# JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)

16 September 2004 *

In Case T-274/01,

**Valmont Nederland BV,** established in Maarheeze (Netherlands), represented by A. Van Landuyt, A. Prompers and G. Van de Wal, lawyers,

applicant,

v

**Commission of the European Communities,** represented initially by G. Rozet and H. Speyart, and subsequently by G. Rozet and H. Van Vliet, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for the annulment of Commission Decision 2002/142/EC on the State aid implemented by the Netherlands in favour of Valmont Nederland BV (OJ 2002 L 48, p. 20),

* Language of the case: Dutch.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Fourth Chamber, Extended Composition),

composed of: H. Legal, President, V. Tiili, A.W.H. Meij, M. Vilaras and N.J. Forwood, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 19 February 2004,

gives the following

## Judgment

### Legal framework

1 Article 87(1) EC provides that, save as otherwise provided in the Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods are, insofar as it affects trade between Member States, incompatible with the common market.

2 Commission Communication 97/C 209/03 on State aid elements in sales of land and buildings by public authorities was published in the *Official Journal of the European Communities* on 10 July 1997 (OJ 1997 C 209, p. 3), hereinafter 'the communication on land sales').

3 In Point I, that communication states its purpose to be, among other things, to clarify the practice of the Commission regarding the examination of sales of publicly owned land, to reduce the number of transactions to be examined in the light of Articles 87 EC and 88 EC and, to that end, to provide guidance on procedure to the Member States.

4 In Point II.1, entitled 'Sale through an unconditional bidding procedure', the communication states, in particular, that '[a] sale of land ... following a sufficiently well-publicised, open and unconditional bidding procedure, comparable to an auction, accepting the best or only bid is by definition at market value and consequently does not contain State aid'.

5 In Point II.2, entitled 'Sale without an unconditional bidding procedure', it states, in particular, as follows:

'If public authorities intend not to use the procedure described under [II.1], an independent valuation should be carried out by one or more independent asset valuers prior to the sale negotiations in order to establish the market value on the basis of generally accepted market indicators and valuation standards. The market price thus established is the minimum purchase price that can be agreed without granting State aid.'

6 In Point II.3, entitled 'Notification', the communication on land sales indicates, essentially, that, in order to allow the Commission to establish whether State aid exists, the Member States should, without prejudice to the *de minimis* rule, notify to it any sale that was not concluded on the basis of either of the procedures described at points II.1 or II.2.

## Background to the dispute

7 Valmont Nederland BV ('Valmont') is a company incorporated under Netherlands law established in Maarheeze (Netherlands), in Noord-Brabant (North Brabant). It is the successor to Nolte Mastenfabriek BV, which was bought in 1991 by its parent company, Valmont Industries Inc.

8 On 1 July 1993, the municipality of Maarheeze (hereinafter 'Maarheeze') and Nolte Mastenfabriek BV signed an agreement for the sale by the former and the purchase by the second of some three hectares of undeveloped land intended for industrial purposes. That agreement fixed a sale price excluding VAT of 900 000 Netherlands guilders (NLG), or approximately EUR 408 402.

9 The transaction was finalised by an authentic deed of sale signed on 8 February 1994. The sale price, excluding VAT, was fixed in accordance with the sale agreement of 1 July 1993, on the basis of NLG 30/$m^2$ (approximately EUR 13.61/$m^2$).

10 In the spring of 1998, articles in the Netherlands press claimed that certain municipalities in Noord-Brabant had made improper use of subsidies granted by the provincial authorities in order to attract businesses into their region. It was claimed that Maarheeze had been the recipient of one such subsidy and used it in such a way as to enable it to sell land below its commercial value.

11 By letter of 1 April 1998, the Commission invited the Netherlands authorities to provide it with information on the matter.

12 By letter of 2 July 1998, the Netherlands authorities informed the Commission of their intention to send it an expert's report determining the price of some of the land concerned at the time when it was sold.

13 By letter of 19 January 1999, the Netherlands authorities sent the Commission a copy of a report of 4 December 1998, drawn up for them by an independent expert, Mr Laureijssen, a member of the firm of experts Laureijssen & Brocken ('the Laureijssen report'). That report, which dealt with two plots of land sold by different municipalities to different undertakings, concluded, with regard to the land sold to Valmont, that the price per square metre should be estimated at NLG 42.50 (approximately EUR 19.29) in 1993.

14 By letter of 7 November 2000, the Commission notified the Netherlands authorities of its decision to open a formal investigation procedure under Article 88(2) EC. It indicated in that decision that the sale of the land, on the one hand, and the subsequent construction of a car park on part of that land, financed by Maarheeze for up to NLG 250 000 (approximately EUR 113 445), on the other, appeared to amount to State aid. Furthermore, it doubted whether it fulfilled the requisite conditions to enable it to be declared compatible with the common market.

15 By letter of 12 December 2000, the Netherlands authorities transmitted their comments to the Commission, together with the following documents:

— a report of 4 October 1994, drawn up on behalf of Valmont by an independent expert, Mr Schekkerman, a member of the firm of experts Troostwijk ('the Troostwijk report'), which concluded that the sale price of the land should be estimated at NLG 1 050 000 (approximately EUR 476 000) in 1994;

— a letter of 28 November 2000 from the same person entirely devoted to the discrepancy between the estimates arrived at in the Laureijssen and Troostwijk reports ('the Troostwijk letter');

— three letters of 6 and 7 October 2000 from undertakings other than Valmont declaring that they used the latter's car park in various ways, free of charge.

16 By Commission Communication 2001/C 37/08 of 3 February 2001 inviting the submission of comments pursuant to Article 88(2) EC (OJ 2001 C 37, p. 44), the letter of 7 November 2000 notifying the Netherlands authorities of the decision to open a formal investigation procedure was brought to the attention of interested parties.

17 By letters of 20 February and 5 March 2001, Valmont council submitted its comments to the Commission.

18 On 18 July 2001, the Commission adopted Decision 2002/142/EC on the State aid implemented by the Netherlands in favour of Valmont Nederland BV (OJ 2002 L 48, p. 20; 'the decision').

19 Article 1 thereof provides that the land transaction and the construction of the car park contain elements of State aid in favour of Valmont amounting to NLG 375 000 (approximately EUR 170 168) and NLG 125 000 (approximately EUR 56 723) respectively.

20 It also finds that those State aid elements are incompatible with the common market (Article 2) and requires the Netherlands, first, to take all necessary measures to recover it from the recipient (Article 3) and, secondly, to inform the Commission of the abovementioned measures (Article 4).

## Procedure and forms of order sought by the parties

21 By application lodged at the Court Registry on 22 October 2001, Valmont brought the present action.

22 The case was initially allocated to the First Chamber, Extended Composition, and subsequently, upon the Judge-Rapporteur being assigned to the Fourth Chamber as a result of the changes to the composition of the chambers of the Court of First Instance from 1 October 2003, to the Fourth Chamber, Extended Composition.

