JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)

29 March 2007 *

In Case T-366/00,

Scott SA, established in Saint-Cloud (France), represented by Sir Jeremy Lever QC, G. Peretz and J. Gardner, Barristers, and R. Griffith and M. Papadakis, Solicitors,

applicant,

supported by

French Republic, represented by G. de Bergues, S. Seam and F. Million, acting as Agents,

v

Commission of the European Communities, represented by G. Rozet and J. Flett, acting as Agents,

defendant,

* Language of the case: English.

APPLICATION for partial annulment of Commission Decision 2002/14/EC of 12 July 2000 on the State aid granted by France to Scott Paper SA/Kimberly-Clark (OJ 2002 L 12, p. 1),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (First Chamber),

composed of J.D. Cooke, President, R. García-Valdecasas and I. Labucka, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 25 October 2006,

gives the following

Judgment

Facts

1 In 1969, Scott Paper Co., established in the United States of America, acquired Bouton Brochard, a company governed by French law, and created a separate company, Bouton Brochard Scott SA, which took over the business of Bouton Brochard. Bouton Brochard Scott was renamed Scott SA in November 1987. Throughout the material period, the applicant was involved in household and sanitary paper production.

2 On 31 August 1987, the City of Orleans (France), the département of Le Loiret (France) and the applicant concluded an agreement for the sale to the applicant of a 48-hectare plot on La Saussaye industrial estate and on the water treatment levy, which was to be calculated at a special rate ('the Scott agreement'). This agreement provided that the département of Le Loiret and the City of Orleans would contribute up to 80 million French francs (FRF) (EUR 12.2 million) towards the preparation of the site for the applicant.

3 The task of carrying out the studies and work necessary for the preparation of the land in question was entrusted to the Société d'économie mixte pour l'équipement du Loiret ('Sempel'). Pursuant to an agreement dated 12 September 1987 between the département of Le Loiret, the City of Orleans and Sempel ('the Sempel agreement'), the City of Orleans sold 68 hectares to Sempel for a token price of one franc. In addition, it appears from Article 4 of the Scott agreement and Article 12 of the Sempel agreement that Sempel was to sell a 48-hectare plot together with a factory warehouse ('the property') to Scott for FRF 31 million (EUR 4.7 million), that is to say, a price of FRF 65 per square metre.

4 In November 1996, the French Court of Auditors published a report entitled 'Local authority assistance for undertakings'. Its aim in publishing this report was to draw attention to possible aids granted by French local authorities to certain undertakings, including, in particular, the conveyance to the applicant of the property on La Saussaye industrial estate.

5 Following publication of this report, the Commission received a complaint, by letter dated 23 December 1996, concerning the allegedly preferential conditions on which the City of Orleans and the département of Le Loiret had sold the property to the applicant and the rate at which the water treatment levy had been set for the applicant.

6 By letter of 17 January 1997, the Commission requested the French authorities to provide further information. There followed an exchange of correspondence between the French authorities and the Commission between January 1997 and April 1998, in the course of which the French authorities provided, in part, the information requested, notably by letters of 17 March, 17 April and 29 May 1997. On 8 August 1997, the Commission again requested details from the French authorities. The Commission received further information from the French authorities on 3 November 1997 and from the complainant on 8 December 1997, 29 January and 1 April 1998.

7 By letter of 10 July 1998, the Commission informed the French authorities of its decision of 20 May 1998 to initiate the procedure provided for in Article 88(2) EC and asked them to submit their comments and to answer certain questions ('the decision to initiate the procedure'). In that letter, the Commission also requested the French authorities to inform the applicant that the procedure had been initiated and that it might have to repay any aid unlawfully received. By the publication of the letter of 10 July 1998 in the *Official Journal of the European Communities* of 30 September 1998 (OJ 1998 C 301, p. 4), the interested parties were put on notice that the procedure had been initiated and invited to submit any observations on the measures in question.

8 The applicant was informed of the decision to initiate the procedure by a telephone call from the French authorities on 30 September 1998. By letter of 23 November 1998, the applicant submitted observations on the decision to initiate the procedure.

9 By letter of 25 November 1998, the French authorities also submitted observations on the decision to initiate the procedure.

10 Having noted the observations of the French authorities and of the third parties, the Commission once again asked the French authorities for additional information. As only part of this information was provided, on 8 July 1999 the Commission directed the French authorities, pursuant to Article 10(3) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty (OJ 1999 L 83, p. 1), to provide the necessary information. The French authorities replied in part to this demand on 15 October 1999.

11 In the course of a meeting of 7 December 1999 between the Commission and a French delegation, which included representatives of Scott, the Commission agreed, by way of exception, to permit the delegation, in the interest of the procedure, to provide additional information before the end of December 1999.

12 Following the meeting of 7 December 1999, by letter of 24 December 1999, the applicant submitted additional information. By letter of 12 January 2000, the Commission wrote to the applicant refusing to accept its letter of 24 December 1999 because it had been submitted after the expiry of the deadline fixed in the decision to initiate the procedure, namely 30 October 1998.

13 The French authorities sent additional information to the Commission on 10 January and 21 February 2000.

14 The applicant's shares were purchased by Kimberly-Clark Corp. ('KC') in January 1996. KC announced the closure of the plant in January 1998. The plant's assets, namely, the site and the paper-mill, were purchased by Procter & Gamble ('P&G') in June 1998.

Contested decision

15 On 12 July 2000, the Commission adopted Decision 2002/14/EC on the State aid granted by France to Scott Paper SA/Kimberly-Clark (OJ 2002 L 12, p. 1) ('the contested decision'). After the present action was lodged (see paragraph 23 below), the Commission served a corrigendum to the contested decision on France on 2 March 2001. Article 1 and recitals 172, 217 and 239(b)(a) of the contested decision were corrected accordingly.

16 The amended text of the contested decision reads:

'Article 1

The State aid in the form of a preferential land price and a preferential rate of water treatment levy granted by France to Scott and amounting, in the case of the land price, to FRF 39.58 million (EUR 6.03 million) or, at present value, FRF 80.77 million (EUR 12.3 million) ... is incompatible with the common market.

Article 2

1. France shall take all necessary measures to recover from the beneficiary the aid referred to in Article 1 and already made available to it unlawfully.

2. Recovery shall be effected without delay and in accordance with the procedures of national law, provided that they allow the immediate and effective execution of this Decision. The aid to be recovered shall include interest from the date on which it was made available to the beneficiary until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.'

17 In determining the value of the aid, the Commission concluded that the original plot of 68 hectares ('the undeveloped land') had been purchased by the French authorities between 1975 and 1987 for a total price of FRF 10.9 million (EUR 1.7 million) (recitals 15 and 170 to the contested decision).

18 Relying on the 'Statement of final account: La Saussaye and La Planche Industrial Estate' dated 26 July 1993 ('Sempel's statement of final account'), the Commission added to this sum of FRF 10.9 million the total costs incurred by Sempel in the land improvement operations, namely FRF 140.4 million (EUR 21.4 million), and thus came to a sum of FRF 151.3 million (EUR 23.1 million) (recitals 168 to 170 to the contested decision).

19 The Commission then subtracted from this amount FRF 51.3 million (EUR 7.9 million) corresponding to the financial cost of the loans contracted by Sempel, the refund of VAT on the land improvement operations and the cost of a public intercepting sewer, all of which had been shown by the French authorities as being not intended solely for Scott but as serving the whole community (recital 171 to the contested decision).

20 According to the Commission, the cost of the property sale thus came to FRF 100 million (EUR 15.2 million). However, because Scott purchased only 48 hectares of the 68-hectare plot, the Commission calculated that the cost of the transaction

relating directly to Scott was 48/68 of FRF 100 million or FRF 70.588 million (EUR 10.76 million)

21 Finally, the Commission deducted from that amount the sum of FRF 31 million (EUR 4.7 million) which Sempel had received from Scott, thus resulting in a net loss to the French authorities of approximately FRF 39.58 million (EUR 6.03 million), or, at present value, FRF 80.77 million (EUR 12.3 million).

22 The following table summarises the Commission's above calculation:

Particulars (FRF.m)	Total (FRF.m)
Cost of the property (original site of 10.9 and improvements of 140.4)	151.3
Deductions (financial cost of the Sempel loans of 29.4; refund of VAT of 8.3; cost of a public intercepting sewer of 13.6)	– 51.3
Net Cost (151.3 — 51.3)	100
Cost of Scott purchase (48/68 of the Net Cost)	70.588
Price paid by Scott	– 31
Amount of aid	39.588

Procedure and forms of order sought by the parties

23 By application lodged at the Registry of the Court of First Instance on 30 November 2000, the applicant brought the present action.

