

JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)

29 March 2007 *

In Case T-369/00,

Département du Loiret (France), represented by A. Carnelutti, lawyer,

applicant,

supported by

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

intervener,

v

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

defendant,

* Language of the case: French.

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 Company, 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 ('Bouton Brochard Scott'), which took over the business of Bouton Brochard. Bouton Brochard Scott was renamed Scott SA in November 1987. Throughout the material period, Scott SA was involved in household and sanitary paper production.

- 2 On 31 August 1987, the City of Orleans (France), the département du Loiret (France) and Scott concluded an agreement for the sale to Scott 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 applicant 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 Scott.

- 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 applicant, the City of Orleans and Sempel ('the Sempel agreement'), the City of Orleans sold 68 hectares to Sempel for a token price of FRF 1. In addition, it appears from Article 4 of the Scott agreement and Article 12 of the Sempel agreement that Sempel was to sell the 48 hectares together with a factory warehouse 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 public 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 Scott of the 48-hectare plot on La Saussaye industrial estate.

- 5 Following publication of this report, the Commission received a complaint, by letter dated 23 December 1996, about the preferential conditions on which the City of Orleans and the département du Loiret had sold the 48-hectare plot to Scott and the rate at which the water treatment levy had been set for that undertaking.

- 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, concerning the information and details requested.
- 7 Scott's shares were bought by Kimberly-Clark Corp. in January 1996. Kimberly-Clark announced the closure of the plant in January 1998. The plant's assets, namely the site and the paper mill, were bought by Procter & Gamble (P & G) in June 1998.
- 8 By letter of 10 July 1998, the Commission informed the French authorities that it had taken a decision on 20 May 1998 to initiate the procedure provided for in Article 88(2) EC and invited them to submit their comments and to answer certain questions. The interested parties were informed that the procedure had been initiated and invited to submit any observations on the measures in question, 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).

Contested decision

- 9 Following the formal examination procedure, the Commission on 12 July 2000 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 13 below), the Commission served a corrigendum to the contested decision on the French Republic on 2 March 2001. Article 1 and recitals 172, 217 and 239(b)(a) to the contested decision were amended accordingly.

10 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.'

- 11 As regards the imposition of interest, the Commission considered (recital 239 to the contested decision):

‘... in order to re-establish the economic conditions with which the company would have had to contend if it had not been granted incompatible aid, the French authorities must take all necessary steps to eliminate the advantages deriving from the aid and recover it from the beneficiary.

The aid must be recovered in accordance with the procedures of French law, and must include the interest which has accrued between the date on which it was granted and the date on which it is actually repaid, calculated using the reference rate for determining the net grant equivalent of regional aid in France’.

- 12 Thus, the present-day value of the aid to be recovered calculated by the Commission, namely FRF 80.77 million (see paragraph 10 above), takes account of the application of interest from the date on which the unlawful aid was granted until the date of the contested decision. The rate of that interest corresponds to the reference rate used by the Commission to measure the aid element of public subsidies in France, namely ‘5.7% as from 1 January 2000’ (recitals 172 and 239 to the contested decision).

Procedure and forms of order sought by the parties

- 13 By application lodged at the Registry of the Court of First Instance on 4 December 2000, the applicant brought the present action.

- 14 By application lodged at the Registry on 30 November 2000, registered as Case T-366/00, an application also seeking partial annulment of the contested decision was brought by Scott.
- 15 By a document lodged at the Registry on 19 March 2001, Scott applied for leave to intervene in the present proceedings in support of the form of order sought by the applicant.
- 16 By order of the President of the Fifth Chamber, Extended Composition, of 10 May 2001, Scott was granted leave to intervene in the present case in support of the form of order sought by the applicant.
- 17 Upon application by Scott, the Court decided to adjudicate first on the limitation issue raised by Scott in Case T-366/00 on the basis of Article 15 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), before any discussion of the substance of the case.
- 18 By judgments of 10 April 2003, the Court of First Instance dismissed the applications introduced by the applicant and Scott 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.
- 19 Pending the judgment of the Court of Justice on Scott's appeal against the judgment in *Scott v Commission*, cited in paragraph 18 above, the Court of First Instance suspended the proceedings in the present case and also in Case T-366/00.