23 On hearing the report of the Judge-Rapporteur, the Court (Fourth Chamber, Extended Composition) decided to open the oral procedure. It also asked the parties, pursuant to Article 64 of its Rules of Procedure, to answer a number of written questions and produce a number of documents. The parties complied with the request within the specified period.

24 The parties made their submissions to the Court and gave their oral replies to the Court's questions at the hearing on 19 February 2004.

25 Valmont claims that the Court should:

— annul the decision;

— order the Commission to pay the costs.

26 The Commission contends that the Court should:

— dismiss the application;

— order Valmont to pay the costs.

**Law**

27 In support of its claims, Valmont puts forward six pleas in law.

28 The first plea in law alleges infringement of Article 87(1) EC inasmuch as the sale of the land carries no benefit. The second plea in law alleges infringement of Article 87 (1) EC inasmuch as the sale of the land and the construction of the car park do not affect trade and do not distort competition. The third plea in law alleges, in essence,

that the administrative procedure was conducted irregularly and that Valmont's procedural rights were not observed. The fourth plea in law alleges, in essence, infringement of Article 87(1) EC inasmuch as the Commission concluded that the sale of the land contained a benefit by basing itself on an expert's report which is of no evidential value. The fifth plea in law alleges, in essence, infringement of Article 87(1) EC inasmuch as the construction of the car park contains no benefit. The sixth plea in law alleges, in essence, infringement of the rules regarding recovery of State aid and procedural time-limits.

29 Valmont's first and fourth pleas in law constitute, in essence, a single plea in law, alleging infringement of Article 87(1) EC inasmuch as the sale of the land does not contain a benefit, which must be examined first. Next to be examined will be Valmont's fifth plea in law alleging infringement of Article 87(1) EC inasmuch as the construction of the car park does not contain a benefit.

*The plea in law, alleging infringement of Article 87(1) EC inasmuch as the sale of the land does not contain a benefit*

30 According to Valmont, the Commission misapplied the communication on land sales, made erroneous use of the Laureijssen report and made a manifest error of assessment of the sale.

31 The argument concerning the use made by the Commission of the Laureijssen report must be examined first of all.

Arguments of the parties

32 First, Valmont argues that the Commission based itself on the Laureijssen report, drawn up at the request of the Netherlands authorities towards the end of the preliminary investigation stage, in 1998, despite the fact that it was inconsistent. In particular, Valmont claims that, with regard to the land at issue, that report arrives, without any rational explanation, at a market price of NLG 42.50/$m^2$ and that the Commission adopted that conclusion without seriously examining it.

33 Secondly, the Commission disregarded the Troostwijk report, commissioned by Valmont in order to obtain bank financing, in 1994, despite the fact that it was relevant. Furthermore, it peremptorily disregarded the Troostwijk letter.

34 The Commission replies that Valmont's arguments overlook the fact that, when investigating land sales by a public body pursuant to Article 87(1) EC, the Commission, which is not itself qualified to estimate the price of such an asset, bases itself on the objective criteria set down in the communication on land sales. In particular, in the context of the procedure described in Point II.2 of that communication, it is for an expert to take into account the whole of the relevant economic circumstances. Provided that, first, such an expert is qualified and independent within the meaning of that provision and that, secondly, no serious methodological error is apparent in his report, the Commission is obliged to adopt the conclusions to which it arrives.

35 In the present case, on the one hand, the Commission could base itself on the Laureijssen report, which was drawn up after the sale but still for the purposes of the administrative procedure. First, the expert was possessed of the knowledge and independence required by the second to fourth paragraphs of Point II.2(a) of the communication on land sales. Next, the task entrusted to him to estimate the price

of the land at the time of the sale was carried out in accordance with the fifth paragraph of Point II.2(a) of that communication. Furthermore, his working methods were appropriate since, in particular, he had visited the site. Finally, careful examination of the Laureijssen report shows that the expert dedicated the requisite attention to all the relevant factors and that, finally, the calculation of the price per square metre of the land properly included those factors.

36 On the other hand, the Commission could disregard the Troostwijk report and the Troostwijk letter since the estimate in those documents concerned the developed land which Valmont could sell rather than the undeveloped land which it had acquired.

Findings of the Court

37 In view of the fact that aid is a legal concept which must be interpreted on the basis of objective factors, the Community Courts must in principle, having regard both to the specific features of the case before them and to the technical or complex nature of the Commission's assessments, carry out a comprehensive review as to whether a measure falls within the scope of Article 87(1) EC (Case C-83/98 P *France* v *Ladbroke Racing and Commission* [2000] ECR I-3271, paragraph 25, and Case T-98/00 *Linde* v *Commission* [2002] ECR II-3961, paragraph 40). The exception to that principle is where a complex economic appraisal is involved, in which case review by the Court is restricted (see, to that effect, Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 11, and Joined Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia* v *Commission* [2003] ECR I-4035, paragraph 39).

38 Furthermore, the legality of a Commission decision concerning State aid must be assessed in the light of the information available to the Commission when the decision was adopted (Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 16, and C-197/99 P *Belgium* v *Commission* [2003] ECR I-8461, paragraph 86).

39 In the present case, Article 1 of the decision states that the sale of the land contains an element of State aid amounting to NLG 375 000 (approximately EUR 170 168), and it is clear from recitals 15 to 18 of the decision that the difference between the sale price of the land and the market price of the land determined by the Commission is thus described as State aid.

40 In order to arrive at such a conclusion, the Commission first pointed out that it followed from point II.2 of the communication on land sales that a Member State which wished to sell a piece of land could have its value estimated beforehand by an expert, such an estimate then constituting the market price which, where adhered to, rules out the existence of State aid. It found, in the present case, that the experts' reports which it had available were subsequent to the transaction (recital 16 of the decision).

41 Next, it considered that the Troostwijk report had no evidential value while the Laureijssen report was evidential (recital 17 of the decision).

42 Finally, it adopted the market price of NLG 42.50/$m^2$ (approximately EUR 19.29/$m^2$) estimated in the Laureijssen report, compared the sale price of NLG 30/$m^2$ (approximately EUR 13.61/$m^2$) with it and concluded from that comparison that there existed State aid (recital 18 of the decision).

43 It must therefore be considered whether the Commission based itself exclusively on a report devoid of any evidential value in order to conclude that there was State aid in the land's sale price. Since that question does not involve, in the present case, any complex economic appraisal it must, as such, be fully reviewed.

44 Measures which, in various forms, mitigate the burdens which are normally included in the budget of an undertaking and which are thereby similar to subsidies constitute benefits for the purposes of Article 87(1) EC (see, to that effect, Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1961] ECR 1, 39, and *Italy and SIM 2 Multimedia*, cited at paragraph 37 above, paragraph 35), such as, among others, the supply of goods or services on favourable terms (see, to that effect, Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219, paragraphs 28 and 29, and Case C-126/01 *GEMO* [2003] ECR I-13769, paragraph 29).

