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

31 May 2006 *

In Case T-354/99,

Kuwait Petroleum (Nederland) BV, established in Rotterdam (Netherlands), represented by P. Mathijsen, lawyer,

applicant,

supported by

Kingdom of the Netherlands, represented initially by M. Fierstra, and subsequently by H. Sevenster, acting as Agents,

intervener,

* Language of the case: Dutch.

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

defendant,

APPLICATION for partial annulment of Commission Decision 1999/705/EC of 20 July 1999 on the State aid implemented by the Netherlands for 633 Dutch service stations located near the German border (OJ 1999 L 280, p. 87),

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

composed of J. Pirrung, President, A.W.H. Meij, N.J. Forwood, I. Pelikánová and S. Papasavvas, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 22 November 2005,

gives the following

Judgment

Background to the case

1 From 1 July 1997, the excise duties levied by the Netherlands on petrol, diesel and liquid gas were increased to NLG 0.11, NLG 0.05 and NLG 0.08 per litre respectively. In Article VII of the Wet tot wijziging van enkele belastingwetten c.a. (Law amending various fiscal laws, Stbl. 1996, p. 654) of 20 December 1996, the Netherlands legislature, aware that that increase would have detrimental consequences for Dutch operators of service stations located, in particular, along the German border, provided for the adoption of temporary measures intended to mitigate the disparity between the levels of excise duty payable after that increase and the amount of excise duty levied on light oils in Germany.

2 Accordingly, on 21 July 1997, the Kingdom of the Netherlands adopted the Tijdelijke regeling subsidie tankstations grensstreek Duitsland (Temporary Regulation on subsidies payable to service stations located near the German border, Stcrt. 1997, p. 138), as amended by ministerial decree of 15 December 1997 (Stcrt. 1997, p. 241; 'the Temporary Regulation'). That regulation, which came into force with retroactive effect from 1 July 1997, provided for the grant of a subsidy of NLG 0.10 per litre of petrol to operators located within 10 km of the border between the Netherlands and Germany, and of NLG 0.05 per litre of petrol to operators located between 10 and 20 km from that border.

3 In order to comply with the conditions in Commission Notice 96/C 68/06 on the *de minimis* rule for State aid (OJ 1996 C 68, p. 9) ('the *De Minimis* Notice'), the Temporary Regulation set a ceiling on the subsidies equivalent to ECU 100 000 over a period of three years (from 1 July 1997 to 30 June 2000 inclusive), i.e. the ceiling laid down in the Notice. Moreover, the financial aid provided for by the Temporary Regulation was aid per applicant, a term which covered any natural or legal person, or successor in title thereto, on whose behalf, or at whose risk, one or more service stations were operated.

4 The Netherlands Government subsequently proposed an amendment to the Temporary Regulation designed to provide that the subsidy no longer be granted per applicant but per service station ('the Draft Amendment').

5 The Netherlands Government, wishing to verify that the Draft Amendment to the Temporary Regulation complied with the *De Minimis* Notice, informed the Commission of that amendment by letter of 14 August 1997, stating that 'in the event that the Commission considers that the [proposed] scheme must nevertheless be notified pursuant to Article 88(3) EC, the Netherlands Government requests that this letter be deemed to be such a notification' ('the Conditional Notification').

6 Following several exchanges with the Netherlands authorities, and fearing that the Temporary Regulation and the Draft Amendment did not adequately prevent cumulations of aid of the kind prohibited by the *De Minimis* Notice, the Commission decided, in June 1998, to initiate the procedure provided for in Article 88(2) EC (OJ 1998 C 307, p. 10) ('the decision to initiate the procedure').

7 At the end of that procedure, the Commission adopted Decision 1999/705/EC of 20 July 1999 on the State aid implemented by the Netherlands for 633 Dutch service stations located near the German border (OJ 1999 L 280, p. 87) ('the contested decision'), by which it declared that part of the disputed aid was incompatible with the common market and that another part of that aid was covered by the *de minimis* rule.

8 In the contested decision, the Commission classified the service stations in six categories:

— dealer-owned/dealer-operated ('Do/Do') service stations, where the dealer owns the service station, which he operates at his own risk, and is linked to the oil company by an exclusive purchasing agreement which does not contain a price management system (PMS) clause;

— company-owned/dealer-operated ('Co/Do') service stations, where the dealer rents the service station, which he operates at his own risk, and is linked, as a tenant, to the oil company by an exclusive purchasing agreement without a PMS clause;

— service stations in respect of which the Netherlands authorities did not provide any information or provided only partial information;

— company-owned/company-operated ('Co/Co') service stations, where the service station is operated by employees or subsidiaries of the oil company, who carry no business risk and are not free to choose their suppliers. The Commission divided this category into two subcategories: 'pure' Co/Co service

stations, where the service station is owned and operated by the oil company, and 'de facto' Co/Co service stations, where the same dealer has applied for aid more than once and therefore appears several times on the list of recipients;

— Do/Do service stations linked to the oil company by a PMS clause, under which, in certain circumstances, the oil company bears part of the cost of forecourt discounts made by the operator; and finally

— Co/Do service stations linked to the oil company by a PMS clause.