24 By application lodged at the Registry of the Court of First Instance on 4 December 2000, and registered under number T-369/00, an action for annulment of the contested decision was also brought by the département of Le Loiret.

25 By a document lodged at the Registry of the Court of First Instance on 5 April 2001, the French Republic sought leave to intervene in the present proceedings in support of the form of order sought by the applicant.

26 By order of the President of the Fifth Chamber (Extended Composition) of 10 May 2001, the French Republic was granted leave to intervene in support of the form of order sought by the applicant.

27 At the request of Scott, the Court of First Instance decided to rule on the limitation issue raised by Scott on the basis of Article 15 of Regulation No 659/1999 before dealing with the substance of the case.

28 By judgments of 10 April 2003, the Court of First Instance dismissed the applications introduced by Scott and by the département of Le Loiret in so far as they were founded on infringement by the Commission of Article 15 of Regulation No 659/1999 and the costs were reserved (Case T-366/00 *Scott* v *Commission* [2003] ECR II-1763 and Case T-369/00 *Département du Loiret* v *Commission* [2003] ECR II-1789). As to the remaining issues, it was decided that the proceedings would be resumed.

29 Pending the judgment of the Court of Justice on Scott's appeal against the judgment in *Scott* v *Commission*, cited in paragraph 28 above, the Court of First Instance suspended the proceedings in the present case and also in Case T-369/00.

30 By judgment of 6 October 2005 in Case C-276/03 P *Scott* v *Commission* [2005] ECR I-8437, the Court of Justice dismissed Scott's appeal against Case T-366/00 *Scott* v *Commission*, cited in paragraph 28 above.

31 By letter of 10 November 2005, the Court of First Instance invited the parties to submit observations on the resumption of proceedings in the light of the judgment in Case C-276/03 P *Scott* v *Commission*, cited in paragraph 30 above. In its response of 24 November 2005, the applicant confirmed that the only pleas in law and arguments remaining to be addressed were those relating to the aid in the form of the alleged preferential price of the site purchased by the applicant on La Saussaye industrial estate and the imposition by the Commission of compound interest in the order for recovery of this aid.

32 Upon hearing the report of the Judge-Rapporteur, the Court decided to re-open the oral procedure and, by way of measures of organisation of procedure, requested the parties to answer certain written questions. The parties complied with this request.

33 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 25 October 2006.

34 In that context, the applicant claims that the Court should:

— annul Article 2 of the contested decision, in so far as it concerns the aid granted in the form of a preferential land price referred to in Article 1;

— order the Commission to pay the costs.

35 The French Republic, intervening in support of the form of order sought by the applicant, submits that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

36 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs;

— in the alternative, order the parties to bear their own costs.

Law

37 The applicant puts forward four pleas in law in support of its action. The first alleges a breach of procedural rights, the second a breach of the principle of equal treatment, the third a breach of the principle of protection of legitimate expectations and the fourth alleges erroneous assessment of the aid.

38 The Court will first examine the admissibility of the annexes to the application and will then examine the fourth plea.

Admissibility of the annexes to the application

Arguments of the parties

39 The Commission criticises the fact that the applicant relies on documents which did not form part of the administrative procedure. According to the Commission, the following annexes to the application are inadmissible: annex 6 (article in *Les Échos* of 31 March/1 April 2000); annex 13 (letter dated 24 December 1999 from Scott's lawyer to the Commission) and annex 19 (letter dated 24 March 2000 from Scott's lawyer to a member of Commissioner Monti's cabinet).

40 The Commission further submits that annex 23 to the application (the original offer of the City of Orleans to the applicant) was submitted, in part, to the Commission in an annex to the letter of 7 January 2000 from the French authorities. However, several pages were omitted. Annex 23 to the application adds the missing pages. As this is the first time that those pages have been furnished to the Commission, they are inadmissible. The Commission adds that, in the circumstances of the present case, the Court is still entitled to take judicial notice of certain matters set out in that document.

41 The applicant claims that the article in *Les Échos* (see paragraph 39 above) is admissible because it was not published until after the period during which the applicant was permitted to place materials before the Commission.

42 As for the letters of 24 December 1999 and of 24 March 2000 (see paragraph 39 above), they should have formed part of the administrative procedure before the Commission and they were wrongly rejected by it.

43 As to annex 23 to the application (see paragraph 40 above), the applicant claims that it did not know that the French Government had given the Commission only an incomplete copy of that document. However, the Commission should not be able to exclude material simply because it appears that the material submitted to the Commission by a Member State is erroneous or incomplete.

Findings of the Court

44 It should be pointed out *in limine* that the documents which the Commission considers to be inadmissible were validly annexed to the application and therefore form part of the file before the Court. As a result, their admissibility is not in itself at issue here. The Commission is really arguing that the documents in question should not be taken into consideration by the Court in its appreciation of the legality of the contested decision because they did not form part of the Commission's file during the administrative procedure.

45 It must be borne in mind that 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 Case C-197/99 P *Belgium* v *Commission* [2003] ECR I-8461, paragraph 86). As the Commission has correctly submitted, this means that the applicant may not rely on factual arguments which were unknown to the Commission and which were not notified to it during the administrative procedure (see, to that effect, Case T-110/97 *Kneissl Dachstein* v *Commission* [1999] ECR II-2881, paragraph 102).

46 However, it does not follow from that case-law that proof submitted by the recipient of aid in an action for annulment may not be taken into account in order to appreciate the legality of the contested decision where that proof had been properly submitted to the Commission during the administrative procedure prior to the adoption of the contested decision, if the Commission had excluded it for reasons which cannot be justified.

47 It is therefore appropriate to examine each of the annexes in question.

48 With regard to the article in *Les Échos* (see paragraph 39 above), it is common ground that it was not submitted to the Commission during the administrative procedure. Therefore, that article may not be taken into account for the purpose of assessing the legality of the contested decision.

49 As regards the initial offer of the City of Orleans to the applicant (see paragraph 40 above), it is not contested that the French Republic submitted that document to the Commission during the administrative procedure as an annex to its letter of 7 January 2000 but that it omitted certain pages without informing the Commission. It was not obvious from the pages sent to the Commission that other pages had been omitted. As a result, the Commission cannot be blamed for not having asked the French Republic to submit the missing pages, so that the legality of the contested decision may not be assessed in light of the content of those pages.

50 With regard to the letter from Scott's lawyer to the Commission of 24 March 2000 (see paragraph 39 above), as Scott admitted in its reply to the written questions of the Court, it deals with the limitation issue. In light of the fact that the Court has already dealt with this issue (see paragraphs 27 and 28 above), the objection raised with regard to that letter is irrelevant for the purposes of this judgment.

51 It is appropriate, next, to examine the letter from Scott's lawyer to the Commission of 24 December 1999 (see paragraph 39 above). The Commission refused to take this letter into account on the basis that it came from a third party and was lodged after the expiry of the deadline laid down by the decision initiating the procedure (see paragraph 12 above).

52 It should be recalled in that regard that the procedure for reviewing State aid is, in view of its general scheme, a procedure initiated in respect of the Member State responsible, in light of its Community obligations, for granting the aid (Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraph 81).

53 In that procedure for reviewing State aid, interested parties other than the Member State responsible for granting the aid, therefore, cannot themselves claim a right to debate the issues with the Commission in the same way as may that Member State. They have, effectively, the role of a source of information for the Commission (see Case T-198/01 *Technische Glaswerke Ilmenau* v *Commission* [2004] ECR II-2717, paragraph 192 and the case-law cited).

54 In that regard, the procedure for review of State aid accords no special role to the recipient of State aid as compared with all interested parties. It is clear, moreover, that the procedure for reviewing State aid is not a procedure initiated 'against' the recipient of aid giving rise to rights on which it could rely which are as extensive as rights of defence as such (*Falck and Acciaierie di Bolzano* v *Commission*, cited in paragraph 52 above, paragraph 83). Nevertheless, even though the recipient of aid does not have the status of a party to the procedure, the case-law has granted it certain procedural rights which are designed to enable it to provide information to the Commission and to put forward its arguments (Case C-276/03 P *Scott* v *Commission*, cited in paragraph 30 above, paragraph 34).