45 When applied to the sale of land to an undertaking by a public authority, the consequence of that principle is that it must be determined whether, in particular, the sale price could not have been obtained by the purchaser under normal market conditions (see, to that effect, Joined Cases T-127/99, T-129/99 and T-148/99 *Diputación Foral de Álava and Others* v *Commission* [2002] ECR II-1275, paragraph 73, a paragraph which was not subject to appeal). Where the Commission carries out an examination for that purpose of the experts' reports drawn up after the transaction in question, it is bound to compare the sale price actually paid to the price suggested in those various reports and to determine whether it deviates sufficiently to justify a finding that there is a benefit (see, to that effect, *Diputación Foral de Álava and Others*, cited above, paragraph 85, a paragraph which was not subject to appeal). That method makes it possible to take into account the uncertainty of such a determination, which is by nature retrospective, of such market prices.

46 In the present case, contrary to what is stated in recital 18 of the decision, the conclusion of the Laureijssen report that the sale price excluding VAT should be

estimated at NLG 42.50/$m^2$ in 1993 does not rely on any calculation or on a comparison with the prices paid for other land sold by the municipality concerned and sales of land by other proprietors.

47 First, that figure does not rely on any explicit and verifiable figures. Indeed, after stating, in the ninth and tenth paragraphs of Point 3.4, as follows:

'[T]he municipality of Cranendonck, formerly Maarheeze, also based itself on the cost price. No plot of approximately [three hectares] which was directly sellable was available. The plot sold to Valmont International BV belonged to the municipality and consisted of woods worth approximately NLG 2/$m^2$.

The cost of construction had been estimated by the municipality at NLG 30/$m^2$ excluding VAT (which is also the figure found for "Den Engelsman"). The development plan was drawn up after the sale to Valmont, namely on 24 August 1994 ...', the Laureijssen report immediately concludes, at point 4:

'[O]n the basis of the foregoing evaluations and of the comparison with assets sold and rented, the immovable asset in question must be estimated on the basis of:

(a) the 1993 price index;

(b) its being unburdened by a lease;

(c) there being no third-party rights ...;

(d) its being unburdened by any mortgage or charge;

(e) there being no drawbacks at the environmental level, such as pollution of the ground or the air, processed or harmful materials, which might negatively influence, in the long or short term, the value of the asset being estimated;

(f) taking nevertheless into account justified cost reductions for each asset, such as declared by the municipality,

as being:

value for private freehold sale:

...

NLG 42.50/$m^2$ excluding VAT.'

48 On the one hand, it is clear from the passage cited above that, in order to fix the sale price, Maarheeze based itself on a cost price of NLG 32/$m^2$ obtained by adding the value of the ground in its original wooded state (NLG 2/$m^2$) and the costs of providing services (NLG 30/$m^2$). That cost price therefore consists of the explicit and verifiable sum of objective figures. Moreover, it is apparent that the cost of

providing services of NLG 30/$m^2$, which constitutes the essential constituent of that cost price, corresponds to that found for the whole of the Den Engelsman area, in which is situated the land sold to Valmont, and may therefore be considered as having been estimated at its fair value. Finally, it is apparent that that cost price justifies a sale price of NLG 30/$m^2$, as the expert states in the first to third paragraphs of point 3.4 of his report:

'During the visits we made to the municipalities of Helmond and Cranendonck [formerly Maarheeze], we received information concerning the fixing of the sale price charged in the transactions in question involving E.P.M. and Valmont Nederland BV.

The municipalities have explained the reduction in the land prices.

For the sake of completeness of our report, we do not wish to deprive you of that reply. We believe that the explanations given are such as to justify the sale prices'.

49 On the other hand, it is clear that it is impossible to verify objectively the elements then set forth in the Laureijssen report or the market price of NLG 42.50/$m^2$ supposedly resulting from their combination.

50 In the first place, the elements appearing in point 4(b), (c), (d) and (e) of that report had already been taken into account by the sale agreement of 1 July 1993 and by the authentic deed of sale of 8 February 1994. The former document indicates, at paragraph 1, that '[t]he municipality has investigated whether there is any pollution of the ground of the land sold' and that 'the investigation shows that the state of the

ground is deemed fit for development and for its use for the purpose intended for the plot'. The second document reiterates that conclusion at point C.6, and reiterates, at points C.2.1, C.2.3 and C.5, that the plot is freehold and unburdened by third-party rights, charges or mortgages. In the absence of any explanation in the Laureijssen report, it is arbitrary to consider that the latter document evaluates the effect of those elements on the sale price more accurately than was done at the time of the sale.

51 Next, as regards the reference in point 4(f) of the Laureijssen report to 'justified cost reductions for each asset' being taken into account, it is worth noting that, although that report actually describes a justified cost reduction so far as concerns the second plot, sold by a municipality other than Maarheeze, to an undertaking other than Valmont, which it aimed to estimate (see paragraph 13 above), it does not, on the contrary, mention any such element with regard to the plot sold by Maarheeze to Valmont.

52 At the hearing, the Commission stated that it had requested further details in that respect from the Netherlands authorities during the administrative procedure, that they had failed to provide them and that the passage in question referred no doubt to declarations made to the expert by Maarheeze municipal officials but which were not set down in the Laureijssen report.

53 According to the case-law cited in paragraph 38 above, the legality of a decision on State aid adopted by the Commission may only be assessed on the basis of information available to the Commission at the time of its adoption. In the present case, it follows that, although the Commission did not obtain the additional information it requested, it did indeed however have at its disposal the Laureijssen report containing the reference in question and was not exonerated from assessing the evidential value thereof. The Court may thus review the legality of the decision in that respect. However, it is not disputed by the parties that the Laureijssen report does not explain what the 'justified cost reduction' relating to the land bought by Valmont might be and the Court considers that an unsubstantiated reference cannot

reasonably be considered conclusive and relevant for the purpose of explaining the discrepancy of NLG 10.5/$m^2$ noted between the cost price of NLG 32/$m^2$ on which Maarheeze based itself and the sale price of NLG 42.5/$m^2$ estimated in the Laureijssen report. The argument that that reference could be considered to refer to statements made to the expert by Maarheeze municipal officials which were not set down in the Laureijssen report is too speculative to affect that assessment.

54 However, in so far as it may be inferred from the Commission's arguments that the error committed by it in that respect is connected with the incomplete nature of the information available to it, it remains to be examined whether the Commission may avail itself of that fact.