9 As regards the first two categories, the Commission considered that there was no risk of cumulation of aid and that the *de minimis* rule was applicable (Article 1 of the contested decision).

10 For the third category, the Commission considered that a prohibited cumulation of aid could not be ruled out. Therefore, in its view, the aid granted to the service stations in question was incompatible with the common market and with the functioning of the Agreement on the European Economic Area (EEA) inasmuch as it could exceed EUR 100 000 per recipient over a period of three years (point (a) of the first paragraph of Article 2 of the contested decision).

11 As regards the fourth category, the Commission also considered that grants of aid incompatible with the common market and the functioning of the EEA Agreement to companies owning and operating more than one service station could not be ruled out, inasmuch as, given the possible cumulation of aid, that aid could exceed

EUR 100 000 per recipient over a period of three years (point (b) of the first paragraph of Article 2 of the contested decision).

12 Finally, as regards the last two categories, the Commission also considered that, for the same reasons, there was a risk of cumulation of aid to the oil companies concerned. In its view, the supplier profited from either all or part of the aid granted to the operators since those operators were no longer able to invoke the PMS clause or could only do so to a more limited extent (points (c) and (d) of the first paragraph, and the second paragraph, of Article 2 of the contested decision).

13 The Commission considered that the measures taken by the Netherlands Government which were not covered by the *de minimis* rule constituted aid within the meaning of Article 87(1) EC (see recitals 88 to 93 in the preamble to the contested decision) and that that aid was not covered by any of the derogations provided for in Article 87(2) and (3) EC (see recitals 94 to 102 in the contested decision). It therefore declared that aid to be incompatible with the common market (Article 2 in the contested decision) and ordered its recovery (Article 3 of the contested decision).

14 In the annex to the contested decision, the Commission published a list of the 769 applicants for subsidies pursuant to the Temporary Regulation and listed, in respect of each of them, where applicable, the name of an oil company under the heading 'Oil company/Label contract' and the name of an oil company under the heading 'Oil company/Label group'. The applicant's name is contained under those two headings in respect of 16 service stations.

15 By letter of 6 October 1999, the Netherlands Ministry of Finance sent the applicant a list of 13 service stations among the 16 service stations in respect of which a dual reference to 'Q8' was to be found in the annex to the contested decision, as well as

the amount of subsidies received by each of those 13 stations under the Temporary Regulation, stating that that 'information [was] sufficient to give [the applicant] an overview of the consequences of the [contested] decision which were of interest to it'. In the contested decision, two of those service stations, identified by the numbers 333 and 347, are classified in the category 'de facto' Co/Co service stations (point (b) of the third paragraph of Article 2), four service stations, identified by the numbers 419, 454, 459 and 483, are classified in the category Do/Do with PMS clause (Article 2(c)) and seven service stations, identified by the numbers 127, 211, 230, 271, 387, 494 and 519, are classified in the category Co/Do with PMS clause (Article 2(d)).

Procedure and forms of order sought

16 Between 20 September 1999 and 19 January 2000, 74 actions against the contested decision were brought before the Court of First Instance.

17 On 9 October 1999, the Kingdom of the Netherlands brought an action against the contested decision before the Court of Justice, registered under Case C-382/99.

18 By an application lodged with the Registry of the Court of First Instance on 10 December 1999, the applicant brought the present action against the contested decision, of which it became fully aware only on 6 October 1999.

19 By order of 9 March 2000, the President of the First Chamber (Extended Composition) of the Court of First Instance, having heard the parties, stayed the proceedings in the present case pursuant to Article 77(a) of the Rules of Procedure of the Court of First Instance, pending a decision of the Court of Justice in Case C-382/99.

20 On 13 June 2002, the Court of Justice gave judgment in Case C-382/99 *Netherlands* v *Commission* [2002] ECR I-5163, by which it dismissed the action. Accordingly, proceedings resumed in the present case.

21 At the request of the Court of First Instance, the applicant lodged its observations on the consequences to be drawn for the present case from the judgment in *Netherlands* v *Commission*, cited in paragraph 20 above.

22 The composition of the Chambers of the Court of First Instance changed at the beginning of the new judicial year and the Judge-Rapporteur was assigned to the Second Chamber (Extended Composition), to which this case was itself accordingly assigned.