55 In the present case, it is common ground that Scott was invited to submit its observations during the formal examination procedure under Article 88(2) EC and under Article 6(1) of Regulation No 659/1999 and that Scott availed itself of that opportunity to submit detailed observations to the Commission on 23 November 1998 (see paragraph 8 above).

56 However, it does not follow from the case-law cited at paragraphs 52 to 54 above that the Commission is therefore entitled to ignore all other observations made by the recipient of aid after the expiry of the deadline laid down by the decision to open the procedure. It is clear from the case-law that the Commission must conduct a diligent and impartial examination of the case under Article 88 EC (see Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719 (*'Sytraval'*), paragraph 62, and Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein Westfalen* v *Commission* [2003] ECR II-435, paragraphs 167 and 168). It follows that the Commission might be obliged, in certain circumstances, to take into account the observations of the recipient of aid after the expiry of the time laid down by the decision to open the procedure.

57 It is worth noting that no provision of Regulation No 659/1999, including its Article 6, prevents the Commission from accepting such observations. Indeed, that latter article permits the Commission to extend the deadline for the submission for observations of interested parties in duly justified cases.

58 It should also be noted that it is settled case-law that a classification as aid requires that all the conditions set out in Article 87(1) EC are fulfilled (Case C-142/87 *Belgium* v *Commission (Tubemeuse)* [1990] ECR I-959, paragraph 25, and Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraph 74). Thus the Commission is obliged to assess whether the recipient received a real advantage from the alleged aid. In the present case, the existence of such an advantage was vigorously contested during the entire administrative procedure. In fact, the determination of the value of the property in issue was the subject of a detailed exchange of correspondence between the French authorities,

Scott and the Commission. In those circumstances, the Commission cannot shelter itself behind a formalist interpretation of its State aid obligations and refuse the recipient of aid an opportunity to submit its comments on a controversial aspect of the inquiry by rejecting information provided within a deadline laid down by the Commission itself (see, in that sense, Case T-34/02 *Le Levant 001 and Others* v *Commission* [2006] ECR II-267, paragraph 96).

59 Even though the procedure for reviewing State aid is a procedure initiated against the Member State responsible and notwithstanding the obligation of the latter to fully cooperate with the Commission and to supply it with all requested information, the Commission cannot ignore the fact that a potential order for recovery could have significant financial consequences for the recipient of aid. Furthermore, when requesting the production of and evaluating proofs, the Commission cannot assume that there is an identity of interest between the Member State and the recipient of aid, in particular with regard to the calculation of the value of the aid. In light of the fact that the aid is reimbursed to the Member State in question and not to the Community, the Commission cannot assume that a Member State has an interest in minimising the amount to be recovered in order to ensure that the recipient of the aid is treated in an equitable manner.

60 In the present case, the Commission was required to examine an alleged State aid nearly 10 years after its grant in 1987. Moreover, Scott, the recipient of the alleged aid, which had been purchased by KC in 1996, then sold the property in issue to P&G in 1998 (see paragraph 14 above). It follows that it was not easy in this case to obtain information regarding the value of the aid.

61 During its meeting of 7 December 1999 with the French delegation, including representatives of Scott, the Commission was still seeking to clarify the facts of the present case. It therefore took the decision 'in the interests of the proceedings' to authorise the production of supplementary information before the end of December

1999 (recital 11 to the contested decision). The parties are in dispute as to whether the Commission permitted only the French authorities to submit additional information or whether that offer was addressed to the entire delegation, including the representatives of Scott. However, the Court finds that the Commission has not established that it expressly restricted its offer to the French authorities alone during the meeting in question. In any case, it was as a result of that offer that Scott sent its letter of 24 December 1999 to the Commission.

62 The Court finds that the decision of the Commission to reject that letter was disproportionate and contradictory. First, in light of the fact that the Commission was prepared to accept additional information following on from the meeting in question and up until 31 December 1999, there was no reason in the circumstances to draw a distinction according to the source of the information and to reject the letter for the simple reason that it came from the recipient of the aid and not from the French authorities. It is worth noting in that regard that during the hearing the Commission confirmed that if the content of the letter of 24 December 1999 had been provided on a French Government letterhead, the document in question would have been accepted and taken into account in the contested decision. The Commission may not, on the one hand, permit the recipient of aid to participate in a meeting at which it authorises the supply of additional information and, on the other hand, then prevent it from producing such information. Secondly, the response of the Commission was contradictory in that it accepted similar information from the French authorities on 7 January and 21 February 2000 (see paragraph 13 above), that is to say well after the expiry of the deadline of 31 December 1999 laid down during the meeting in question.

63 In those circumstances, the reasons for rejecting the applicant's letter of 24 December 1999 cannot be accepted. That letter may therefore be relied upon by the applicant in contesting the legality of the contested decision, since its content had been presented to the Commission within a period which it had itself laid down before the end of the administrative procedure and indeed six months before the adoption of the contested decision.

Fourth plea: mistaken valuation of the aid

— Arguments of the parties

64 First, the applicant claims that the Commission erred in its assessment of the value of the property. In particular, the Commission's approach is erroneous in that it is based on the cost to the Member State of the undeveloped land and of the improvements and presupposes that those costs, less the price of FRF 31 million paid to Sempel, equals the value of the alleged aid.

65 With regard to the value of the undeveloped land, the applicant observes that the costs incurred by the City of Orleans up to 12 years before the date of the sale to the applicant do not give a reliable indication of the value of the undeveloped land in 1987. The applicant, referring to its letter of 24 December 1999 and the French Republic's letter of 21 February 2000, claims that the Commission ought to have taken as its basis the tax audit carried out by the French authorities, according to which the value of the undeveloped land in 1987 or 1988 was in fact only FRF 5.55 per square metre.

66 As for the Commission's argument that it could disregard the tax audit because it was carried out six years after the sale at issue, the applicant observes that the audit relates to the value of the undeveloped land at a time which is relevant for the purpose of the State aid procedure and that it is based on a valuation carried out at that time. The applicant adds that the valuation used for the purpose of the tax audit was appropriate for valuing the land in connection with the alleged State aid because it was clearly in the interest of the tax authorities to put as high a value as possible on the land in order to reduce the depreciation costs of the factory that the applicant could claim in calculating its future income tax.

67 The applicant submits that the alleged manifest error of assessment is not the Commission's error in not taking into account the 1988 valuation used in the course of the 1993 tax audit. Rather, the error is the Commission's reliance on data which were manifestly unreliable, whereas the applicant had provided valid alternative information which the Commission failed to consider.

68 According to the applicant, as the City of Orleans had owned the land in question since 1975 (recital 15 to the contested decision), this was not a case where, under a contract between a State body and an undertaking that was to receive State aid, the State body agreed to purchase the land in order to sell it to the undertaking at a price less than that paid by the State body. In that case, the valuation of any State aid would be based on the cost of the land to the State body. In the present case, on the other hand, the Commission ought to have determined the value of the land at the date on which it was sold to Scott.

69 As for the costs of improving the land, the Commission was wrong to treat Sempel's expenditure on improving the land as the value of the aid. It is clear from the Scott agreement that the local authorities agreed that Sempel would carry out work on the site for a maximum of FRF 80 million. In view of this ceiling, the Commission's assumption that 48/68 of every franc of Sempel's expenditure created a benefit for the applicant is manifestly erroneous and unfair.

70 In addition, the costs incurred by Sempel might have been wasted, or could have been incurred in doing work which was neither requested by Scott nor in its interest, or might have been spent on infrastructure work of the kind usually funded by the central government budget and which therefore does not constitute aid (see recitals 168 and 169 to the contested decision).

71 The applicant adds that, after improvement, the property was sold to the applicant for FRF 31 million (or FRF 64 per square metre). According to the applicant, that was the market price. On this point, the applicant notes that, in 1998, P&G purchased the 48-hectare plot in question together with the factory at the true market price, that is to say, FRF 27.653 million. The price paid by P&G is a better guide to the value of the property in 1987 than the factors which the Commission chose to take into account.

72 Second, the applicant claims that the Commission made manifest errors of assessment in calculating the amount of the aid.

73 In particular, according to the applicant, there was a calculation error in the contested decision which was corrected by the Commission after the application was lodged (see paragraph 15 above).

74 In addition, the Commission manifestly erred in its assessment by setting the rate of interest at 5.7% for the purpose of calculating the present value of the aid relating to the property. However, as the Commission valued the cost of the aid to the State, it ought to have used the interest rate paid in France by de facto public sector bodies such as Sempel, that is to say, a rate lower than the rate paid by the private sector for loans.

