

# Case T-109/01

Fleuren Compost BV

v

Commission of the European Communities

(Actions for annulment — State aid — Aid granted by the Kingdom of the Netherlands to manure-processing undertakings — Scheme approved by the Commission for a fixed period — Aid granted before or after the approved period)

Judgment of the Court of First Instance (Second Chamber, Extended Composition), 14 January 2004 . . . . . II - 132

## Summary of the Judgment

1. *State aid — Administrative procedure — Obligation on the Commission to give the interested parties an opportunity to submit their comments — Right of the aid recipient to a fair hearing — Limits*  
(Art. 88(2) EC)

2. *State aid — Commission decision — Duty of care on the Member State granting the aid and the recipient of that aid as regards the communication of all relevant information*  
(Art. 88(2) EC)
3. *State aid — Investigation by the Commission — No observations from interested parties — No effect on the validity of the Commission's decision — Obligation to consider of its own motion information which has not been expressly invoked — No such obligation*  
(Art. 88(2) EC)
4. *State aid — Commission decision — Judicial review — Limits — Legality to be assessed in the light of the information available when the decision was adopted*  
(Arts 88(3) EC and 230 EC)
5. *State aid — Prohibition — Derogations — Aid which can be regarded as compatible with the common market — Commission's discretion — Judicial review — Limits*  
(Art. 87(3) EC)
6. *Acts of the institutions — Statement of reasons — Obligation — Scope — Commission's decision defining an aid measure — Commission's decision finding non-notified aid incompatible with the common market*  
(Arts 87(1) EC, 88(3) EC and 253 EC)
7. *State aid — Recovery of illegally granted aid — Application of national law — Possible legitimate expectations on the part of the recipients — Protection — Conditions and limitations*  
(Arts 87 EC and 88 EC)

1. During the review phase provided for in Article 88(2) EC, the Commission must give the interested parties an opportunity to submit their comments.

In that respect, publication of a notice in the *Official Journal of the European Communities* is an appropriate means of informing all the parties concerned

that a procedure has been initiated. That communication is intended to obtain from the persons concerned all the informations needed to guide the Commission with regard to its future action. Such a procedure also guarantees to the other Member States and the sectors concerned an opportunity to make their views known.

appropriate, the recipient of the aid to adduce evidence to show that the aid is compatible with the common market and, if necessary, to plead specific circumstances relating to recovery of the aid already paid should the Commission require its repayment.

However, under the procedure for reviewing State aid, interested parties other than the Member State responsible for granting the aid cannot themselves lay claim to an exchange of arguments with the Commission such as that initiated in regard to that Member State. In that respect, of the interested parties, the recipient of the aid does not play a special role pursuant to any provision governing that procedure, given that the procedure is not initiated against it, by virtue of which it could rely on rights as extensive as the rights of the defence as such.

(see para. 45)

(see paras 40-44)

2. Since the decision to initiate the procedure provided for in Article 88(2) EC contains an adequate preliminary analysis by the Commission setting out the reasons for its doubts regarding the compatibility of State aid with the common market, it is for the Member State concerned and, where appro-

3. While Article 88(2) EC requires the Commission to seek comments from interested parties before it reaches a decision on State aid, it does not prevent the Commission from determining aid to be incompatible with the common market in the absence of any such comments. Moreover, it cannot be complained that the Commission failed to take into account matters of fact or of law which could have been submitted to it during the administrative procedure but which were not, since it is under no obligation to consider, of its own motion and on the basis of prediction, what information might have been submitted to it.

(see paras 48, 49)

4. In an action for annulment based on Article 230 EC the lawfulness of the Community measure concerned must be assessed in the light of the matters of fact and of law existing at the time when that measure was adopted.

authority but must restrict itself to examining whether the authority's assessment is vitiated by a manifest error or misuse of powers.

(see para. 90)

Therefore, the legality of a decision concerning State aid is to be assessed in the light of the information available to the Commission when the decision was adopted. A Member State therefore cannot rely before the Community judicature on matters of fact which were not put forward in the course of the pre-litigation procedure laid down in Article 88 EC.

6. The statement of reasons required by Article 253 EC must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure, so as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to exercise its power of review.

(see paras 50, 51, 96)

5. For the purposes of applying Article 87(3) EC, the Commission enjoys a wide discretion, the exercise of which involves assessments of an economic and social nature which must be made within a Community context. The Community judicature, in reviewing whether such a power was lawfully exercised, cannot substitute its own assessment for that of the competent

The Commission must therefore state why it considers that a State measure falls within the scope of Article 87(1) EC. In that respect, even in cases where the circumstances in which the aid has been granted show that it is liable to affect trade between Member States and to distort or threaten to distort competition, the Commission must at least set out those circumstances in the statement of the reasons for its decision.

The Commission is not, however, bound to demonstrate the real effect

of aid already granted. If it were, that requirement would ultimately favour Member States which grant aid in breach of the duty to notify laid down in Article 88(3) EC, to the detriment of those which do notify aid at the planning stage.

(see paras 119-121)

7. In view of the mandatory nature of the supervision of State aid by the Commission under Article 88 EC, undertakings cannot, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article. A diligent operator should normally be able to determine whether that procedure has been followed, even if the State in question was responsible for the illegality of the decision to grant aid to such a degree that its revocation appears to be a breach of good faith.

While, in order to challenge its repayment, the recipients of unlawful aid

may, in the procedure for the recovery of the aid, plead exceptional circumstances which could legitimately have given rise to a legitimate expectation that the aid was lawful, those recipients can rely on such exceptional circumstances, on the basis of the relevant provisions of national law, only in the framework of the recovery procedure before the national courts, and it is for them alone to assess the circumstances of the case, if necessary after obtaining a preliminary ruling on interpretation from the Court of Justice.

Finally, any hopes wrongly raised by the authorities of the State distributing the aid, without the Commission even being informed of them, cannot under any circumstances affect the lawfulness of the decision to recover the aid. If that were possible, Articles 87 and 88 EC would be deprived of all practical force, since national authorities would thus be able to rely on their own unlawful conduct or negligence in order to render decisions taken by the Commission under the provisions of the Treaty ineffectual.

(see paras 135-137, 143)