23 By order of 25 September 2003, having heard the parties, the President of the Second Chamber (Extended Composition) of the Court of First Instance granted the Kingdom of the Netherlands leave to intervene in support of the applicant.

24 By letter of 20 February 2003, the Commission informed the Court of First Instance of the situation concerning the recovery of the aid in question. That letter indicated that, with respect to the oil companies, the Netherlands authorities, in agreement with the Commission, had established a general method of calculation to determine

the amount of recoverable subsidies. It was for those companies to submit their observations on that method of calculation.

25 At the request of the Court, the applicant, by letter of 27 August 2003, lodged its observations on the Commission's letter of 20 February 2003.

26 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber, Extended Composition) decided to open the oral procedure.

27 The parties presented oral argument and their replies to the questions put by the Court at the hearing on 22 November 2005.

28 The Kingdom of the Netherlands stated that it would not file a statement in intervention or submit oral argument at the hearing.

29 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

30 The Commission contends that the Court should:

— dismiss the action as inadmissible in part;

— dismiss it as unfounded for the remainder;

— order the applicant to pay the costs.

Law

The scope of the action

The service stations concerned

31 The Court finds that the grounds for annulment put forward by the applicant in support of its form of order sought relate solely to the 13 service stations identified in the letter of 6 October 1999 from the Netherlands authorities (see paragraph 15 above), that is to say, service stations 127, 211, 230, 271, 333, 347, 387, 419, 454, 459, 483, 494 and 519. It follows that the applicant is seeking partial annulment of the contested decision only in so far as it relates to those 13 service stations.

32 It appears, however, to have been established at the hearing that the Netherlands authorities, following agreement with the Commission, are no longer asking the applicant to repay, on the basis of the contested decision, the subsidies received for seven of the service stations, namely stations 230, 333, 347, 419, 454, 459 and 519.

33 According to settled case-law, an action for annulment brought by a natural or legal person is not admissible unless the applicant has an interest in seeing the contested measure annulled (Joined Cases T-480/93 and T-483/93 *Antillean Rice Mills and Others* v *Commission* [1995] ECR II-2305, paragraph 59, and Case T-141/03 *Sniace* v *Commission* [2005] ECR II-1197, paragraph 25). For an applicant to be entitled to pursue an action seeking the annulment of a decision, he must retain a personal interest in the annulment of the contested decision (see the order of the Court of 17 October 2005 in Case T-28/02 *First Data and Others* v *Commission* [2005] ECR II-4119, paragraphs 36 and 37, and case-law cited).

34 In the present case, in so far as the Netherlands Government is no longer asking the applicant to repay the subsidies received for those seven service stations, the applicant is no longer subject to any legal obligation on the basis of the contested decision — read in the light of the agreement between the Netherlands Government and the Commission following their collaborative effort to resolve the difficulties in implementing that decision — as regards those seven stations. Since it is no longer subject to any obligation to repay, the annulment of the contested decision would not procure any advantage for the applicant in that regard. The applicant therefore no longer has any standing to bring proceedings in respect of those stations.

35 Accordingly, the present action must be declared inadmissible in as far as it concerns service stations 230, 333, 347, 419, 454, 459 and 519.

The scope of the judgment of the Court of Justice

36 The Commission, whilst leaving it for the Court of First Instance to rule on the matter, submits that the applicant's pleas in law and arguments put forward previously before the Court of Justice in Case C-382/99 and rejected in the judgment in *Netherlands* v *Commission*, cited in paragraph 20 above, are inadmissible.

37 That argument must be rejected on two grounds. First, the staying of the proceedings before the Court of First Instance pursuant to the third paragraph of Article 54 of the Statute of the Court of Justice pending resolution of a case before the Court of Justice where, as in the present case, the validity of the same act is at issue does not remove the Court of First Instance's jurisdiction over the case in which proceedings have been stayed and it retains full and exclusive jurisdiction to recommence hearing the case when the stay of proceedings is ended. Second, the principle of upholding the rights of the defence does not permit pleas in law validly put forward before one court to be rejected by another court before which the applicant in that action has not had the opportunity to appear and present argument.

38 Although the principle of the sound administration of justice, to the manifestation of which the parties contribute by their conduct, may lead the parties to restrict their action and their defence to those questions which raise genuine differences from those already decided upon by the Court of Justice, it is not for the Court of First Instance to act of its own motion to impose those restrictions in the place and stead of those parties by dismissing as inadmissible certain pleas in law previously put forward before the Court of Justice. However, a non-constructive attitude on the part of a party is likely to result in costs that are unnecessary for the resolution of the dispute and may be taken into account when costs are awarded.