55 According to the case-law, where it considers that aid has been granted without it having been notified to it and is, therefore, unlawful, the Commission has the power to require the Member State concerned to provide it with all the information necessary for its examination; it is only where the Member State concerned fails to provide the information requested that the Commission is empowered to make its decision on the basis of the information available to it (see, to that effect, Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraphs 19 and 22, and Joined Cases C-324/90 and C-342/90 *Germany and Pleuger Worthington* v *Commission* [1994] ECR I-1173, paragraph 26).

56 The power conferred on the Commission to require the Member State concerned to provide it with information is at present provided for by 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). That regulation entered into force on 16 April 1999. To the extent that it provides procedural rules, it applies to any administrative procedure pending before the Commission when it entered into force, save for those provisions which contain a specific body of rules in that regard (see, to that effect, Case T-369/00 *Département du Loiret* v *Commission* [2003] ECR II-1795, paragraphs 50 and 51). Since the preliminary investigation stage was set in motion

by the letter of 1 April 1998 and the formal investigation procedure was opened by decision of the Commission notified to the Netherlands authorities by letter of 7 November 2000 (see paragraphs 11 and 14 above), that regulation applies in the present case.

57 According to the wording of Article 10 of Regulation No 659/1999 itself, the power conferred on the Commission to address to the Member State concerned, successively, a request for information (Article 10(2) and, by reference, Article 5 (1) thereof), followed, if necessary, by a reminder (Article 10(2) and, by reference, Article 5(2) thereof) and, finally, an instruction to provide information (Article 10(3) of that regulation) depends initially merely on a choice by the Commission. Furthermore, Article 10(3) of Regulation No 659/1999 provides, inter alia, that, where a decision requiring information to be provided is adopted, it must 'specify what information is required'.

58 It follows that the Commission may adopt a final decision where it considers to have available all the necessary information and that it is only where it considers that that is not the case that it requires the Member State concerned to provide it (see, to that effect, *Germany and Pleuger Worthington*, cited in paragraph 55 above, paragraph 26, and Case C-17/99 *France* v *Commission* [2001] ECR I-2481, paragraph 28), as described in the preceding paragraph.

59 However, in the present case, the Commission has stated that it had requested the Netherlands authorities to provide it with an explanation regarding the reference in the Laureijssen report to a 'justified cost reduction' relating to the land bought by Valmont. In other words, the Commission considered that the information in its possession was not sufficient. None the less, it did not obtain additional information and finally based the decision solely on the information it then had in its possession. Moreover, the fact that the Commission stated in the decision that 'on the basis of the information available, [it could] rely [on the Laureijssen] report' (recital 18 of the decision) attests to that.

60 Nevertheless, it is not clear from the decision or the file, nor does the Commission claim, moreover, that the Netherlands authorities were ever required, by decision requiring that information be provided, adopted under Article 10(3) of Regulation No 659/1999, to provide the information in question. Since the Commission has not made use of the powers enabling it to enjoin the Member State concerned to provide it with it, it cannot rely on the incomplete nature of the information in its possession in order to justify the decision (see, to that effect, *Germany and Pleuger Worthington*, cited at paragraph 55 above, paragraphs 28 and 29).

61 Finally, the reference, in point 4(a) of the Laureijssen report, to the 1993 price index does not demonstrate that the sale price ought to have been fixed at NLG 42.50/$m^2$ but only that it could, in theory and in different circumstances, have been fixed at NLG 50/$m^2$. That latter figure must be understood, as the Commission explained at the hearing, only as a 'rather artificial price'.

62 Perusal of the table entitled 'Land sale price, excluding VAT, per square metre', in point 3.2 of the Laureijssen report, shows that a price of NLG 50/$m^2$ was the theoretical sale price applicable in 1993 in Maarheeze. The evaluations which precede that table state that the sale prices actually agreed case by case are 'strongly influenced and/or decided' by that theoretical sale price, and the '[r]emarks' which follow it show that, in the expert's view, that price is applicable irrespective of the actual size of the land concerned, since '[Maarheeze] does not distinguish between large and small plots'.

63 However, point 3.2 of the Laureijssen report also reads that, in 1993, 'the economy was clearly in recession ... in central and eastern [Noord-]Brabant', that, indeed, 'land prices have not generally been downwardly revised', but also that, '[i]n the

circumstances, there is clearly a devaluation'. The expert continues, in unambiguous terms:

'Charging a lower price in unfavourable economic circumstances, particularly when selling large volumes of industrial land, is entirely understandable. Indeed, obtaining a quicker return on investment and preventing loss of future interest are sufficient reasons from an economic point of view. Moreover, in the circumstances described, that could have a knock-on effect on the price where one is dealing with market operators who are acting logically.'

64 Perusal of the Laureijssen report thus makes it clear, first, that a sale price which is lower than the theoretical price of NLG 50/$m^2$ was 'entirely' understandable, 'particularly when selling large volumes', or even logical in the economic context of 1993 with regard to a transaction such as that in issue in the present case; secondly, that the cost price of NLG 32/$m^2$ was based on objective and ascertainable criteria and could constitute a market price; thirdly, that the alleged market price of NLG 42.50/$m^2$ arrived at in that report is not based on the sum of verifiable elements.

65 In the second place, that figure of NLG 42.50/$m^2$ is not based on a comparison with prices paid in other land sales by the municipality concerned or on land sales by other proprietors.

66 On the other hand, perusal of the Laureijssen report shows that the expert enquired into the existence of similar, contemporaneous transactions with which to compare the sale, as emerges from the second and third paragraphs of point 3.1 of the report, and that he reviewed the transactions carried out by Maarheeze between 1991 and 1995 and examined the transactions carried out by other proprietors, both private and public, but that he then took the view that it was impossible to carry out such a comparison.

67 Perusal of the table entitled 'Total land sales per year', in point 3.2 of the Laureijssen report, leads to the observation that, apart from the plot of three hectares sold to Valmont, sale of land by Maarheeze for industrial development and noted by the expert involved a total of 0.18 hectares of land in 1991, 0.56 hectares in 1993, 0.04 hectares in 1994 and 3.52 hectares in 1995, without it being, moreover, possible to determine whether the latter figure corresponds to a single transaction or to several transactions, since it is an annual total. Furthermore, there is no sale listed for 1992.

68 Likewise, in the second to sixth paragraphs and the sixteenth to nineteenth paragraphs of point 3.2 and again in the first and third paragraphs of point 3.3 of the Laureijssen report, the expert found that there were no comparable transactions carried out by other proprietors in either the public or private sectors. First, the municipalities of Noord-Brabant had a monopoly with regard to sales of land made suitable for industrial development. Second, those municipalities charged different sales prices for plots of comparable sizes as shown in the table entitled 'Land sale prices excluding VAT per $m^2$', which appears in point 3.2 of the abovementioned report, and in the remarks which follow it.

