible for development aid is identical overall to the number catered for with the original use.

(22) The aggregate development effect with the new use of the ships is very similar to what was originally intended for FPO.

(23) The development effects forgone during the year when the ships were not operated on account of the bankruptcy of Renaissance Financial need not necessarily be offset by any of the conditions relating to the use of the ships since the bankruptcy was the result of *force majeure* (the terrorist attacks of 11 September 2001).

(24) In order to provide some compensation for the time lost when the ships were not in operation, France imposed, and the owner accepted, an extension of the requirement on the use of the two ships by four and five months respectively, to mid#2005.

(25) P&O PC has decided to continue operation of at least one of the ships in FPO until April 2006 and is currently in talks with the Government of FPO on a further extension of its presence there.

(26) In its later submissions France estimates that the spending generated by the two ships in areas eligible for development aid amounts to EUR 28,9 million a year, of which 78 % or EUR 22,5 million a year in FPO. The total spending in FPO generated by the new use of the ships would therefore be EUR 175,5 million (see Table).

TABLE

Estimated spending in French Polynesia linked to the ships *Pacific Princess* (formerly *R3*) and *Tahitian Princess* (formerly *R4*)

(EUR million)

Operator	1999	2000	2001	2002	2003	2004	2005	2006	Total

a Although the ships were not operated for one year, they were maintained and, according to France, generated around EUR 8,5 million in local spending in FPO, in the form of crew costs (even a ship not in operation needs a crew to look after it), fuel and technical maintenance costs, port fees, etc.

Renaissance Financial	5,8	44	34,5						84,3
Owners[a]				8,5					8,5
Princess Cruises				7,8	22,5	22,5	22,5	7,4	82,7
Total									175,5

a Although the ships were not operated for one year, they were maintained and, according to France, generated around EUR 8,5 million in local spending in FPO, in the form of crew costs (even a ship not in operation needs a crew to look after it), fuel and technical maintenance costs, port fees, etc.

(27) Lastly, France agrees with the comments made by ECP.

V. ASSESSMENT

Legal basis for the assessment

(28) Article 87(1) of the EC Treaty declares any aid granted through State resources to certain undertakings incompatible with the common market in so far as it distorts or threatens to distort competition and affects trade between Member States, unless it falls within the scope of the derogations provided for in Article 87(2) or Article 87(3).

(29) With regard to Article 87(3), the Council adopted on 21 December 1990 Directive 90/684/EEC on aid to shipbuilding[(7)], in accordance with which the present aid was initially notified and approved. Under Article 4(7) of this Directive, aid granted as development assistance to a developing country is not subject to the aid ceiling for operating aid. In assessing the compatibility of development aid with the common market, the Commission:

— ascertains that the proposed aid falls within the scope of the Agreement of OECD Working Party No 6 concerning the interpretation of Articles 6 to 8 of the OECD Understanding on Export Credits for Ships,

— verifies the particular 'development' content of the proposed aid[(8)].

(30) In approving the aid, the Commission therefore verified its development content. In Decision 1999/719/EC approving the aid, it stated that:

'Clearly, if the vessels are not deployed in FPO, they will not bring about any economic development there. Therefore, it is essential that the aid is linked to a requirement that the vessels be deployed in FPO. France has undertaken that the vessels will be used exclusively in FPO for at least five years. The Commission has decided to make this a condition upon which it approves the aid, since the development content of the project would otherwise be compromised.'

(31) The Commission noted in its decision to open the formal investigation procedure in 2003 that France had agreed that one of the ships, *Pacific Princess*, formerly *R3*, should operate permanently outside FPO and that the other, *Tahitian Princess*, formerly *R4*, although being based in Papeete, the

capital of FPO, should also occasionally operate in regions not belonging to FPO.

(32) On the basis of this observation, and given the clear conditions imposed by the Commission in Decision 1999/719/EC and the fact that both ships were at least partially used outside FPO, the Commission considered that the condition imposed by its 1999 decision was no longer met, causing it to suspect that there had been a misuse of State aid.

(33) The rules concerning misuse of aid are set out in Article 16 of Regulation (EC) No 659/1999, which in turn refers to the normal rules regarding the formal investigation procedure and the procedures applicable to unlawful aid.

(34) This assessment will, therefore, focus on whether the aid can be compatible with the common market on the basis of Decision 1999/719/EC and the rules on development aid contained in the State aid rules governing shipbuilding.

Appraisal of the compatibility of the aid

(35) The Commission firstly notes that it is established that the ships have not been used in accordance with Decision 1999/719/EC.

(36) The Commission will therefore assess whether the aid granted in 1999 can nevertheless be considered as compatible with the common market on the basis of the new facts that have come to light during the present investigation and of the original objective of the aid, which was the particular economic development effect on FPO.

(37) The two main aspects to be assessed are the effects of the terrorist attacks of 11 September 2001 and the particular economic development effect on FPO.

Effects of 11 September 2001

(38) The Commission has, in a number of State aid decisions[(9)], acknowledged that the terrorist attacks of 11 September 2001 were to be regarded as exceptional circumstances for the cruise ship industry. It therefore considers that the argument put forward by France and ECP whereby these events created a situation of *force majeure* is admissible.

