

## Case T-366/00

Scott SA

v

**Commission of the European Communities**

(State aid — Land sale price — Decision ordering the recovery of aid incompatible with the common market — Errors in the calculation of the aid — Obligations of the Commission with regard to the calculation of the aid — Rights of the recipient of aid — Regulation (EC) No 659/1999 — Article 13(1))

Judgment of the Court of First Instance (First Chamber), 29 March 2007 . . . II - 802

### Summary of the Judgment

1. *State aid — Commission decision — Assessment of the legality by reference to the information available at the time of adoption of the decision*
2. *State aid — Administrative procedure — Obligations of the Commission — Diligent and impartial assessment*  
(Art. 88 EC)

3. *State aid — Administrative procedure — Determination of the amount of aid to be recovered*  
(Art. 88 EC)
4. *State aid — Meaning*  
(Arts 87 EC and 88(2) EC)
5. *State aid — Administrative procedure — Obligations of the Commission — Diligent and impartial assessment*  
(Art. 88(2) EC)
6. *State aid — Administrative procedure — Possibility for the Commission to base its decision on the information available — Condition*  
(Art. 88(2) EC; Council Regulation No 659/1999)

1. 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. Consequently, factual arguments which were unknown to the Commission and which were not notified to it during the administrative procedure may not be relied upon before the Court. However, it does not follow from that 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 Commission's decision where that proof had been properly submitted to the Commission during the administrative procedure prior to the adoption of the decision, if the Commission had

excluded it for reasons which cannot be justified.

(see paras 45, 46)

2. Although the procedure for review of State aid governed by Article 88 EC accords no special role to the recipient of the aid as compared with all interested parties, and even though the

recipient of aid does not have the status of a party to the procedure, the Commission, in the light of its obligation to conduct a diligent and impartial examination of the case, might be obliged, in certain circumstances, to take into account the observations of the recipient of aid submitted after the expiry of the time laid down to do so by the decision to open the procedure.

This is so where the recipient provides information following a meeting between the Member State concerned and the Commission on an aspect it considers to be important, controversial and difficult to clarify given how far back in time the facts date and the advantage granted to the recipient, in which its representatives took part and during which the Commission, in the interests of the proceedings, authorised the production of supplementary information within a fresh time-limit laid down by it.

Commission may not, out of sympathy with the beneficiary, order recovery of an amount which is less than the value of the aid received nor mark its disapproval of the serious character of the illegality by ordering recovery of an amount in excess of that value. It must therefore assess the actual value as accurately as the circumstances of the case will allow. Although particular circumstances which allowed for only a partial assessment of the exact value of the aid may be taken into consideration in the assessment of the legality of the Commission's decision, 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, and the mere fact that the Commission may have to resort to an approximate evaluation does not mean that it has a margin of appreciation with regard to the determination of the amount to be recovered.

(see paras 94-96)

(see paras 54-63)

3. The objective in ordering the repayment of illegal aid is not to impose a penalty not provided for by Community law, but 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. Thus, the

4. When assessing the value of an aid in the form of a sale of property at an allegedly preferential price, the private investor principle requires an assessment of the open-market sale value of the property at the time. During the Article 88(2) EC investigation procedure, the Commission is bound to use the most reliable method to determine the value of the property. The use of historical acquisi-

tion and development costs incurred by the vendor, in this case the relevant public authorities, do not satisfy that obligation in the place and stead of an independent evaluation of the property value at the time the transfer agreement is concluded. The sale price of the property 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.

governed by Article 88(2) EC, to carry out its investigation by conducting a diligent and impartial examination of all the evidence in the case, so as have complete information.

(see paras 135, 136)

(see paras 106-108)

6. In the area of State aid, in accordance with the principles laid down in the case-law and by Regulation No 659/1999 laying down detailed rules for the application of Article [88 EC], 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.

5. Where the Commission is informed that its valuation of the amount of the aid it calculated in applying the calculation method it did is contradicted by various other assessments, based on different methods, and does not take the necessary measures to eliminate the uncertainties surrounding its own assessment, it fails in its obligation in the formal investigation procedure of State aid

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 where it contradicts information brought to its knowledge by parties such as the recipient of the aid.

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.

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 of aid found to be illegal 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 such third parties.

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, which is not the

(see paras 146-149)