- 20 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 the judgment in Case T-366/00 *Scott v Commission*, cited in paragraph 18 above.
- 21 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 20 above. In its response of 24 November 2005, the applicant confirmed that it maintained its substantive pleas in support of its action.
- 22 Upon hearing the report of the Judge-Rapporteur, the Court decided to reopen the oral procedure and, as a measure of organisation of procedure, requested the parties to reply in writing to a series of questions. The parties complied with this request.
- 23 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 25 October 2006.
- 24 The applicant claims that the Court should:
- annul the contested decision in so far as it declares unlawful the State aid granted in the form of the preferential land price and orders repayment of the sum of FRF 39.58 million (EUR 6.03 million) or, at present value, FRF 80.77 million (EUR 12.3 million);
 - order the Commission to pay the costs.

25 The Commission contends that the Court should:

- dismiss the application as unfounded;
- order the applicant to pay the costs.

26 Scott, intervening in support of the form of order sought by the applicant, claims that the Court should:

- declare the application well founded;
- order the Commission to pay the costs.

Law

27 In support of its action, the applicant relies on two pleas in law. The first alleges breach of the principles of non-retroactivity of Community law and legal certainty and infringement of Articles 87 EC and 253 EC in that the Commission applied 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 second plea alleges infringement of Article 87(1) EC and also of Article 253 EC. The second plea is divided into five parts, concerning the following aspects of the contested decision:

- publicity relating to the land sale in question;

- the tax revenues generated by the establishment of Scott;

- the expenditure incurred in the general interest;

- an error in calculating the aid;

- the capitalisation of the interest.

28 It is appropriate to deal with the fifth part of the second plea first.

Arguments of the parties

29 The applicant claims that the Commission infringed Article 87(1) EC and Article 253 EC by capitalising the interest in the contested decision. It asserts, in that regard, that the restoration of the status quo does not entail the capitalisation of the interest, but the charging of the annual interest decided upon. It had not been the Commission's consistent practice to capitalise the interest. Furthermore, the Commission failed to state its reasons for capitalising the interest and thus infringed Article 253 EC.

30 Scott accepts that it may be appropriate, in certain cases, to impose compound interest in order to eliminate the advantage obtained by the beneficiary, for example where the beneficiary has invested the amount of an interest-free loan granted to it by a Member State and would achieve a net profit after complying with a recovery

order which did not impose compound interest. However, that specific case does not correspond with the present case and the contested decision does not claim that it does.

31 Scott further asserts that, by providing that recovery is to take place in accordance with the national rules, Article 2 of the contested decision has the consequence that the interest applicable to the period from the date of the contested decision to the date of recovery of the aid will be calculated at a simple rate. If it is correct to calculate thus the interest applicable to that period, it is even more correct to calculate the interest at a simple rate for the period between the date on which the aid was granted and the date of the contested decision.

32 The Commission observes that, in accordance with a consistent line of decisions, where aid is declared to be incompatible with the common market, effective competition must be restored (recital 218 to the contested decision). To that end, the advantage which the beneficiary has actually enjoyed must be wholly eliminated. In the Commission's submission, by expressing the nominal value of the aid at present value (see recital 172), the contested decision took into account the real advantage, which can be equated to the grant of an interest-free loan, which the beneficiary enjoyed during the relevant period. The present-day value represents the equivalent of the financial advantage resulting from the availability of the capital free of charge for a certain period and reflects the cost that Scott would have borne if it had borrowed that amount from a bank in 1987 until the date of adoption of the contested decision. The Commission emphasises that the approach which it took in the contested decision is consistent with that approved by the Court of First Instance in Case T-459/93 *Siemens v Commission* [1995] ECR II-1675, paragraph 97, and that the decision is therefore reasoned to the requisite standard.

33 The Commission observes that the present-day value used in the contested decision already includes the advantage which the beneficiary enjoyed between the time when the aid was granted, in 1987, and the date of adoption of the decision, so that all that remains is to take account of interest for the period between the date of adoption of the decision and the date of actual recovery.