75 The Commission points out, first, that the applicant does not deny that the Commission complied with the general rules concerning information injunctions (see Article 13 of Regulation No 659/1999 and Joined Cases C-324/90 and C-342/90 *Germany and Pleuger Worthington* v *Commission* [1994] ECR I-1173, paragraph 26). The Commission claims that it was not obliged to serve the injunction directly on the applicant because the State aid procedure takes place exclusively between the Commission and the Member State. The applicant had an opportunity to submit

observations following the decision to open the procedure and, in any case, it had an opportunity to provide the missing information after the press release concerning the information injunction. Further, as will be shown below, the Commission stresses the fact that the absence of that information is not important in the present case.

76 The Commission says that it sought to determine the value of the undeveloped land and the improvements transferred to the applicant. In so far as the Commission proceeded on the basis of the costs paid by the Member State, it did so because it found that, in the present case, that approach gave a reliable indication of the probable value of the property as sold to the applicant.

77 As for the value of the undeveloped land, the Commission tried to establish its value as at 31 August 1987, the date of the agreement. Even though in the contested decision the Commission did not retroactively apply its Communication 97/C 209/03 on State aid elements in sales of land and buildings by public authorities (OJ 1997 C 209, p. 3) ('the 1997 Communication'), the Commission did apply its 'systematic and logical' approach to Article 87(1) EC, as set out in that communication. The Commission points out that the property in issue was not sold by way of an unconditional bidding procedure and that no independent expert valuation was obtained when it was sold to the applicant. In those circumstances, the Commission submits that the original cost of the land to the public authorities is an 'important indicator' of the value of the undeveloped land.

78 The French authorities informed the Commission three times in the course of the procedure that the average cost of the undeveloped land purchased between 1975 and 1987 was FRF 15 per square metre (footnote 8 to the contested decision). Although the authorities stated in their letter of 3 November 1997 that 30 hectares were purchased on 1 July 1975, 32.5 hectares on 13 December 1984 and 5.5 hectares on 18 September 1987, they chose not to give the price for each purchase. Neither the deeds of sale nor any other document evidencing the successive purchases of the undeveloped land by the City of Orleans were produced to the Commission in the

course of the administrative procedure. The Commission was never informed of the method used to calculate the average price of FRF 15 per square metre. Furthermore, it is not known for certain which area, out of the total of 68 hectares purchased by the City of Orleans, was finally transferred to the applicant to form the parcel of 48 hectares. In those circumstances, the Commission was justified in finding that the stated price of FRF 15 per square metre relates to a period extending up to 1987 and which could therefore be regarded as a sufficiently recent and thus reliable indicator of the minimum value of the land at the date of the Scott agreement.

79 In addition, according to point 2.2 of the minutes of the meeting of the City Council of Orleans of 27 May 1994, the original, 'very moderate', value of the undeveloped land was FRF 10.9 million, or FRF 23 per square metre. As the minutes were drawn up before the start of the present procedure by the authority which had itself granted the aid in question, the Commission considers that the minutes provided a reasonable and reliable basis on which to determine the value of the undeveloped land. The Commission adds that it is clear from the offer document prepared for the applicant by the City of Orleans that the 'value of the [undeveloped] land in March 1987 [was] 20 million francs' (or 50 hectares at FRF 40 per square metre).

80 Contrary to what the applicant claims, the French authorities did not invoke, in their letter of 21 February 2000, a valuation of the undeveloped land at FRF 5.5 per square metre on the basis of an alleged tax audit. According to the Commission, this was simply information provided to assist in the understanding of a table; the statement is not supported by any documentary evidence; it relates to 1993, some six years after the Scott agreement; and it contradicts other statements made by the French authorities in the course of the procedure and also the statement of the Orleans City Council in its 1994 minutes. It follows that the Commission did not err when it chose not to infer from the passage to which the applicant refers that the value of the undeveloped land had been proven to be FRF 5.5 per square metre.

81 The applicant claims for the first time in its reply that the letter of 24 December 1999 contains a valuation of the undeveloped land carried out in 1988 (see

paragraph 65 above). According to the Commission, the new factual assertions in the reply are inadmissible in the same way that the letter of 24 December 1999 is inadmissible. On this point, the Commission observes that even that letter does not reveal the slightest reference to a valuation carried out in 1988.

82 Apart from the fact that the letter is inadmissible, the Commission contends that it must be rejected in substance. First, the applicant produced no document corroborating the assertion that such a valuation was made in 1988 on the basis of the value of the undeveloped land in 1987 and gave no explanation of the legislation or regulations by virtue of which such a valuation is said to have been made. Second, the local tax authorities might have attributed essentially fictitious token values to the land for the purpose of assessing liability to local or other taxes, such values bearing little or no relation to the true market value of the land. Third, contrary to the applicant's submission, there is no reason to conclude that the tax authorities attributed the highest possible value to the land in order to limit as much as possible the value of the improvements, reduce the applicant's depreciation costs and thus increase the tax to be paid by the applicant. Fourth, the Commission observes that a valuation by the tax authorities does not necessarily exclude an element of State aid.

83 The Commission goes on to deny the applicant's assertion that the City of Orleans owned the undeveloped land from 1975. As mentioned at paragraph 78 above, the French authorities stated that 30 hectares were purchased on 1 July 1975, 32.5 hectares on 13 December 1984 (slightly more than two years before the offer to Scott) and 5.5 hectares on 18 December 1987, that is to say, after the conclusion of the Scott agreement and the Sempel agreement. Therefore, according to the reasoning of the applicant itself (see paragraph 68 above), this was a situation where the Commission was right to take account of the price which the State had been required to pay to acquire the undeveloped land. The Commission adds that France chose not to provide the Commission with details of the part of the land finally transferred to the applicant or with the method used to calculate the average price.

84 As for the improvements, the Commission did decide to order the French authorities to provide detailed explanations and documents showing precisely the work carried out by Sempel and its actual cost. The Commission was never given this information in the course of the administrative procedure.

85 Furthermore, the applicant does not explain the true value to it of the improvements. As explained at paragraph 77 above, where there is no appropriate bidding procedure and no independent expert valuation carried out before the negotiations leading to the sale, the cost to the Member State, namely FRF 89.1 million, gives a good indication of the value to the applicant of the improvements. In this connection, the Commission explains that it used Sempel's statement of final account, that is to say, the most reliable documentary evidence available (in this case audited), deducting Sempel's financing costs, VAT and public infrastructure costs by agreement with the French authorities (recitals 89 and 171 to the contested decision). The Commission determined the total value of the improvements on the basis of that statement. Contrary to the applicant's submission, the value of the improvements transferred to the applicant depends on the work actually carried out by Sempel, not on the terms of the Scott agreement.

86 The Commission observes that, according to the minutes of the City of Orleans Council meeting of 27 May 1994, the 'total cost of the operation' to the City of Orleans and the département of Le Loiret, including the land and the improvements, was either FRF 84 482 274 million or FRF 92 531 048 million (point 2.2).

87 The Commission considers that the purchase price paid by P&G in 1998 (see paragraph 71 above) did not give a better indication of the value of the improvements carried out in 1987 than the other evidence which it had in its possession and which is described in the contested decision. The Commission draws attention to the fact that, throughout the procedure, the applicant has complained of injustice on the ground that KC paid the full price when it acquired Scott but that, 'when Scott sold the assets', the purchase price did not include an amount reflecting

the aid element. This argument amounts to an admission that the sale price to P&G reflected an asset value heavily influenced by the very existence of the aid in the first place. The applicant cannot 'have its cake and eat it'. Either P&G 'paid' Scott for the aid, in which case there is no injustice in recovering the aid from Scott, or the price paid by P&G (and the price at which Scott was able and willing to sell) was from the beginning profoundly affected by the grant of the aid, in which case it cannot possibly serve as the basis for calculating the true value of the land and improvements in 1987.

88 The Commission also adds that it ordered the French authorities to provide more detailed information (recitals 97 and 168 to the contested decision).

89 Second, the Commission admits that there is a calculation error in the contested decision (see paragraph 73 above) and points out that, as a result, it took the measures necessary to correct the error (see paragraph 15 above).

90 The applicant's argument that the Commission's approach is inconsistent and that it ought to have used the rate of interest paid by Sempel (see paragraph 74 above) must be rejected. The Commission correctly used the rate of 5.6% laid down in the Notice on the method for setting the reference and discount rates for calculating the amount to be repaid under a recovery order relating to illegal State aid.

Findings of the Court

91 The concept of State aid is a legal one which must be interpreted on the basis of objective factors. Therefore, 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).