(39) The Commission considers that, in the case in point, the impact of the terrorist attacks of 11 September 2001 was twofold.

(40) Firstly, it contributed to the bankruptcy of Renaissance Financial. Even though Renaissance Financial had already encountered problems before 11 September 2001, the terrorist attacks in their impact on the cruise market were decisive because potential investors withdrew their support for the company. Owing to difficulties in finding a new interested operator and to complicated legal problems that had to be resolved between Renaissance Financial's receivers, the owners, the French Government and the new operator, it took almost a year for the ships to be put back into service. Therefore, the fact that the ships were not operated for almost one year and

the resulting loss of development effects for FPO can be linked to the situation of *force majeure* created by the event of 11 September 2001.

(41) The second effect of 11 September 2001 was to influence, in the short and medium term, the cruise industry by, on the one hand, obliging companies to lower prices in a bid to keep their customers and, on the other, making potential clients more reluctant to travel long distances by plane. Since FPO is a long way from the United States and Europe, operating cruise ships there became more difficult from a financial point of view. While this effect can now be considered to be over, it was discernible until 2003.

(42) On the basis of the above observations, the Commission considers that the period during which the ships could not be operated owing to the events linked to the terrorist attacks does not have to be offset and can therefore be deducted from the development effect needed to justify the aid.

Development effects

(43) The Commission has assessed the development effects of the use of the ships and compared them with what was originally intended.

(44) The Commission agrees with the French request that the development effects of the two ships should be assessed together since both ships were jointly assessed in Decision 1999/719/EC. Furthermore, from a development point of view, it is the aggregate development effect that is of relevance and not the question as to which of the two ships accounted for that effect.

(45) However, the Commission does not take the view that the development effects in all the regions eligible for development aid should be taken into account since the original decision concerned only development effects in FPO. Taking into account effects in other regions or countries would be tantamount to altering the original objective of the aid.

(46) In the original decision the Commission based its approval of the aid on estimations of annual spending of some EUR 44 million for the two ships, or 5 × EUR 44 million = EUR 220 million over the five#year period.

(47) If the time lost as a result of the 11 September events (one year) is deducted, the development effects that would be needed to comply with the original decision would be 4 years × EUR 44 million = EUR 176 million. The spending generated in FPO by the operation of the ships, currently put at EUR 175,5 million, is virtually equal to that amount.

(48) It can therefore be concluded that, taking account of the situation of *force majeure* created by the attacks of 11 September 2001, the ships will, by virtue of their currently known past and future use, have generated a development effect similar to what was originally anticipated.

(49) Accordingly, the Commission considers that the particular development effect of the aid is ensured, that the conditions for authorising the aid are thus met and that the aid has therefore not been misused.

VI. CONCLUSION

(50) The Commission finds that France has, in breach of Article 88(3) of the Treaty, unlawfully changed the conditions governing the development aid authorised for the construction of two ships. However, since the development effects for FPO, taking into account the time lost for reasons of *force majeure*, are equivalent to what was originally intended, the aid is compatible with the common market and, in particular, with the rules governing development aid for the shipbuilding sector,

HAS ADOPTED THIS DECISION:

Article 1

The Sate aid which France has implemented as development aid for the construction of the cruise ships *Pacific Princess* (formerly *R3)* and *Tahitian Princess* (formerly *R4)*, in the form of tax concessions, is compatible with the common market under Article 87(3)(e) of the Treaty.

Article 2

This Decision is addressed to the French Republic.

Done at Brussels, 20 July 2005.

For the Commission

Neelie KROES

Member of the Commission

(**1**) OJ L 202, 18.7.1998, p. 1.

(**2**) OJ C 105, 1.5.2003, p. 30.

(**3**) OJ L 292, 13.11.1999, p. 23.

(**4**) See footnote 2.

(**5**) La loi du 11 juillet 1986 modifiée, relative aux investissements productifs dans les départements et territoires d'Outre-Mer.

(**6**) OJ L 83, 27.3.1999, p. 1. Regulation as amended by the 2003 Act of Accession.

(**7**) OJ L 380, 31.12.1990, p. 27. Directive as last amended by Directive 94/73/EEC (OJ L 351, 31.12.1994, p. 10).

(**8**) The same provision is found in Regulation (EC) No 1540/98, which replaced Directive 90/684/EEC, and in the Commission framework on State aid in shipbuilding (OJ C 317, 30.12.2003, p. 11), which has been applicable since 1 January 2004 following the expiry of Regulation (EC) No 1540/98.

(**9**) Including the decision in Case N 843/01 concerning Meyer Werft Papenburg (OJ C 238, 3.10.2002, p. 10).

Changes to legislation:
There are currently no known outstanding effects for the Commission Decision of 20 July 2005 on the State aid implemented by France for two cruise ships with a view to the development of French Polynesia (notified under document number C(2005) 2731) (Only the French text is authentic) (Text with EEA relevance) (2006/219/EC).