39 However, although the Court may have previously held that a stay of proceedings was necessary given that the validity of the same act was at issue both before it and before the Court of Justice, and although it goes without saying that the answer

provided by the Court of Justice in that context must be respected, it is nevertheless for the Court of First Instance, which judges the merits of the case, to ascertain whether the solution given by the Court of Justice may be applied to the case before it in the light of any differences of fact or of law (see, to that effect, Case T-43/98 *Emesa Sugar* v *Council* [2001] ECR II-3519, paragraph 73). If there are differences, it is for it to rule on the question of whether those differences call for a solution different from the one upheld by the Court of Justice. If there are no such differences and if one of the parties insists on putting forward pleas in law identical to those already rejected by the Court of Justice, the Court of First Instance may also decide to reject those pleas, by reasoned order, as being manifestly unfounded.

Substance

40 The applicant initially put forward four pleas in law: first, errors of fact; second, disregard of the concept of State aid; third, incorrect application of the *de minimis* rule; and, fourth, infringement of the principle of sound administration.

41 The Court takes formal notice of the fact that the applicant, in its observations submitted following the judgment in *Netherlands* v *Commission*, cited in paragraph 20 above, withdrew its plea relating to incorrect application of the *de minimis* rule.

42 The Court finds that the applicant's first plea relates solely to service stations 230, 333, 347, 419, 454, 459 and 519. Since the action has been held to be inadmissible in respect of those stations (see paragraph 35 above), that inadmissibility extends to this plea.

43 It is therefore necessary only to consider the two remaining pleas, alleging, first, disregard of the concept of State aid and, second, infringement of the principle of sound administration.

Disregard of the concept of State aid

— Arguments of the parties

44 The applicant states that the Commission disregarded the concept of State aid in finding that it had been established that there had been an advantage conferred on it, that State resources had been used and that there was a distortion of competition.

45 It acknowledges that the managers of the five service stations 127, 211, 371, 387 and 494 belonging to it, and the owner of service station 483, concluded an exclusive supply contract with it containing a PMS clause.

46 By the first part of its plea, the applicant submits that the Commission interpreted its PMS clause incorrectly. In the contested decision, the Commission found that the oil companies' intervention was mandatory by reason of the PMS clauses. The applicant states that, for its part, it decides completely freely whether or not to intervene in favour of the operator. Thus, Article 6 of its 'Price management system' lays down the conditions for allowing the applicant 'the possibility' of bearing part of the cost of the forecourt discount. Moreover, the last paragraph of that article

provides that the applicant may, at any time, 'unilaterally' amend its clause. It states that it uses that clause freely when it finds it useful for defending its commercial interests. The Commission is therefore wrong in stating that the applicant was obliged to apply that system.

47 The applicant asks the Court to leave aside the Court of Justice's general considerations regarding PMS clauses and to concentrate instead on the applicant's specific clause. Moreover, in *Netherlands* v *Commission*, cited in paragraph 20 above, the Court stated merely that the Commission assumed that the scheme provided indirect aid to oil companies solely on the ground that the contracts contained such clauses. The applicant asks the Court to order the Commission to produce the text of the PMS clauses on which it based its finding.

48 By the second part of its plea, the applicant states that no advantage was conferred on it by the aid. It voluntarily granted various forms of compensation to the six service stations concerned on the basis of its PMS clause for a total amount of NLG 1 083 058, as demonstrated by the documents annexed to its application. Instead of finding that the aid in question conferred an advantage on the applicant, the more appropriate finding would be that the service stations in question received both the aid and the compensation provided for by the clause applied by the applicant. Even if the Commission's reasoning was correct, *quod non*, the Netherlands authorities could be required only, in the event of partial compensation, to recover part of the 'de facto' compensation.

49 The applicant does not accept the Commission's reasoning that the factual arguments are inadmissible on the ground that they were not put forward during the administrative procedure. It states that that procedure takes place primarily between

the Commission and the Member State concerned. The other parties concerned are to be taken into account only if they have been the subject of specific information, which has not been the case in regard to the applicant.

50 By the third part of the plea, the applicant states that, since the aid in question has not had any impact on it, there has been no State resource in respect of it. Moreover, there cannot be any distortion of competition because, even if one were to assume that the Commission's reasoning were correct, all suppliers, both those in the Netherlands and their subsidiaries operating in Germany, would receive the same type of advantage. Lastly, because of the *de minimis* rule, trade between Member States has not been affected.

51 The Commission submits that the analysis elaborated in the contested decision is well founded, as confirmed by the judgment in *Netherlands* v *Commission*, cited in paragraph 20 above.

— Findings of the Court

52 By the first part of its plea, the applicant states, in essence, that its PMS clause is not mandatory in nature and therefore does not correspond to the clause as described in the contested decision.