92 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, 19, and Joined Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia* v *Commission* [2003] ECR I-4035, paragraph 35), such as, among others, the supply of goods or services on favourable terms (Case C-126/01 *GEMO* [2003] ECR I-13769, paragraph 29; see also Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219, paragraphs 28 and 29).

93 When applied to the sale of land to an undertaking by a public authority, the effect of that principle is that it is necessary to determine particularly whether 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). When determining the market price of the land, the Commission must take into account the uncertainty surrounding such a determination, which is by nature retrospective, of such market prices (Case T-274/01 *Valmont* v *Commission* [2004] ECR II-3145, paragraph 45).

94 It is also settled case-law that the Commission's objective in ordering the repayment of illegal aid is to ensure that its recipient forfeits the advantage which it had enjoyed over its competitors on the market and to restore the situation existing prior to the payment of the aid (see, to that effect, *Tubemeuse*, cited in paragraph 58 above,

paragraph 66, and Case C-348/93 *Commission* v *Italy* [1995] ECR I-673, paragraph 27). Thus, even if the recovery of unlawful aid is implemented long after the aid in question was granted, it cannot constitute a penalty not provided for by Community law (Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraph 65, and Case T-55/99 *CETM* v *Commission* [2000] ECR II-3207, paragraph 164). In other words, decisions of the Commission ordering the recovery of State aid are measures designed to restore the previously existing situation and are not penal in character.

95 However, if the Commission, pursuant to its obligation to conduct a diligent and impartial examination of the case under Article 88 EC (see, to that effect, *Sytraval*, cited in paragraph 56 above, paragraph 62, and *Westdeutsche Landesbank Girozentrale and Land Nordrhein Westfalen* v *Commission*, cited in paragraph 56 above, paragraph 167), does decide to order the recovery of a specific amount, it must assess as accurately as the circumstances of the case will allow, the actual value of the benefit received from the aid by the beneficiary. In restoring the situation existing prior to the payment of the aid, the Commission is, on the one hand, obliged to ensure that the real advantage resulting from the aid is eliminated and it must thus order recovery of the aid in full. The Commission may not, out of sympathy with the beneficiary, order recovery of an amount which is less than the value of the aid received by the latter. On the other hand, the Commission is not entitled to mark its disapproval of the serious character of the illegality by ordering recovery of an amount in excess of the value of the benefit received by the recipient of the aid.

96 It is to be noted in this regard that the Commission may not be faulted because its assessment is approximate. In the case of a non-notified aid, it may be that the circumstances of the case are such that the Commission has difficulty in determining the precise value of the aid, particularly where a significant period of time has elapsed since the sale of the property in question. Those circumstances must be borne in mind when reviewing the legality of the Commission decision and particularly the issue as to whether the Commission conducted the Article 88(2) EC examination procedure in a diligent manner. Nevertheless, the essential issue as to

the determination of the value of the aid is a point of fact upon which the Community Court must carry out a comprehensive review. The mere fact that the Commission may have to resort to an approximate evaluation because of the circumstances of the case, does not mean that it had a margin of appreciation with regard to the determination of the amount to be recovered.

97 In the present case, the applicant stresses that the price which it paid for the property, namely, FRF 31 million, represented the market value of that asset in 1987, at the date of the conclusion of the Sempel agreement.

98 However, in the contested decision, the Commission concluded that the French authorities had sold the property to Scott at a preferential price and fixed the value of the property at FRF 70.588 million. The Commission came to this latter amount by relying on the costs incurred by the French authorities rather than by determining as of 1987 the actual market value of the property (see paragraphs 17 to 20 above).

99 The Commission submits that it was entitled, and even obliged, to rely on the costs incurred by the French authorities. On the one hand, this approach gave an accurate indication of the probable market value of the land and the improvements transferred to the applicant. On the other hand, the Commission stresses in the contested decision (see, in particular, recitals 97 to 99) that the French Republic did not cooperate during the administrative procedure, engaged in delaying tactics and, in particular, did not supply all the information necessary in order to determine the value of the State aid, despite the information injunction decision taken in accordance with Article 10(3) of Regulation No 659/1999 (see paragraph 10 above).

100 In those circumstances, it is for the Court to determine, in the light of the case-law cited at paragraphs 91 to 95 above, whether the Commission carried out with the necessary care its examination of the case by evaluating the factual elements in question and, particularly, to assess whether the value attributed to the property in issue by the Commission in the contested decision corresponds with sufficient accuracy to the market value in 1987.

101 It should be pointed out *in limine* that it is common ground that the Commission made a material error in its calculation of the amount of the aid in the original version of the contested decision, which it corrected after the present case was lodged. Specifically, in the original version of the contested decision, the Commission took as its starting-point the costs of the sale of the whole 68-hectare site and then deducted the FRF 31 million which had been paid by Scott. The Commission then multiplied the resulting sum by 48/68 to reflect the fact that Scott only purchased 48 hectares. According to this calculation, there was an aid of FRF 48.7 million (EUR 7.42 million) or, at present value, of FRF 100 million (EUR 15.2 million) in the form of a preferential land price.

102 However, the Commission's calculation was erroneous in that it only gave Scott credit for 48/68 of the FRF 31 million and not for the whole of that sum. The Commission admitted this error and, in the corrected version of the contested decision, concluded that the aid was FRF 39.58 million or, at present value, FRF 80.77 million.

103 In light of the fact that this mistake was corrected by the Commission after the introduction of the present case, it cannot of itself justify the annulment of the contested decision. However, this mistake does merit two observations. First, it raises the question as to how the Commission made an error of such gravity in the course of its inquiry. Secondly, and particularly, the occurrence of such an error reinforces the need for the Court to carefully examine all the other aspects of the calculation of the aid.

104 It is now necessary to examine the approach used by the Commission in the contested decision in determining the value of the property at issue.

— Errors of method and calculation in the contested decision

105 It should be noted, first of all, that when assessing the value of an aid in the form of a sale of property at an allegedly preferential price, the principle of the private investor operating in a market economy applies. Therefore, the value of the aid is equal to the difference between what the recipient in fact paid and what it would have had to pay in an arm's length transaction on the open market to buy an equivalent property from a vendor in the private sector at the time of the relevant transaction.

106 The Commission accepts in the present case that in determining the amount of the aid, it relied on the costs incurred by the French authorities (see paragraph 76 above). In fact, the Commission did not base the contested decision on any direct and independent estimate of the market value of the property in 1987. Instead, the Commission relied on the cost of the property to the authorities in question. Even though the costs incurred in purchasing and improving land may be a secondary or indirect indication of the value of the property, those factors are not the best proof of that value. Indeed, the private investor principle requires the Commission to assess the open-market sale value of the property in question as of August 1987. That price is not necessarily determined by the costs incurred by the vendor because it is in fact influenced by various factors, including supply and demand on the market at the time of the sale. In other words, the costs incurred by the French authorities over a 12-year period in purchasing the undeveloped land in issue (see paragraph 17 above) and in improving the land, do not necessarily represent its market value in August 1987.

107 The Commission justifies its recourse to a valuation based on the costs incurred by the French authorities by saying that those authorities, contrary to the 'systematic and logical' approach to Article 87(1) EC as subsequently set out in the Commission's 1997 Communication, did not sell the property in the context of an unconditional bidding procedure and did not obtain an independent expert valuation at the time of the sale to the applicant (see paragraphs 77 and 85 above). In those circumstances, the Commission considers that it was entitled to base its determination of the value of the property in issue on the costs incurred by the authorities in question.

108 However, the fact that the French authorities did not, in 1987, determine the value of the property through a bidding procedure or by obtaining an independent valuation before selling it to Scott, does not relieve the Commission of its own obligation, during the Article 88(2) EC investigation procedure, to use the most reliable method to determine the value of the property. Contrary to what the Commission contends, it did not follow the systematic and logical approach taken in the 1997 Communication but had immediate recourse to the historical acquisition and development costs incurred by the French authorities, without examining the possibility of obtaining an independent evaluation of the property (see paragraphs 137 and 138 below).

109 Moreover, even supposing that the Commission was entitled to rely exclusively on the costs incurred by the authorities in question in order to determine the value of the property, the Court finds that its approach with respect to the valuation of the unimproved site is mistaken in that, on the one hand, the Commission made a second calculation error and, on the other hand, it relied on inaccurate information with regard to the costs in question.