Findings of the Court

- 34 The Court will first examine the applicant's argument that the Commission did not sufficiently state the reasons for its decision to determine the present-day value of the aid by applying a compound interest rate to the original amount.
- 35 As is clear from settled case-law, the statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Case C-367/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63, and Case C-301/96 *Germany v Commission* [2003] ECR I-9919, paragraph 87).
- 36 In the present case, the contested decision uses an interest rate of 5.7% without specifying that it is a compound rate. It is only by carrying out a calculation by reference to the sum of FRF 80.77 million indicated as the 'present-day value' of the aid estimated at FRF 39.58 million when it was granted in 1987 that the reader is able to conclude that a compound rate was used. The Commission does not indicate its reasons for charging a compound rate rather than a simple rate. Nor does it indicate how charging an interest rate makes it possible to express as a present-day value in 2000 the value of aid in the form of a sale of land at a preferential price in 1987.

- 37 The applicant, supported by Scott, claims that as the capitalisation of interest constituted an innovation in the Commission's practice, the Commission ought to have stated the reasons on which its decision was based in that regard.
- 38 The Court notes that at the date of the contested decision there was no rule stating that the rate of interest provided for in recovery orders would be compound and that the Commission was not in the practice of imposing compound interest in its recovery orders.
- 39 In the first place, as regards the absence of such a rule, it must be borne in mind that the power conferred on the Commission to adopt decisions ordering recovery of unlawful aid is now provided for in Regulation No 659/1999 (see, in that regard, *Département du Loiret v Commission*, cited in paragraph 18 above, paragraphs 50 and 51). It follows from Article 14(2) of Regulation No 659/1999 that 'aid to be recovered pursuant to a recovery decision shall include interest at an appropriate rate fixed by the Commission'. The Commission confirmed in its written answers to the questions put by the Court that that provision does not specify whether simple interest or compound interest is to be applied.
- 40 In effect, in its communication on the interest rates to be applied when aid granted unlawfully is recovered published in the *Official Journal of the European Union* of 8 May 2003 (OJ 2003 C 110, p. 21), namely three years after the date of adoption of the contested decision, the Commission noted that the question had arisen as to whether the interest applicable in the event of recovery of unlawful aid ought to be simple or compound and that it considered it 'necessary to clarify urgently its position on the matter'. It thus informed the Member States and the parties concerned that, in any decision ordering the recovery of unlawful aid that it might adopt in the future, it would apply the reference rate on a compound basis. It follows by contrary inference that before the adoption of that communication the Commission's position as regards the use of a compound interest rate in recovery orders was not self-evident.

- 41 The only regulatory basis for the use of a compound interest rate is Article 11(2) of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 (OJ 2004 L 140, p. 1), which provides that ‘the interest rate shall be applied on a compound basis until the date of the recovery of the aid’.
- 42 In the second place, the Commission has not established that it was its practice to impose compound interest in its recovery orders at the time of the contested decision. It does not invoke any decision to that effect in the contested decision; and in answer to a written question put by the Court with a view to establishing its practice at the material time, the Commission was unable to invoke a single decision adopted before the contested decision in which compound interest was imposed.
- 43 It follows that the imposition of compound interest in the present case was the first manifestation of a new and important policy of the Commission which the Commission wholly failed to explain. In the contested decision, the Commission ought, first, to have indicated that it had decided to capitalise the interest and, second, to have justified its approach (see, to that effect and by analogy, Case 73/74 *Fabricants de papiers peints v Commission* [1975] ECR 1491, paragraphs 31 to 34). Contrary to the Commission’s contention (see paragraph 32 above), the reference to *Siemens v Commission*, which concerns generally the importance of charging interest, does not provide the detail required in this case.
- 44 It should be added that, in the light of the time which elapsed between the date of the sale in issue and the contested decision, namely 13 years, the imposition of compound interest had significant financial consequences on the amount of the aid to be recovered (see paragraph 10 above). Accordingly, the applicant and the intervener had a particular interest in knowing the reasoning underlying the imposition of compound interest. In those circumstances, the Commission’s obligation to state the reasons on which the contested decision was based was all the greater.