53 The Court finds, as a preliminary point, that the Commission had certain knowledge of the applicant's PMS clause for the purposes of adopting the contested decision. The Commission had in its possession 574 exclusive purchasing agreements linking the service stations concerned to the oil companies (recital 7 in the contested decision), most of which included a PMS clause. Moreover, in the applicant's case, its

clause was referred to specifically in the contested decision (recitals 28, 31, 49 and 50). Furthermore, the Commission provided, in the annex to its statement in defence, four exclusive purchasing agreements concluded by the applicant and some of the six service stations with which the applicant admits to having agreed on a PMS clause (service stations 127, 211, 371 and 387). Accordingly, there are no grounds for upholding the applicant's request that the Commission be ordered to produce the text of the PMS clauses on which it relied.

54 In the contested decision, the Commission defines PMS clauses in the following manner:

'The [PMS] clause usually stipulates that the oil company may bear part of the cost of the forecourt discount granted by the dealer in so far as domestic and/or international market conditions make a temporary or long-term adjustment of these discounts desirable or necessary. Consultations between the parties are often necessary before such reductions are introduced' (recital 84 in the contested decision).

It found that that clause 'obliges the supplier to compensate the dealer, at least in part, for losses incurred as a result of ... increases in excise duty' (recital 85 in the contested decision). It concluded that '[b]y granting aid to dealers as compensation for losses of income resulting from increases in excise duty on light oil in the Netherlands, the Dutch Government [was], in fact, compensating the supplier in full or in part for its obligation under [that] clause' (recital 85 in the contested decision).

55 The contested decision thus indicates that the PMS clause forms part of the contractual obligations linking the service stations and the oil companies, although that clause is not necessarily overriding and/or automatic in nature.

56 In its judgment in *Netherlands* v *Commission*, cited in paragraph 20 above, despite the applicant's argument that PMS clauses differ in their content and, in the majority of cases, do not create an unconditional obligation on oil companies to contribute to forecourt discounts (paragraph 57), the Court of Justice found that the aid granted to service stations had the effect of releasing the oil companies from their obligation to bear all or part of the costs of the forecourt discounts offered by their dealers to prevent loss of market share (paragraph 66). That tends to indicate that the Court of Justice considered that the PMS clauses analysed by the Commission were mandatory in nature, although it did not rule directly on whether that obligation was unconditional in nature.

57 That analysis concords with that of Advocate General Léger, who used the same formula as the Court of Justice in his Opinion in *Netherlands* v *Commission*, cited in paragraph 20 above ([2002] ECR I-5167). He demonstrated the soundness of that formula by stating that, in the absence of aid, he considered it 'highly likely' that the companies would exercise the PMS clauses at the request of their distributors so as to avoid losing market share (paragraph 129 of the Opinion).

58 Next, it is appropriate to consider the applicant's clause. According to the text of that PMS clause provided by the applicant:

'The PMS allows [the applicant], in certain specific situations [below], the possibility of bearing part of the cost of the forecourt discount granted by the dealer ...

The situations where [the applicant] is prepared to bear the participation referred to in the PMS tables are as follows:

(a) Actual probability of loss of turnover.

(b) There must definitely be positive consultations with [the applicant], that is, [the applicant] must participate only following consultations with [the applicant's] inspector in charge of the dealer's area and if that inspector agrees to [the applicant's] participation.

(c) The dealer may call for [the applicant's] participation only after it has been established in writing, see annex.

...

[The applicant] may amend the PMS unilaterally (in whole or in part) at any time during the contract period.'

59 It follows that the applicant reserves the right not to exercise its PMS clause. Thus, that clause gives the applicant only 'the possibility' of compensating part of the cost of the forecourt discount. Likewise, the operator may 'call for' the application of that clause only when the applicant's participation in compensating the cost of the forecourt discount has been established in writing. Moreover, the fact that the applicant reserves the right to amend that clause unilaterally reinforces the

impression that the applicant exercises full control over it. The basic conclusion to be drawn is that that clause may be exercised only with the agreement of the applicant.

60 Nevertheless, the documents provided by the applicant indicate that it exercised the PMS clause, at least during the period from 1 January to 15 October 1997, in all of the contracts which contained that clause. It follows that the applicant actually intended to exercise its PMS clause.

61 The Court also notes that, as acknowledged by the applicant, its clause indeed corresponds to the description given in recital 84 in the contested decision. Moreover, the applicant's clause in effect obliges it to compensate at least part of the loss incurred by the other contracting party by reason of increases in excise duties, as referred to by the Commission in recital 85 in the contested decision. As acknowledged by the applicant at the hearing, the PMS clause is most certainly intended to apply in the event of loss of market share, which can occur inter alia when excise duties are increased. That has also been demonstrated by the applicant's exercise of that clause in the present case. It follows that the applicant's PMS clause must be viewed as being mandatory for the purposes of the contested decision.