69 Consequently, as stated in the ninth paragraph of point 3.2 of the Laureijssen report, the expert carried out 'an estimate ... largely [based] on hypothetical arguments', without, moreover, his report making clear the elements on which that estimate had been based, since it states first that '[a]ccount has been taken of sales transactions, to a certain party, of a plot of a minimum size of [four hectares]' (fourth paragraph of point 3.1 of the Laureijssen report), then that '[t]here were no comparable land sales of [four hectares] in the municipality of [Maarheeze] during the period from 1991 to 1995 to a specific tenderer' (first paragraph of point 3.3 of the Laureijssen report) and finally that the synopsis of the figures in the table entitled 'Land sales excluding VAT per $m^2$' 'covers an average for plots of approximately 90 000 $m^2$', that is to say nine hectares (point 3.2 of the Laureijssen report).

70 When asked to speak to the evidential value of the Laureijssen report, the Commission put forward various arguments seeking to justify the market price of NLG 42.50/$m^2$ concluded in that document and to put to one side the market price of NLG 32/$m^2$ which it mentions. However, none of those arguments is persuasive.

71 First, the Commission indicated in its answers to the Court's written questions that it was normal for an expert report to provide, as here, a general estimate. It is nevertheless true that an expert report can be deemed of any evidential value, either by the Commission or by the Court, only as regards its objective content and that a mere unsubstantiated statement in such a document does not make it possible to conclude that State aid exists. Besides, it is the line of argument adopted by the Commission during the hearing with regard to the Troostwijk report. It argued that, if the method for determining the price of the land adopted in the Troostwijk report, which subtracts the costs of construction from the value of the developed land (recital 17 of the decision) were deemed to be acceptable, it is still the case that 'no accurate calculation' of those costs was carried out in the present case and the figure of NLG 35/$m^2$ at which the report arrives is therefore inadequate in any event.

72 Secondly, the Commission stated in its replies to the Court's written questions and later at the hearing that, although imprecise, the list of factors determining the market price in point 4 of the Laureijssen report is adequate provided it is produced, as in the present case, by an independent qualified expert. However, although the Commission may commission outside consultants, without albeit being bound thereto (see, to that effect, Case T-106/95 *FFSA and Others* v *Commission* [1997] ECR II-229, paragraph 102, and Case T-72/98 *Astilleros Zamacona* v *Commission* [2000] ECR II-1683, paragraph 55), it is not thereby exempted from assessing their work. Subject to judicial review, ensuring that Article 87 EC is observed and Article 88 EC is implemented is the central and exclusive responsibility of the Commission (see, to that effect, the judgments of the Court of Justice in Case 78/76 *Steinike & Weinlig* [1977] ECR 595, paragraph 9, Case C-354/90 *Fédération nationale du commerce extérieur des produits alimentaires and Others* [1991] ECR I-5505, paragraph 14, and Case C-44/93 *Namur-Les assurances du crédit* [1994] ECR I-3829, paragraph 17) and not of the aforementioned experts.

73 Thirdly, the Commission states in its replies to the written questions of the Court that the Laureijssen report also mentions factors which help to explain the conclusion at which it arrives. The Commission took those factors into account implicitly in its analysis.

74 On the one hand, the Commission observes that the land, which is located alongside a major road, is easily accessible and has modern facilities, according to the description in point 2 of the Laureijssen report. However, the Court considers that, on account of its generality and vagueness, that argument does not appear in this case capable of explaining, by itself, the conclusion at which the Laureijssen report arrives. For the rest, although the expert mentions those factors in his report, he does not draw any explicit inference therefrom in his assessment or in his conclusion as to the value of the land.

75 On the other, the Commission takes the view that account should be taken of the reference in the first paragraph of point 3.2 of the Laureijssen report, according to which '[a]s a general rule, land prices are determined on the basis of the addition of the purchase or asset value, the cost of providing services, infrastructure and change-of-use work, the benefits, the risks etc.'. However, the Court notes that according to the case-file, the costs of providing services are in fact taken into account in point 3 of the sale undertaking of 1 July 1993 and in point C.6 of the deed of sale of 8 February 1994, and points out that the Laureijssen report unequivocally states that they, together with the asset value of the land, are already included in the cost price on which Maarheeze based itself when selling the land to Valmont (see paragraphs 47 and 48 above). As to the other factors, it is sufficient to state that they are not examined in the Laureijssen report any more than they are in the decision.

76 Fourthly, the Commission bases a line of argument in its answers to the Court's written questions, and subsequently at the hearing, on a document produced at its own initiative entitled 'Proposal of the [Maarheeze municipal] council of 17 June 1980' which aims, in particular, at fixing the general terms and conditions of the sale and a sale price of the plots of land intended for industrial use.

77 Even if that document, of which the Commission was not in possession when it adopted the decision, since its reply to the Court's written questions make it clear that it was sent in a letter from the Netherlands authorities of 15 January 2004, could be taken into account, it does not mean it must be followed.

78 Admittedly, the document deals with the carrying-out, in 1980, of an extension to the Den Engelsman industrial estate, into which Valmont moved in 1994. The document says of that extension that '[t]he gross surface is of +/- 2.85 hectares, and the net surface area to be made available is +/- [1.74] hectares', so that 'the sale price should be fixed at NLG 45/$m^2$ excluding VAT'. However, without it being necessary to examine the relevance in the present case of a proposal relating to a developed area of land 14 years prior to the transaction in question as a response to '[v]arious undertakings established in [the] municipality [which] asked to be taken into account for the purchase of industrial land', the gross surface area of which is, moreover, smaller than that of the land sold to Valmont, it suffices to note that there is nothing in the file to suggest that the proposal in question was ever adopted by Maarheeze.

79 On the contrary, the decision of Maarheeze municipal council of 26 June 1980 concerning general terms and conditions for the sale of land intended for industrial use, to which the deed of sale of 8 February 1994 refers and which was also produced before the Court, does not contain, for its part, any reference whatever to the sale price.

80 Moreover, perusal of the proposal of 17 June 1980 on which the Commission is placing reliance leads to the observation that it intended to fix a sale price of NLG 45/$m^2$ on the basis of a cost price of NLG 44.10/$m^2$ and, therefore, to limit the immediate pecuniary benefit obtained by Maarheeze from the sale of the land in question to NLG 0.90/$m^2$. That document is therefore not such as to establish the reasonable nature of the conclusion at which the Laureijssen report arrived, which found a cost price of NLG 32/$m^2$ and a market price of NLG 42.50/$m^2$, so that there is a discrepancy of NLG 10.50/$m^2$, that is to say ten times greater than that in the document in question, between those two figures.

81 Fifthly, the Commission maintained in its replies to the Court's written questions that the market price of NLG 42.50/$m^2$ is corroborated by a report of the Netherlands ministry for social housing, development and the environment entitled '1993 inquiry into industrial estates and the location of spare offices' and included as annex 25 to its defence. With regard to the land acquired by Valmont, that report mentioned a price of NLG 47/$m^2$. However, it must be stated that, as produced by the Commission as an annexure to its pleadings, that document consists of a page-long general synthesis in which there is no mention of the information in question.