110 First, in the contested decision, the Commission states that the 68 hectares in question, 'which were agricultural land at the time, had been bought by the City [of

Orleans] between 1975 and 1987 for [FRF] 16 [per square metre] (EUR 2.4 [per square metre]), or a total price of FRF 10.9 million (EUR 1.7 million)' (recital 15). The Commission cites paragraph 2.2 of the City of Orleans Council's minutes of 27 May 1994 in that regard. However, it is clear from those minutes that the amount of FRF 10.9 million was the cost of the 48-hectare site transferred to Scott and not the cost of the 68-hectare site. Therefore, contrary to the Commission's calculations, the cost of the undeveloped land was FRF 23 per square metre, that is to say, nearly 50% more than FRF 16 per square metre. The Commission's calculation is, therefore, vitiated by an error in the calculation.

111 It follows that the Commission, in calculating the amount of aid received by Scott, should not have apportioned the amount of FRF 10.9 million between the 48-hectare site and the 20-hectare site (recital 170 to the contested decision), but should have allocated it in full to the 48-hectare site. The fact that this error works in Scott's favour does not make it excusable. The Commission was obliged to establish, as far as possible, the true value of the aid in question and to order the recovery of that exact amount (see the case-law cited at paragraph 95 above).

112 It follows that the Commission was also mistaken in concluding that its assessment of the value of the undeveloped land at FRF 16 per square metre was corroborated by the average purchase price for the 68 hectares of FRF 15 per square metre which had been submitted by the French authorities during the administrative procedure (recital 15 to the contested decision and footnote number 8).

113 It is to be presumed, therefore, that if the Commission had not erroneously calculated that the cost per square metre of the 48-hectare site was FRF 16 per square metre, it would have noted the significant discrepancy between the FRF 15 per square metre and FRF 23 per square metre and would, as a result, have questioned the reliability of the information relating to the cost of the undeveloped land.

114 Secondly, as for the use of inaccurate information with regard to the cost of the undeveloped land, the Commission relied, at least in part, on the average price of FRF 15 per square metre which the French authorities paid for the 68-hectare site which was purchased in three plots on 1 July 1975 (30 hectares), 13 December 1984 (32.5 hectares) and 18 September 1987 (5.5 hectares). In fact, the Commission noted repeatedly during the hearing that it used the average price of FRF 15 per square metre as the value of the undeveloped land.

115 However, the Commission never checked the purchase price of each of the plots in question. On the contrary, it used an average price for the three plots purchased in 1975, 1984 and 1987, which does not necessarily have the effect of leading to the real market value of the undeveloped land in 1987. In particular, and contrary to the Commission's contention (see paragraph 78 above), the cost of the plots of 30 hectares and 32.5 hectares, purchased respectively in 1975 and 1984, does not necessarily represent the market value of the undeveloped land in 1987 when calculated by reference to the private investor principle. It should be pointed out in that regard that, according to the Commission's 1997 Communication, '[t]he [initial] cost to the public authorities of acquiring land and buildings is an indicator for the market value unless a significant period of time elapsed between the purchase and the sale of the land and buildings' (point II.2.d). Even using the approach it set out in that communication, the Commission was certainly not entitled to rely on the acquisition costs of the plot which was purchased in 1975.

116 On the contrary, the purchase price of the 5.5-hectare plot purchased contemporaneously with the sale in issue in 1987 could have given an indication of the price per square metre of the undeveloped land in question, subject to clarification of the circumstances, and the conditions of the purchase in question. However, instead of trying to obtain this information (see paragraphs 151 to 153 below in that regard), the Commission relied on second-best information.

117 Further, the case file gives no indication as to which part of the 68-hectare site was sold to Scott and in particular, what the relationship is between the three plots purchased in 1975, 1984 and 1987 and the 48 hectares purchased by Scott in 1987.

118 The Commission stressed repeatedly in its pleadings (see paragraph 79 above), and particularly in its replies to the Court's written questions, that the figure of FRF 10.9 million referred to in the City of Orleans Council's minutes of 27 May 1994 related to the 'very moderate' initial value of the undeveloped land of 48 hectares, rather than to its original cost. Apart from the fact that the Commission mistakenly concluded in the contested decision that the sum of FRF 10.9 million related to the 68-hectare plot (see paragraph 110 above), it should be noted that paragraph 2.2 of the City Council minutes is, in fact, a very brief summary without detailed explanation of the 'cost of the operation', including the FRF 10.9 million figure for the purchase of the undeveloped land which was 'the initial value of the land'. The Commission itself indicated in the contested decision that this figure was the 'purchase price' or 'cost' of the land to the French authorities (recitals 20, 157, 161 and 170).

119 It should be added that the Commission did not have any information regarding the circumstances in which the three individual plots of the 68 hectares were purchased by the City of Orleans. The contractual terms of those purchases are also unknown. In particular, the Commission did not know whether each of the individual plots had been purchased by negotiation or as a result of a compulsory purchase order. In the latter hypothesis, it is at least possible that the amount of FRF 10.9 million included compensation for disturbance for the original owners, including for the cessation of agricultural activities on the land, as well as other purchase costs for the State which exceed the true market value of the undeveloped land in issue.

120 Moreover, it is clear from the case-file that the Commission did not focus on certain pertinent facts with regard to the valuation of the improvements to the land in question. In particular, according to the Scott agreement (see paragraphs 2 and 3 above), it was foreseen that Scott would pay a price of FRF 31 million for the property and the construction of a 'factory of 30 000 m^2' thereon. However, according to the City of Orleans Council's minutes of 27 May 1994, a 'factory of approximately 54 000 m^2 was constructed (instead of the 30 000 m^2 which had been initially planned)'. This discrepancy is not mentioned in the contested decision and was apparently not taken into account by the Commission in its examination of the

case. It may be assumed that, had it taken this fact into consideration, the Commission would have questioned the reliability of its determination of the per-square-metre value of the property.

121 Furthermore, it is clear from Article 4 of the Scott agreement that the applicant agreed to purchase the property for FRF 31 million and that Sempel would carry out work on the site for a 'maximum sum' of FRF 80 million. However, according to Sempel's statement of final account, which was sent by the French authorities to the Commission on 6 October 1999, the total cost to Sempel of the improvement operations was FRF 140.4 million. The fact that the improvement works cost FRF 140.4 million instead of the 'maximum sum of [FRF 80 million]' provided for in the Scott agreement, in other words an excess of 75.5%, should have made the Commission realise that Sempel's costs were not necessarily equivalent to a part of the market value of the property. In that connection, and as Scott points out by way of criticism of the Commission, Sempel's statement of final account is not mentioned in the decision to initiate the formal investigation procedure. The Commission should at the very least have asked Scott to explain the discrepancy between the figure of FRF 140.4 million and the figure of FRF 80 million envisaged by the Scott agreement.

122 There is nothing in the case-file to indicate whether Sempel's cost overruns are attributable to the construction of a factory nearly twice as big as that which had been originally agreed, whether they result from the inefficiency of Sempel or, indeed, from mere waste which would not have resulted in an increase in value of the property. When questioned on this point by the Court during the hearing, the parties were not able to explain whether the increase in the size of the factory was due to an attempt to give Scott an even greater State aid or whether it resulted from some error in the construction of the factory.

123 It follows from all of the foregoing that the determination by the Commission of the market value of the property in issue in 1987 was vitiated by errors.

— The information which was disregarded by the Commission

124 The Court points out that at the end of the formal examination procedure under Article 88(2) EC towards the beginning of 2000, the Commission was, or should have been, on notice of various other indications of the market value of the property in issue; including the existence of other valuations of that property. Nevertheless, and despite the fact that it only had inexact information regarding the purchase costs of the undeveloped land, the Commission did not sufficiently examine the relevance of that evidence.

125 First of all, in its letter of 24 December 1999, which should have been taken into account by the Commission (see paragraphs 51 to 63 above), Scott referred to the fact that the French tax assessment authorities had valued the undeveloped land at FRF 5.5 per square metre when it was sold by the City of Orleans to Sempel in 1987. The French authorities also referred to this valuation in their letter of 21 February 2000 (see paragraph 13 above). In 1993, the tax authorities used that same valuation when Scott was subject to a tax audit. As submitted by the Commission (see paragraph 82 above), the value used in the context of a tax audit does not necessarily show the 'market value' of land. However, the valuation in question was apparently a contemporaneous assessment of the undeveloped land by an independent authority which should, at the very least, have put the Commission on inquiry. In fact, the contested decision does not make any reference to the FRF 5.5 per square metre figure.