62 Thus, the Commission was entitled to find that, in the light of the applicant's clause, '[b]y granting aid to dealers as compensation for losses of income resulting from increases in excise duty on light oil in the Netherlands, the Dutch Government [was], in fact, compensating the supplier in full or in part for its obligation under [that] clause (recital 85 in the contested decision). Accordingly, the Commission was right to include service stations 127, 211, 371, 387, 483 and 494 in Article 2(c) or in Article 2(d) of the contested decision, thereby placing on the applicant the obligation to recover the aid.

63 The first part of this plea must therefore be rejected as being unfounded.

64 By the second part of its plea, the applicant alleges essentially that it did not itself receive an advantage by reason of the grant of the subsidies to the service stations in question, or only a partial advantage because it voluntarily exercised its PMS clause.

65 First, it is settled case-law that 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 (see *Netherlands* v *Commission*, cited in paragraph 20 above, paragraph 49, and Case C-276/02 *Spain* v *Commission* [2004] ECR I-8091, paragraph 31).

66 It has not been alleged that the Commission was aware, when the contested decision was adopted, that the applicant had continued to exercise its PMS clause, despite the introduction of the Temporary Regulation. Consequently, if this is true, it does not affect the legality of the contested decision.

67 Second, it must be noted that the Commission, when it is faced with an aid scheme such as that in the present case, is generally not in a position — nor is it required — to identify exactly the amount of aid received by individual recipients. Accordingly, the specific circumstances of one of the recipients of an aid scheme can be assessed only at the stage of recovery of the aid (see, to that effect, Case C-310/99 *Italy* v *Commission* [2002] ECR I-2289, paragraphs 89 to 91, and case-law cited). That approach has been upheld in the present case by the Court of Justice in its judgment in *Netherlands* v *Commission*, cited in paragraph 20 above, where it held that 'the obligation on a Member State to calculate the exact amount of aid to be recovered — particularly where, as in the present case, given the large number of service

stations involved, that calculation is dependent on information which that Member State has not provided to the Commission — forms part of the more general reciprocal obligation to cooperate in good faith in the implementation of Treaty rules concerning State aids imposed on the Commission and the Member States' (paragraph 91).

68 Consequently, even if the facts alleged by the applicant are true, they cannot affect the validity of the contested decision; they can affect only how the aid is recovered. According to settled case-law, '[i]n the absence of pertinent provisions of Community law, the recovery of aid which has been declared incompatible with the common market is to be carried out in accordance with the rules and procedures laid down by national law' (see *Netherlands* v *Commission*, cited in paragraph 20 above, paragraph 90, and case-law cited). It is for the national court alone to assess the material circumstances of the case (see, to that effect, the order of the Court of Justice in Case C-297/01 *Sicilcassa and Others* [2003] ECR I-7849, paragraphs 41 and 42, and the judgment of the Court of First Instance in Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraph 104).

69 Where, as in the present case, the Member State concerned has pleaded difficulties in implementing the Commission's decision on aid and has resolved those difficulties by cooperating in good faith with the Commission, the implementation measures ultimately adopted by that Member State fall to be assessed by the national court. This is so even where the Commission has given its approval to the implementation proposed by the Member State concerned. That approval merely serves to express the Commission's opinion as to whether that implementation is acceptable from a Community point of view, in the light of the difficulties in implementation encountered by that Member State, but it does not in any way affect the responsibility of the Member State concerned as to the identification and method of resolving those difficulties. If there were to be a dispute concerning the recovery of the aid after that approval, in particular with respect to the findings of fact contained in the contested decision or in the light of the precise quantification of the actual advantage to be recovered, it would be for the national court to resolve those remaining difficulties in implementation through its national rules, having regard to the contested decision and, if necessary, having regard to those remaining difficulties, bearing in mind the Commission's approval. In case of doubt, the

national court always has the possibility of referring inquiries to the Commission by virtue of the principle of sincere cooperation (see, to that effect, Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraphs 49 and 50, and case-law cited, and, by analogy, *Netherlands* v *Commission*, cited in paragraph 20 above, paragraphs 91 and 92) or of obtaining a preliminary ruling on interpretation from the Court of Justice (see *Siemens* v *Commission*, cited in paragraph 68 above, paragraph 104, and case-law cited).

70 It follows that the second part of this plea must be rejected as being inoperative.

71 By the third part of its plea, the applicant alleges that the aid did not lead to any distortion of competition and did not affect trade between Member States, inter alia because of the *de minimis* rule.