- 45 Furthermore, the reasons stated by the Commission are insufficient as regards the use of the 5.7% interest rate. In the contested decision, the Commission merely describes it as the reference rate used to measure the aid element of public subsidies in France since 1 January 2000 and refers, in a footnote, to a table drawn up by itself, used to measure the 'subsidy equivalent' of aid, and indicating the reference and update rates fixed for the Member States (recitals 172 and 239).
- 46 According to the Commission notice on the method for setting the reference and discount rates (OJ 1997 C 273, p. 3), the 'indicative rate is defined as the five-year interbank swap rate, ... plus a premium'. It seems that that rate of 5.7% applicable for 2000 reflected a reference rate for a five-year period. However, the contested decision does not in any way justify the use of such a rate for a period of 13 years, from the date of the sale in issue, in 1987, to the date of the contested decision, in 2000.
- 47 Nor does the 1997 notice contain any indication as to whether the rates were to be simple or compound. Until the date of the contested decision, the table in question was used for the application of simple interest rates. No explanation is given in the contested decision as to whether those rates were apt for the purpose of calculating compound interest.
- 48 The Commission claims that the use of a compound rate for the purpose of expressing the present value of the initial value of the subsidy is justified by the need to restore effective competition by eliminating the advantage received by the beneficiary (see paragraph 32 above).
- 49 Such justification presupposes, first, that the beneficiary still retains such an advantage at that date and, second, that the form of the aid in issue can be assimilated to an interest-free loan of a sum corresponding to the value of the initial subsidy. The contested decision wholly fails to address those points.

50 In that regard, it will be recalled that, according to the contested decision, the aid granted to Scott in 1987 took the form of the conveyance of developed land at a preferential price, that is to say, at a price below the then market price. It is by no means obvious that, in such circumstances, expressing the present-day value of the estimated value of the initial subsidy by applying a rate of compound interest of 5.7% during the period in question will achieve a figure corresponding to the advantage which the beneficiary enjoyed as owner of the asset in 2000. In effect, the Commission stated that the advantage granted in 1987 consisted in the conveyance of the developed land subsidised to the extent of 56% (FRF 39.58 million of an estimated value of FRF 70.588 million). The contested decision does not explain how Scott still held such an advantage at the time of its adoption.

51 Furthermore, it is common ground that Scott ceased its operations on La Saussaye industrial estate and that the land and the factory were sold to P & G in 1998 (see paragraph 7 above), for a price of FRF 27.6 million according to the French authorities (recital 162 to the contested decision). Although the Commission did not consider it necessary to check that figure, it does not deny that that sale took place in normal market conditions and it analyses that sale in the contested decision and accepts the possibility that the property was sold for FRF 27.6 million (recitals 163 to 166). In fact, that price was below not only the value which the Commission had determined in 1987 (FRF 70.588 million) but also the price of FRF 31 million that Scott had paid to Sempel.

52 In those circumstances, and in the absence of any statement of reasons in the contested decision concerning the link between the presumed advantage held by Scott in 2000 and the sum of FRF 80.77 million, the Court finds it impossible to exercise its power of review of the question as to whether the use of a compound interest rate results in a present-day value corresponding to the value of the advantage that must be eliminated.

53 Last, the contested decision contains an obvious inconsistency which was not explained by the Commission. Although the Commission calculated the present-day

value of the aid in the contested decision by using a compound rate, Article 2 of the decision, in providing that recovery is to take place in accordance with the national rules (see paragraph 10 above), has the consequence that the interest attaching to the period between the date of the contested decision and the date of recovery of the aid is to be calculated at a simple rate. The Commission provided no justification for applying interest on a compound basis until the date of the contested decision and then interest on a simple basis up to the time of the recovery of the aid. Furthermore, although Scott pointed out that inconsistency (paragraph 31 above), the Commission did not even attempt to justify its approach in that regard in these proceedings.

- 54 It follows that the contested decision did not state sufficient reasons. The fifth part of the second plea must therefore be upheld and, accordingly, the contested decision must be annulled in so far as it concerns the aid granted in the form of a preferential price for the land in issue, without its being necessary to examine the other pleas and arguments put forward in support of the action.

Costs

- 55 In its judgment in *Département du Loiret v Commission*, cited in paragraph 18 above, the Court of First Instance reserved the costs.
- 56 It therefore falls to the Court to rule in the present judgment on all of the costs relating to the proceedings before this Court.
- 57 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in

the successful party's pleadings. Since the defendant has been unsuccessful, it must be ordered to bear its own costs and to pay the costs incurred by the applicant and by Scott, in accordance with the form of order sought by them.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

- 1. Annuls Commission Decision 2002/14/EC of 12 July 2000 on the State aid granted by France to Scott Paper SA/Kimberly-Clark in so far as 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 and by Scott.**

Cooke

García-Valdecasas

Labucka

Delivered in open court in Luxembourg on 29 March 2007.

E. Coulon

J.D. Cooke

Registrar

President

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