82 Sixthly, the Commission claimed at the hearing that the Laureijssen report was, amongst the expert reports available to it, the only relevant document since its purpose was to estimate the price of the land to be sold freehold by private contract in the same state as at the time of sale. On the other hand, as stated in recital 17 of the decision, it could not rely on the Troostwijk report since it evaluated the whole industrial estate, including buildings, rather than the land as sold by Maarheeze, that is to say undeveloped.

83 None the less, although the Commission was able to observe as a matter of fact that the purpose of the Troostwijk report was to estimate the land as developed, to take the view that that was insufficient and to refer to the Laureijssen report, the purpose of which it believed to correspond to the wording of the fifth paragraph of Point II.2 (a) of the communication on land sales, it was still necessary to establish its evidential value.

84 It must further be observed that, in recital 18 of the decision, the Commission disregarded the Troostwijk letter, which stated in particular that the Laureijssen report did not take any account of the fact that the land was not totally accessible from the public highway and, therefore, overvalued its price, on the ground that '[t]hat statement is not ... supported by any evidence' and that '[t]he [Laureijssen report] explicitly states that the experts visited the site'.

85 However, although the first paragraph of point 3.1 of the Laureijssen report suggests that the expert actually visited the site, that is also the case as regards the author of the Troostwijk report, according to the first paragraph of the section of his report, entitled 'Reply'. The Commission in any event acknowledged as much at the hearing.

86 Accordingly, having noted the existence of a discrepancy between the Laureijssen and Troostwijk reports regarding a factual element affecting the price of the land and not having any information available to consider that the Laureijssen report was accurate in that respect and that the Troostwijk report was not, the Commission, which had taken the view that the latter did not employ a satisfactory calculation method and was not suited in that specific regard, could not extend that opinion and simply disregard the Troostwijk letter as of no evidential value. Furthermore, although the method consisting in calculating the value of undeveloped land on the basis of that of developed land might appear imperfect, it can hardly be denied that its interest lay in the fact that it was free from speculation, as Valmont stated at the hearing without being challenged on that point.

87 Seventhly, the Commission argued that, even supposing that the cost price of NLG 32/$m^2$ constituted a market price which it was constrained to compare with the selling price of NLG 30/$m^2$, it was nevertheless true that there was a discrepancy of NLG 2/$m^2$ between those prices and that therefore Maarheeze did not derive any pecuniary benefit from the sale.

88 None the less, that finding is not relevant, since it follows from the case-law cited at paragraph 45 above that it was still necessary to determine whether the sale price of NLG 30/$m^2$, which produces a full price of NLG 900 000, diverged from the market price of NLG 32/$m^2$, which gives a full price of NLG 960 000, sufficiently to be classified as State aid. In other words, it was for the Commission to assess the discrepancy of 6.25% between those figures in the light of Article 87(1) EC and, on that basis, to come to a conclusion as to the existence or otherwise of State aid.

89 It follows from the foregoing that Valmont's arguments are well founded. The Laureijssen report does not support the Commission's conclusion that the sale price is less than the market price and therefore contains an element of State aid.

90 Accordingly, the Commission has misapplied Article 87(1) EC inasmuch as it considered, on the basis of an expert's report devoid of evidential value in that respect, that the sale of the land contained an element of aid.

91 Article 1 of the decision must therefore be annulled insofar as it declares that the sale of the land contains an element of State aid, without there being any need to examine the rest of the present plea in law or the other pleas in law put forward in that regard. Consequently, Articles 2, 3 and 4 of that decision must also be annulled in so far as they concern the sale of the land.

*The plea in law alleging infringement of Article 87(1) EC inasmuch as the construction of the car park contains no benefit*

Arguments of the parties

92 Valmont claims, first of all, that the information transmitted to the Commission during the administrative procedure shows that the car park built on the land it purchased from Maarheeze is used free of charge by other undertakings. According to Valmont, the information includes, besides the letters from undertakings examined by the Commission in recitals 20 and 21 of the decision (see paragraph 15 above), a letter of 6 October 2000 sent to it by Maarheeze and which it produced as annex 6d to its application initiating proceedings.

93 Secondly, Valmont understands that the Commission might correctly have considered it to be, in recital 20 of the decision, as being the principal beneficiary of the car park, but contests the relevance of certain factual elements on which the Commission relies in support of that assessment.

94 Thirdly, Valmont maintains that, in the circumstances of the present case, the Commission, first, disregarded the conclusiveness of the existence of the opportunity or the right conferred on third parties to use its own car park and, secondly, failed to take account thereof in its reasoning.

95 Fourth and lastly, it contests the approach of the Commission consisting in describing an infrastructure such as the car park as semi-public and arbitrarily concluding that half of the financing granted by a public body for its construction must be deemed a benefit.

96 In reply to those arguments, the Commission states that, in view of the information available, which it claimed did not include the letter produced by Valmont as annex 6d to its application initiating proceedings, it could consider that half of the financing granted by Maarheeze in view of the construction of the car park could be deemed a benefit.

97 First, the Commission did not misassess the facts by considering that the car park constituted a semi-public infrastructure. Indeed, it would appear that that infrastructure was not public, that is to say freely accessible to everyone at any time on the same conditions and without prior authorisations and that Valmont could be considered to be its principal beneficiary. However, it also appeared that undertakings other than Valmont could make use of that infrastructure under a 'gentlemen's agreement' between Valmont and Maarheeze and that Valmont could not legitimately be considered to be the exclusive beneficiary thereof.

98 Secondly, in the absence of a legal rule requiring it to classify an infrastructure such as that referred to in the present case as purely public or private and in the light of information attesting to its hybrid nature, the Commission was entitled to classify the infrastructure as semi-public. That approach was all the more legitimate since the Commission was required to determine accurately the benefit contained in the financing granted to Valmont and that, in the present case, such an operation depended directly on the use made of that infrastructure.

99 Thirdly, in order to overcome such a classification, Valmont ought to have shown that it did not use the infrastructure in question any more than it would use a public car park, which it did not demonstrate, since Valmont was the owner of the land on which it is built.

100 Fourthly and lastly, the logical consequence of classification as a semi-public infrastructure is that half the financing granted for constructing it constitutes State aid. Howbeit, Valmont did not explain why the Commission should have classified as a benefit a smaller proportion of that financing.

Findings of the Court

101 Before examining the plea in law, the letter appended as annex 6d to the application initiating proceedings must be excluded from the proceedings. That letter from Maarheeze to Valmont was classified by the latter as among documents which were appended by the Netherlands authorities to the observations they submitted to the Commission during the formal investigation procedure on 12 December 2000.