72 These arguments were put forward to the Court of Justice in the proceedings giving rise to the judgment in *Netherlands* v *Commission*, cited in paragraph 20 above (paragraph 30 in fine). The Court of Justice rejected them outright (paragraphs 37 to 39), referring, inter alia, with respect to oil companies such as the applicant, to paragraphs 60 to 66 of its judgment. Thus, the Court of Justice took the view that the aid was intended to prevent the service stations located near the German border from experiencing a drop in turnover as a result of the increase in fuel prices following the rise in excise duties in the Netherlands, given the more competitive rates in Germany (paragraph 63). It added that the same purpose was also served by the PMS clauses (paragraph 64). It found that the aid granted to service stations linked to oil companies by PMS clauses had economic effects for the companies concerned since the effect of that aid was, in any event, to release those companies from their obligation to bear all or part of the costs of the forecourt discounts offered by dealers to prevent loss of market share. It concluded from this that the Temporary Regulation therefore constituted aid to oil companies since its effect was to mitigate the burdens which would normally have affected the budget of companies anxious to maintain their market position in the light of developments in the domestic and international markets (paragraph 66).

73 It is clear from the above that, in the view of the Court of Justice, particularly with respect to the oil companies, the aid in question distorted competition and affected trade between Member States.

74 Nor has the applicant put forward any specific evidence with respect to its individual situation which might invalidate the Court of Justice's general assessment.

75 Accordingly, the Court finds that the contested decision is valid in finding that there is distortion of competition and that trade between Member States is affected. The third part of this plea must therefore be rejected as being manifestly unfounded.

76 As all the parts of the plea have been rejected, this plea must be rejected in its entirety.

The plea alleging infringement of the principle of sound administration

— Arguments of the parties

77 By the present plea, the applicant alleges that the Commission infringed the principle of sound administration by failing to inform the interested parties of the measures which it intended to take with respect to them and by not giving them the opportunity to make their views known. It refers to the case-law according to which observance of the right to a fair hearing is, in all proceedings initiated against a

person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of Community law which must be guaranteed even in the absence of any rules governing the proceedings at issue (Case T-450/93 *Lisrestal and Others* v *Commission* [1994] ECR II-1177, paragraph 42).

78 The applicant has been ordered to repay the aid in question to the Netherlands State. It was not informed in advance of that obligation. First, it was not involved in the national administrative proceedings. This tends to show that the Netherlands authorities did not regard it as being a recipient of the aid. Second, the Commission did not at any time contact the oil companies during those proceedings. The notice of the decision to initiate the procedure — which states that 'the Commission cannot rule out the possibility that the oil companies will be the direct recipients of the aid' — is too vague to be considered as an invitation to put forth its point of view. The applicant emphasises that the notice merely stated that the ownership of the service stations concerned could lead to the oil company concerned being found to be the 'recipient' of the aid and therefore liable for reimbursement. If such a mechanism can be imagined, the contested decision is based on an entirely new fact, namely the PMS clauses. The applicant has not had the opportunity to put forward its views on this point.

79 The Commission deems it sufficient to point out that the applicant submitted observations during the administrative proceedings, stating inter alia that the service stations were asking it to increase their margin and that the applicant itself sent the Commission its standard contract containing its PMS clause. It would be contradictory to maintain now that the Commission should not have used that evidence on the ground that it ought to have heard the applicant's views on this point first. Consequently, the applicant was fully familiar with all the details of the case. The Commission adds that it had to obtain an order against the Netherlands authorities on 20 January 1999 in order to obtain supplementary information on the PMS clauses.

— Findings of the Court

80 It should be borne in mind, as a preliminary point, that the administrative procedure regarding State aid is opened only against the Member State concerned (Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraph 81). Undertakings that receive aid are considered only to be 'interested parties' in this procedure (Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission* [2003] ECR II-435, paragraph 122). It follows that, far from enjoying the same rights to a fair hearing as those which individuals against whom a procedure has been instituted are recognised as having, interested parties have only the right to be involved in the administrative procedure to the extent appropriate in the light of the circumstances of the case (*Falck and Acciaierie di Bolzano* v *Commission*, paragraph 83, 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 60).

81 Under Article 88(2) EC, the Commission has a duty to put the interested parties on formal notice to put forward their comments during the formal investigation phase. With regard to that duty, it is settled case-law that the publication of a notice in the Official Journal is an appropriate means of informing all interested parties that a procedure has been initiated (Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 17), and that 'the sole aim of this communication is to obtain from persons concerned all information required for the guidance of the Commission with regard to its future action' (Case 70/72 *Commission* v *Germany* [1973] ECR 813, paragraph 19, and Case T-266/94 *Skibsværftsforeningen and Others* v *Commission* [1996] ECR II-1399, paragraph 256).