126 In the same letter, Scott also invokes a professional valuation of the property by the Galtier firm of consultants in 1996, that is to say, at a time before the Commission had opened the inquiry with regard to the alleged State aid granted to Scott, and according to which the property which Scott purchased for FRF 31 million from Sempel in 1987 was worth FRF 40.6 million. It should be noted in that regard that, in the contested decision, the Commission considered that the property was worth FRF 70.588 million (see paragraph 20 above). In its letter of 24 December 1999, Scott offered to produce a copy of the Galtier report to the Commission.

127 Furthermore, Scott invoked a valuation by the 'Commissaire aux apports' of Scott and KC appointed by the President of Nanterre Commercial Court, who had been requested in accordance with the law to assess the market value of only the assets which were sold to P&G (see paragraph 14 above). The Commissaire aux apports apparently attributed an even lower value than the Galtier firm of consultants to the assets in question. Scott attached two tables to its letter of 24 December 1999 which summarise the valuations of the various assets in question.

128 In the letter of 21 February 2000, the French authorities also made reference to the valuations in question and attached the same tables as those which had been annexed to Scott's letter of 24 December 1999. However, the Commission neither requested the French authorities to produce those valuations nor enquired about the circumstances which led to their preparation.

129 The Commission submits various justifications for not having considered whether those valuations were relevant in the present case.

130 In its pleadings, and also in its response to the questions put to it by the Court, the Commission points out that Scott did not submit any argument in the present case concerning the failure to take into consideration the reports in question and, as a result, the Court cannot annul the contested decision on this ground. Similarly, the Commission maintains that the applicant referred to the valuation by the French fiscal authorities only in its reply and that its argument in that regard is therefore inadmissible (see paragraph 81 above).

131 However, Scott did, in fact, raise an argument with respect to the Commission's mistaken assessment of the value of the property and equally stressed the lack of care taken by the Commission in its treatment of this file (see paragraphs 64 to 71 above). In light of the fact that the determination of the value of the property was

properly raised as an issue, the Court must exercise a full review in that regard (see paragraph 91 above). Moreover, the applicant was entitled to clarify its plea in that regard in its reply, including by referring to the valuation of the undeveloped land by the French fiscal authorities.

132 According to the Commission, the existence of these valuations was raised too late during the administrative procedure and it never even received the relevant documentary proofs. The Court cannot accept this argument. In light of the fact that the Commission permitted the French delegation to submit observations after the meeting of 7 December 1999, the Commission was obliged to fully examine those observations. In accordance with its obligation to diligently and impartially examine a file under Article 88 EC, the Commission should have assessed the information provided and should have requested the production of the valuations which Scott had, indeed, offered to provide to it.

133 The Commission claims that the valuations in question would not have been useful. On the one hand, the valuations in question could not have constituted a reliable foundation for the determination of the value of the aid granted to Scott because the improvements in question had been tailored for Scott itself. On the other hand, the valuations in question were carried out many years after the sale in issue and therefore they could not reliably have shown the value of the property.

134 Even though the valuations in questions were not carried out at the time of the sale in issue, they might have been useful in that they were the only, apparently independent, valuations which sought to fix the market value of the property using generally-accepted valuation standards. The Commission does not contest that the valuations in question were carried out by independent experts and does not question the methods used by the Galtier firm of consultants and by the Commissaire aux apports. In those circumstances, the Commission ought at least to have examined the content of the valuations in question in order to establish their evidentiary value.

135 It should be noted in that regard that the inquiry under Article 88(2) EC is designed to enable the Commission to be fully informed of all the facts of the case (see *Sytraval*, cited in paragraph 56 above, paragraph 38 and the case-law therein). The Commission is therefore under a duty to carry out the requisite consultations in order to be fully informed of the facts of the case before taking its decision (see, to that effect, Case 84/82 *Germany* v *Commission* [1984] ECR 1451, paragraph 13, and *Sytraval*, cited in paragraph 56 above, paragraph 39). In the present case, however, the Commission omitted to examine opinions which could have had probative value in determining the value of the property in issue.

136 It should be added that the mere fact that the other valuations of the property were brought to the attention of the Commission before the adoption of the contested decision shows neither that the FRF 31 million paid by Scott was the market value nor that the Commission's valuation of the property was incorrect. The relevance of these other valuations is that, when the contested decision was adopted, the Commission was on notice of a series of valuations of the property in issue which were incompatible with the valuation it had adopted. Since the Commission did not take the necessary measures to eliminate the uncertainty with regard to the value of the property, the Court finds that the conduct of the Article 88(2) EC inquiry was materially deficient in light of the Commission's obligation to carry out a diligent and impartial examination of the case.

137 Apart from the fact that the Commission ought to have requested the production of the valuations in question, it could also have used other means in order to obtain the necessary information in the present case. It should be noted, in that regard, that the Commission is entitled to engage 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 Joined Cases T-371/94 and T-394/94 *British Airways and Others and British Midland Airways* v *Commission* [1998] ECR II-2405, paragraph 72). Thus, it was within the Commission's power to obtain an expert report on the value of properties in the locality in question in August 1987. Such an expert report would have been particularly useful in the present case because of the inherent uncertainty involved in the Commission's determination of the market value of property, which is necessarily a retrospective process (see paragraph 93 above).

138 Even though the expert's valuation would necessarily have taken place more than 10 years after the sale in issue, a local property expert with knowledge of the market in 1987, and in particular of sales of equivalent property on the open market, could have provided guidance to the Commission by assessing the compatibility of the latter's valuation with information available to the expert.

139 The Court also notes that both Scott and the French Republic, in their letters of 24 December 1999 and 21 February 2000 respectively, in support of their claim that the property was worth FRF 31 million in 1987, informed the Commission that the property in issue had been sold by Scott/KC to P&G in 1998 for FRF 27.6 million (EUR 4.2 million). The Commission has not contested that the sale to P&G was an open market transaction. The Court finds that this sale, which took place a few years after the sale in issue, could have been a useful indicator of the value of the property.

140 However, the Commission did not consider it necessary to check the correctness of the figure in question (recital 163 to the contested decision). The Commission notes that, in light of losses related to the operation of the site and the decision to close the factory in January 1998, KC was prepared to accept a low price. In particular, according to the Commission, KC had already invested in the site in question such that those costs should be regarded as sunk costs. Accordingly, the Commission concluded that the prices were not comparable because KC was in a very different position in 1998 to that of the French authorities in 1987 who already knew that their investment would result in a loss of some FRF 60 million (EUR 9.2 million) (recitals 164 to 166 to the contested decision).

141 It is worth recalling in that regard that, according to the Commission, the property in issue was worth FRF 70.588 million in 1987. Even supposing that KC was willing to accept a low price for the property, according to the Commission's analysis, KC sold the property for a loss of FRF 42.9 million, that is to say, a loss equal to 60% of the value of the property. In those circumstances, the Commission should have examined more seriously a sale price of FRF 27.6 million in 1998 which was, in any

case, relatively close to the market value of the property according to Scott. The fact that KC received less for the property in 1998 than Scott paid for it in 1987, despite the general increase in property values, tends to support the argument that the price paid by Scott in 1987 was the market value.

142 It follows that the Commission ignored information which could have usefully informed its determination of the market value of the property in issue in August 1987.

— The information injunction

143 The Commission submits that, even if the value which it attributed to the aid in the form of the preferential property price was inaccurate, it was entitled and even obliged to use that valuation because of the French authorities' failure to cooperate and to provide more precise information. In those circumstances, the Commission concludes that it was permissible to base the contested decision on the available information (recitals 97 to 99 to the contested decision).

144 It is settled case-law that the Commission is empowered to adopt a decision on the basis of available information when it is faced with a Member State which fails to comply with its obligation of cooperation and refuses to provide information requested from it for the purpose of assessing the compatibility of aid with the common market (Case C-301/87 *France* v *Commission* [1990] ECR I-307 ('*Boussac*') paragraph 22, and *Germany and Pleuger Worthington* v *Commission,* cited in paragraph 75 above, paragraph 26). Before taking such a decision, however, the Commission must comply with certain procedural requirements. In particular, it must order the Member State to provide it, within a time-limit it lays down, with all the documentation, information and data necessary in order that it may adopt a decision in conformity with Article 88 EC. It is only if the Member State,

notwithstanding the Commission's order, fails to provide the information requested that the Commission is empowered to terminate the procedure and make its decision, on the basis of the information available to it, on the question of whether or not the aid is compatible with the common market (*Boussac*, paragraphs 19 and 22). These criteria have been incorporated in Article 5(2), Article 10(3) and Article 13(1) of Regulation No 659/1999. It should be noted in particular that it is clear from Article 10(3) of Regulation No 659/1999 that the decision requiring the Member State to provide information should 'specify what information is required'.