102 As observed in paragraph 38 above, the legality of a Commission decision in the matter of State aid must be assessed in the light of the information available to the Commission when the decision was adopted. As the Commission rightly pointed out, the consequence of that principle is that, whereas there is nothing to prevent an applicant from developing, in support of an action for annulment of such a decision, a legal plea which it did not raise, as an interested third party, during the formal investigation procedure, it is not, on the other hand, permissible for it to rely on factual arguments which were unknown to the Commission and which it had not notified to the latter during that procedure (see, to that effect, Case T-110/97 *Kneissl Dachstein* v *Commission* [1999] ECR II-2881, paragraph 102, and Case T-123/97 *Salomon* v *Commission* [1999] ECR II-2925, paragraph 55).

103 In the present case, the Commission claimed in its defence that the letter in question had not been produced during the administrative procedure and Valmont rejoined, first, that it was entitled to rely in judicial proceedings on any factual element, even if unknown by the Commission and not notified thereto and, secondly, that that document did not, in any event, contain any information which was not already in the letters from undertakings referred to in paragraph 15 above.

104 In the light of the case-law cited in paragraphs 38 and 102 above, the first of those objections is manifestly unfounded in law. As regards the second objection, the Court points out that, although the letter in question does indeed refer to factual information notified to the Commission by the Netherlands authorities, it contains, furthermore, new factual information as the Commission, in any event, stated in reply to a written question of the Court without being challenged on that point. That letter must therefore be removed as not fulfilling the requisite conditions for inclusion in the context of judicial review.

105 As to the substance, Article 1 of the decision states that the construction of the car park contains an element of State aid amounting to NLG 125 000 (EUR 56 723), and recitals 20 to 22 of the decision make it clear that half of the financing granted to that end is also classified as State aid.

106 The Commission, in that connection, put forward an argument in three stages.

107 First, it takes the view that the car park could not be regarded as public given that Valmont was the main beneficiary, as is evidenced by its legal status as proprietor of the car park, by the fact that it was, in all probability, the main user, by the fact that it would in any event have been responsible for the cost of providing services necessary for carrying on business and, moreover, by the fact that the fencing surrounding the car park did not give passers-by the impression that it was a public infrastructure (recital 20 of the decision). The Commission added, in particular, that the 'gentlemen's agreement' entered into, according to the Netherlands authorities and Valmont, between the latter and Maarheeze for the purpose of enabling public access to the car park was not sufficient to establish the public nature of that infrastructure.

108 Next, the Commission considered that the car park should be regarded as semi-public on the ground, first, that it was actually regularly used by other undertakings free of charge, as emerges from the letters from undertakings mentioned in paragraph 15 above, secondly, that it was potentially accessible to other undertakings and, thirdly, that the long-term nature of that situation, which was the result of the 'gentlemen's agreement' between Valmont and Maarheeze, was guaranteed by Maarheeze's powers under the municipal land use plan (recital 21 of the decision).

109 Finally, in view of those factors, the Commission indicated that it regarded half of the costs of providing services for the car park as normal business costs, that, since Maarheeze had financed all the costs of providing services, it had favoured Valmont and that it must be found that there was a benefit amounting, in essence, to half the financing in issue (recital 22 of the decision).

110 As Valmont maintains, the line of argument used by the Commission in order to classify half of the financing in issue as State aid is erroneous.

111 In view of the arguments by which the Commission changed, at the hearing, some of the considerations appearing in its own decision, it is appropriate to consider, first, the assessment of the Commission, in the decision, of the facts of the case as they emerge from the information available and, next, to examine the conclusions drawn by the Commission, in its decision, from that assessment as to the legal classification of the facts.

— Assessment of the facts

112 It is for the Court, when hearing and determining an action for annulment of a Community act, itself to interpret that act, in particular where, as in the present case, the institution from which it emanates explains how the considerations in that act are to be understood (see, to that effect, the judgment of the Court of Justice in Case C-194/99 P *Thyssen Stahl* v *Commission* [2003] ECR I-10821, paragraphs 55 and 56, confirming, on appeal, the judgment of the Court of First Instance in Case T-141/94 *Thyssen Stahl* v *Commission* [1999] ECR II-347, paragraph 392).

113 In the present case, the Court observes that the Commission stated in recital 21 of the decision that undertakings other than Valmont had, in some cases, access or, in others, could have continued free access to the car park. It also accepted the explanations put forward by the Netherlands authorities, set forth in recital 13 of the decision, regarding the 'gentlemen's agreement' between Maarheeze and Valmont, taking the view that Maarheeze 'is in a position to be able to enforce strict observance of its ["gentlemen's agreement"] with Valmont and to ensure the continued use [of the] land as a car park by virtue of its powers under the municipal land use plan'.

114 Examination of the file, in particular of the documents on which the Commission claims to have relied in reply to the questions put at the hearing, leads to the conclusion that those considerations are not erroneous.

115 Indeed, perusal of the letters from undertakings cited at paragraph 15 above, on which the Commission relied, confirms that, far from being reserved for the exclusive use of Valmont, access to the car park was open to other undertakings under arrangements concluded with them. It is thus clear from them, first, that Valmont authorises certain undertakings active in the delivery and transport industry to make use of that infrastructure. Secondly, that authorisation has continued uninterrupted since 1994, when Valmont established itself on its site. Thirdly, such authorisation can be assumed to be continuous, since it covers evenings and weekends. Fourthly, they confer on the undertakings concerned benefits which are not limited to the right to use parking spaces but also cover rights of various kinds including that of loading and unloading, storage of equipment and easier access to locked-off property belonging to those undertakings. It also contributes to protecting those undertakings against a number of risks such as theft of equipment and the bogging-down of the heavy vehicles which such undertakings use. Fifthly, it palliates the lack of public infrastructure suitable for the parking of trailers and, as the Commission has pointed out, avoids their being parked on the streets of Maarheeze. Sixthly, the benefits are granted to the undertakings in question by Valmont free of charge.

116 Likewise, the wording of the letter of 14 May 2001 included in annex 25 to the defence, which the Commission explained at the hearing was the basis for its considerations relating to the 'gentlemen's agreement', leads to the confirmation that the arrangements described in the preceding paragraph are connected with an agreement concluded directly between Valmont and Maarheeze. It therefore follows, first, that the latter concluded and comply with a 'gentlemen's agreement' whose aim is to ensure public use of the car park. Secondly, that the continued and long-term nature of that agreement are, furthermore, guaranteed by a legislative prohibition on the change of use of the land set aside for use as a car park.

117 Accordingly, there is no credence in the argument whereby the Commission, seeking to modify a number of considerations in the decision, claimed that, in point of fact, only a few undertakings made occasional use of the car park when it suited Valmont and that, therefore, the final assessment in the decision was hardly too severe.