82 Accordingly, the applicant may not plead infringement of the principle of sound administration on the ground that the Commission did not specifically solicit the applicant's comments regarding the aid investigation procedure.

83 By contrast, the Commission is obliged duly to place the interested parties in a position to put forward their comments in the course of a formal investigation procedure on State aid (*Falck and Acciaierie di Bolzano* v *Commission*, cited in paragraph 80 above, paragraph 170, and Case T-109/01 *Fleuren Compost* v *Commission* [2004] ECR II-127, paragraphs 45 and 46).

84 The applicant states, in this regard, that the notice of intention to initiate the procedure was too vague for it to consider itself an interested party as an oil company.

85 It should be recalled, as a preliminary point, that the Commission must initiate a formal investigation procedure, informing the interested parties, when, following a preliminary investigation, it has serious doubts as to the compatibility of the financial measure in question with the common market. It follows that the Commission cannot be required to present a complete analysis on the aid in question in its notice of intention to initiate that procedure. The Commission must, however, define sufficiently the framework of its investigation so as not to render meaningless the right of interested parties to put forward their comments.

86 In the present case, in its decision to initiate the formal investigation procedure asking, inter alia, the interested parties to put forward their comments, the Commission stated that it could not rule out the possibility that the oil companies would be considered as being recipients of the aid and potentially required to reimburse it. The Commission based that possibility on the fact that the independent dealers' freedom could be greatly restricted by the exclusive purchasing or lease agreements (de facto control), to the point where they had to be viewed as de facto falling within the category of dealers employed by the oil company, that is, those who do not bear the risks of operating the service station (seventh and eighth recitals in the notice).

87 Admittedly, the Commission, in the contested decision, did abandon its theory of de facto control by oil companies over the service stations through exclusive purchasing agreements, on which its doubts in the notice of intention to initiate the procedure were based (recital 75 in the contested decision). Likewise, in that decision to initiate the procedure, it did not state that the mere existence of a PMS clause automatically made the oil companies de facto recipients of the aid. It was therefore difficult for the applicant to take a position on this specific point. That decision to initiate the procedure does indicate, however, that the Commission, at that stage in its investigation and in the light of the evidence in its possession, had not yet identified that particular mechanism for transferring the benefit of the aid.

88 The Commission did, however, as early as the notice stage, effectively set out its queries as to the actual recipient of the aid, in particular with respect to the control which the oil companies exercise through the exclusive supply agreements. Although those queries, at that early stage in the Commission's investigation, were focused mainly on the independence of the service stations in the light of their classification as Co/Co service stations, the fact remains that the fundamental concept, namely that the oil companies could be the actual recipients of the aid in the light of the exclusive supply agreements, was contained in the notice.

89 The Court also finds that the applicant understood this concept sufficiently well, first, to provide the Commission with a copy of its standard contract and its PMS clause and, second, to inform it that it considered the aid to be necessary because the service stations were asking the applicant to increase their margin. Paradoxically, the nature of the applicant's involvement in providing its PMS clause shows that it was able to grasp which essential facts could be relevant for the purpose of adopting the final decision. The fact that the Commission used, inter alia, the evidence provided by the applicant to support reasoning which led to the finding that the latter was liable for reimbursement is in keeping with the intention of the formal investigation procedure, which makes the interested parties the Commission's source of information.

90 The Court does not accept the applicant's argument put forward at the hearing to the effect that its participation with the Commission in its investigation does not in any event amount to participation in the formal investigation procedure concerning the aid. Suffice it to note that, subsequent to the publication of the notice of intention to initiate the formal investigation procedure, the applicant provided the Commission with comments directly relating to the aid under investigation which were particularly relevant. This intervention by the applicant must therefore be considered, as a matter of fact if not of law, as constituting participation in the formal investigation procedure as an interested party.

91 Accordingly, the Commission, far from having infringed the principle of sound administration, and with the means it had at its disposal, correctly performed its task of putting the interested parties on formal notice duly to submit their comments during the formal investigation procedure on the aid.

92 In the light of the foregoing, the present plea must be rejected as unfounded.

Costs

93 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. Since the applicant has been unsuccessful, it must be ordered to pay the costs, as applied for in the Commission's pleadings.

94 Under the first subparagraph of Article 87(4) of the Rules of Procedure, Member States which intervened in the proceedings are to bear their own costs. The Kingdom of the Netherlands shall therefore bear its own costs.

On those grounds,

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

hereby:

1. Dismisses the action;

2. Orders the applicant to pay its own costs and those of the Commission;

3. Orders the Kingdom of the Netherlands to pay its own costs.

Pirrung Meij Forwood

Pelikánová Papasavvas

Delivered in open court in Luxembourg on 31 May 2006.

E. Coulon J. Pirrung

Registrar President