145 It should also be borne in mind that, according to Article 6(1) of Regulation No 659/1999, 'the decision to initiate the formal investigation procedure shall summarise the relevant issues of fact and law, shall include a preliminary assessment of the Commission as to the aid character of the proposed measure and shall set out the doubts as to its compatibility with the common market'. That decision and its publication in the *Official Journal of the European Union* have the effect of informing the Member State and other interested parties of the facts on which the Commission intends to base its decision. It follows that, if those parties believe that some of the facts contained in the decision to initiate the formal investigation procedure are incorrect, they must inform the Commission thereof during the administrative procedure or risk not being able to challenge those facts at the litigation stage (see, to that effect, with respect to the Member State, Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 31).

146 In accordance with the principles laid down in the case-law and by regulation as described in paragraphs 144 and 145 above, where there is no information to the contrary from interested parties, the Commission is empowered to base itself on the facts it has available at the time it adopts its final decision, even if they are incorrect, provided that the factual elements in question were the subject of an information injunction issued by the Commission to the Member State to provide it with the necessary information. If, however, it fails to order the Member State to provide it with information on the facts on which it intends to rely, it cannot subsequently excuse any errors of fact by stating that, at the time of adopting the decision ending

the formal investigation procedure, it was entitled to rely only on the information it had at that time (Case T-318/00 *Freistaat Thüringen* v *Commission* [2005] ECR II-4179, paragraph 88).

147 Therefore, when the Commission bases a decision on the information available as to certain facts, without having complied, in respect of these specific facts, with the procedural requirements established by the case-law and laid down in Regulation No 659/1999, the Court is entitled to review the issue as to whether taking those facts into account was likely to give rise to an error of assessment vitiating the legality of the contested decision (*Freistaat Thüringen* v *Commission*, cited in paragraph 146 above, paragraph 89).

148 Furthermore, the Commission's entitlement to take a decision on the basis of the available information presupposes that the information in question is reliable and credible.

149 It follows that the failure of the Member State to cooperate does not mean that the Commission's conduct is thereby exempt from all judicial review by the Community courts. The Commission must use all of its powers in order to obtain, so far as possible, the relevant information and must act with due care. In view of the fact that a recovery order such as the one at issue in the present case can have repercussions for third parties, the Commission must also use all of the powers available to it to avoid the possibility that the failure of a Member State to cooperate could have negative and unwarranted consequences for those third parties (see paragraph 59 above).

150 In the present case, the Commission was not entitled to adopt a decision on the basis of the available information in accordance with the case-law and Article 13 of Regulation No 659/1999 because the parties had effectively furnished conflicting information to it which it effectively refused to take into consideration (see paragraphs 125 to 128 above).

151 Furthermore, the Commission did not use its information injunction power to insist on the production of certain relevant information with regard to the value of the aid. In particular, the French authorities were never ordered by virtue of an information injunction under Article 10(3) of Regulation No 659/1999 to produce specific information regarding the purchases of the undeveloped land in issue by the City of Orleans (see paragraphs 114 to 119 above).

152 By letter of 2 May 1999, the Commission specifically requested the French authorities to 'produce the different sale contracts (including, in particular, the prices paid for the land) between the City of Orleans and the six companies which purchased plots on the remaining 20 hectares [Scott only purchased 48 of the 68 hectares]'. In the information injunction of 8 July 1999, the Commission effectively reused that same formulation at Article 1(d). However, the Commission never ordered the French authorities to produce the sale contracts relating to the original purchases of the undeveloped land by the City of Orleans or to specify which part of the 68 hectares had been transferred to Scott. Moreover, the Commission did not request more precise information with regard to the purchase price of the three plots which formed the total of 68 hectares purchased in 1975, 1984 and 1987, that is to say, the 'critical information' according to the Commission's defence.

153 During the hearing, the Commission stressed repeatedly that the price of the third plot which was purchased in 1987 and contemporaneously with the sale in issue, could have given a very useful indication of the market value of the property, while insisting on the fact that the French Republic and the applicant were to blame for its not having more information in this regard (see paragraphs 78 and 83 above). However, the Commission could have ordered the French Republic to produce specific information in that regard and, in the absence of such an injunction, was not entitled to base its assessment on the cost of the undeveloped land.

154 The Commission did order the French Republic to produce all 'documents, information and useful data in order to allow the Commission to examine the compatibility with Article 87 [EC] of the measures accorded to Scott'. However, that kind of general request is not sufficiently precise for the purposes of Article 10(3) of Regulation No 659/1999.

155 It follows from all the above that the Commission was not entitled to adopt a decision on the basis of available information under Article 13(1) of Regulation No 659/1999.

— Conclusion

156 Finally, the Court would point out in general terms that by the end of the Article 88(2) EC procedure, the Commission was, or should have been, on notice of various contradictory indications as to the market value of the property in issue. With regard to the undeveloped land, the Commission had been informed by the French authorities that the average purchase price was FRF 15 per square metre. The Commission concluded that this amount corroborated its erroneous calculation, based on the minutes of the Orleans City Council meeting of 27 May 1994, that the purchase price was FRF 16 per square metre (see paragraph 112 above). On the basis of those minutes, the Commission should have come to a valuation of FRF 23 per square metre (see paragraphs 110 to 112 above). The Commission was also informed of a valuation of the undeveloped land at FRF 5.5 per square metre which had been drawn up by the French fiscal authorities (see paragraph 125 above). It is also appropriate to note, for the sake of completeness, that the Commission requested the Court during the present proceedings to take judicial notice of the fact that it appears from the initial offer of the City of Orleans to the applicant that the undeveloped land was, in fact, worth FRF 40 per square metre (see paragraph 79 above).

157 As for the developed property, it is common ground that Sempel sold it to Scott for FRF 31 million. The Galtier firm of consultants valued the property at FRF 40.6

million in 1996 and the Commissaire aux apports attributed an even lower value to it (see paragraphs 126 and 127 above). The property was then sold by KC to P&G in 1998 for FRF 27.6 million (see paragraph 139 above). However, as mentioned above, the Commission did not review those valuations and decided instead, in coming to its valuation of FRF 70.588 million, to rely on the costs for the Member State.

158 In the circumstances, the Court finds that there was significant uncertainty with regard to the value of the property in issue and that the Commission failed to conduct the examination procedure under Article 88(2) EC with due care and, in particular, failed to carry out a sufficiently detailed examination of the value of the property. Furthermore, it must be noted that the Commission's failures have very serious consequences for the recipient of the aid because of the time which elapsed between the date of the sale in issue and the contested decision, and in particular, the imposition of interest on the amount to be recovered.

159 As a result, the fourth plea must be upheld and Article 2 of the contested decision must be annulled in so far as it concerns the aid granted in the form of a preferential price for the property in issue, without its being necessary to examine the remaining pleas and arguments raised by the applicant, including the admissibility of the argument relating to the use of a compound interest rate in order to calculate the present value of the aid (see paragraph 31 above).

Costs

160 In its judgment in Case T-366/00 *Scott* v *Commission*, cited in paragraph 28 above, the Court of First Instance reserved the costs.

161 In its judgment in Case C-276/03 P *Scott* v *Commission,* cited in paragraph 30 above, the Court of Justice ordered that the Commission and Scott should bear their own costs relating to the procedure on appeal.

162 It therefore falls to the Court to rule in the present judgment on all of the costs relating to the proceedings before this Court.

163 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the defendant has been unsuccessful in most of its pleadings, it will be ordered, in addition to bearing its own costs, to pay the applicant's costs, in accordance with the form of order sought by it.

164 The French Republic shall bear its own costs, in accordance with the first subparagraph of Article 87(4) of the Rules of Procedure.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. Annuls Article 2 of Commission Decision 2002/14/EC of 12 July 2000 on the State aid granted by France to Scott Paper SA/Kimberly-Clark to the

extent that it concerns the aid granted in the form of a preferential price for the property referred to in Article 1;

2. Orders the Commission to bear its own costs and to pay those incurred by the applicant relating to the proceedings before the Court of First Instance;

3. Orders the French Republic to bear its own costs relating to the proceedings before the Court of First Instance.

Cooke García-Valdecasas Labucka

Delivered in open court in Luxembourg on 29 March 2007.

E. Coulon J.D. Cooke

Registrar President