118 It remains true, however, that the Commission itself observed in recital 21 of the decision that the infrastructure 'is available for use by other firms as well' under a 'gentlemen's agreement' between Valmont and Maarheeze; as stated above, it follows from the case-file and the oral submissions of the parties that those considerations are not erroneous.

119 Similarly, the Court must reject argument by which the Commission sought to change its assessment of the 'gentlemen's agreement' examined in recitals 20 and 21 of the decision by maintaining that, at most, it was apparent from the letter of 14 May 2001, cited in paragraph 116 above, that Maarheeze exerted, by means of powers under the municipal land-use plan, a 'certain amount of control' over the use made by Valmont of the car park.

120 That document shows not only that Maarheeze is in a position to be able to ensure the long-term and continued use in various ways of the car park granted to other undertakings but also that that possibility originates in a pre-existing agreement, as the Commission itself points out in recital 21 of the decision.

121 Moreover, at the hearing, Valmont confirmed without being challenged that it could not terminate unilaterally the 'gentlemen's agreement' concluded with Maarheeze and applied uninterruptedly since then.

122 It is thus apparent from both the decision and the case-file that a general arrangement was concluded between Valmont and Maarheeze, that it is applied by them and that, furthermore, its application is ensured by means of a legislative provision and that the consequence is that the car park belonging to Valmont is an infrastructure which is effectively available to a number of other undertakings and potentially to more. It is also apparent that that arrangement solves specific problems concerning parking, storage, loading, unloading, access and security in both the interest of the undertakings concerned and in the public interest. That latter aspect was, moreover, confirmed at the hearing by Valmont and not contested by the Commission.

123 On the other hand, neither the decision nor, furthermore, the case-file shows that Valmont was required by Netherlands law to allow other undertakings to make free and continued use, in different ways, of its own car park since the date of the acquisition of the land on which that infrastructure was constructed. Neither does it appear that that land was subject, at the time of its acquisition, to any rights of use or servitudes for the benefit of other undertakings.

124 In those circumstances, as a result of the agreement it concluded with Maarheeze for the use of land which it owns, Valmont bears a burden in the public interest.

— The legal classification of the facts

125 After pointing out, as described above, that the car park was not public (recital 20 of the decision) and considering that it was nevertheless semi-public by virtue of an agreement concluded with Maarheeze, under which Valmont allowed other parties to make regular and free use thereof (recital 21 of the decision), the Commission took the view, 'in view of [those factors]', that half of the financing granted by

Maarheeze for the construction of that infrastructure constituted normal business costs (recital 22 of the decision). For that reason, the Commission took the view that half of the financing granted by Maarheeze which effectively benefited Valmont amounted to business costs which it should normally have borne and placed it at an advantage; as a corollary, the Commission took the view, implicitly but necessarily, that the other half of that financing in fact benefited other undertakings and did not benefit Valmont.

126 When questioned on that point at the hearing, the Commission confirmed, in clear terms, that that was indeed what was meant in the decision. It thus explained that 'the construction of the car park is of benefit to Valmont, but also a benefit to other undertakings, therefore the Commission considers that 50% of the costs of construction amount to State aid'.

127 That must also be the interpretation as regards the Commission's written pleadings. It thus explained that 'once [it] had found that a number of neighbouring undertakings, under the gentlemen's agreement ..., could use the [car park] in question, it could not properly consider that Valmont was the exclusive beneficiary' of that infrastructure (paragraph 55 of the rejoinder).

128 Consequently, while concluding that the second half of the financing in question could not be classified as State aid, since it did not benefit Valmont, the Commission also concluded that the first half of that financing, for its part, on the other hand amounted to State aid.

129 In that regard, it must be pointed out that the Court has held that, where a State measure must be regarded as compensation for the services provided by the

recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial benefit and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not caught by Article 87(1) EC (judgments of the Court of Justice in Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraph 87, and Joined Cases C-34/01 to C-38/01 *Enirisorse* [2003] ECR I-14249, paragraph 31).

130 However, for such compensation to escape classification as State aid in a particular case, a number of conditions must be satisfied (*Altmark Trans and Regierungspräsidium Magdeburg*, paragraph 88, and *Enirisorse*, paragraph 31).

131 First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic benefit which may favour the recipient undertaking over competing undertakings. Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations. Fourth, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations (*Altmark Trans and Regierungspräsidium Magdeburg*, paragraphs 89 to 95).

132 In the present case, as has been stated above, it follows from the Commission's own assessments, which are not erroneous, that Valmont bears a burden in allowing others to use its car park in various ways regularly and free of charge, under an agreement concluded, in the public interest as much as in that of the third parties concerned, with a territorial authority. It is also apparent from those assessments that a portion of the financing granted by the territorial authority for the construction of that car park effectively benefits Valmont.

133 In those circumstances, the Commission could not automatically consider that that portion of the financing necessarily benefited Valmont but should first examine, in the light of the information available, whether or not that portion of the financing could be regarded as being in fact compensation for the burden borne by Valmont. To that end, it was required to ascertain whether the conditions set out in paragraphs 130 and 131 above were satisfied.

134 However, the decision shows that the Commission merely considered that that portion of the financing benefited Valmont, and does not show at all that the Commission examined the question as to whether it could be regarded as being compensation for the burden borne by Valmont.

135 When asked at the hearing to state its views in that regard, the Commission claimed that the portion of the financing classified as State aid in the decision had rightly been so classified since it had been granted without expressly being made subject to the mandatory provision of specific services.

136 None the less, insofar as the Commission therefore suggests that the conditions necessary for that portion of the financing to escape being classified as State aid are not satisfied, it must be pointed out that it is not for the Community judicature to

replace the Commission by carrying out in its stead an examination it never carried out and substituting the conclusions to which it then arrives.

137 It follows from the foregoing that the Commission has not established in the decision nor, furthermore, at the hearing, to the requisite legal standard that half of the financing granted to Valmont for it to construct a car park on its premises should be classified as State aid under Article 87(1) EC.

138 Article 1 of the decision must therefore be annulled insofar as it declares that the construction of the car park contains an element of State aid, without there being any need to examine the rest of the present plea in law or the other pleas in law put forward in that regard. Consequently, Articles 2, 3 and 4 of that decision must also be annulled insofar as they concern the construction of the car park.

139 It follows that the decision must be annulled in its entirety.

## Costs

140 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the other party's pleadings. As Valmont has applied for costs and the Commission has been unsuccessful, the Commission must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)

hereby:

**1. Annuls Commission Decision 2002/142/EC of 18 July 2001 on the State aid implemented by the Netherlands in favour of Valmont Nederland BV;**

**2. Orders the Commission to pay the costs.**

Legal Tiili Meij

Vilaras Forwood

Delivered in open Court in Luxembourg on 16 September 2004.

H. Jung H. Legal

Registrar President