JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

9 September 2009 *

In Case T-369/06,

**Holland Malt BV,** established in Lieshout (Netherlands), represented initially by O. Brouwer and D. Mes, and subsequently by O. Brouwer, A. Stoffer and P. Schepens, lawyers,

applicant,

supported by

**Kingdom of the Netherlands,** represented by C. Wissels, M. de Grave, C. ten Dam and Y. de Vries, acting as Agents,

intervener,

* Language of the case: English.

**Commission of the European Communities,** represented by T. Scharf and A. Stobiecka-Kuik, acting as Agents,

defendant,

APPLICATION for annulment of Commission Decision 2007/59/EC of 26 September 2006 concerning the State aid granted by the Netherlands to Holland Malt BV (OJ 2007 L 32, p. 76),

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

composed of O. Czúcz (Rapporteur), President, I. Labucka and S. Soldevila Fragoso, Judges,

Registrar: C. Kantza, Administrator,

having regard to the written procedure and further to the hearing on 12 November 2008,

gives the following

## Judgment

### Background to the dispute

1 The applicant, Holland Malt BV, is a joint venture between Bavaria NV, a brewery which produces beer and soft drinks, and Agrifirm, a cooperative of cereal producers in Germany and the northern Netherlands. The applicant obtained a patent enabling it to produce and sell HTST (High Temperature, Short Time) malt, a type of malt that increases the stability of taste, flavour and sparkle of beer, as well as its shelf life.

2 The Netherlands Government decided to grant investment aid of EUR 7 425 000 to the applicant under a regional investment scheme called 'Regionale investeringsprojecten 2000', which was subsequently extended to include the sectors processing and selling agricultural products listed in Annex I to the EC Treaty.

3 The subsidy granted to the applicant is for the construction of a malting plant in Eemshaven (Netherlands) and is designed to bring together various operations — such as the storage and processing of malting barley and the production of and trade in malt — on one site. The actual payment of the subsidy was suspended pending its approval by the Commission. Investment in this project was required to be effected before 1 July 2005 in order to secure payment of the subsidy.

4 The expected production capacity of the Eemshaven malting plant was to be 120 000 tonnes per year. Following the construction of that plant and the closure of the production plants in Lieshout (Netherlands) and Wageningen (Netherlands), the applicant's annual production capacity was to be 205 000 tonnes of malt in 2005, as against 150 000 tonnes (in Lieshout and Wageningen) in 2001. Construction work commenced in February 2004 and, according to the Commission in the contested decision, the malting plant became operational in 2005.

5 By letter of 31 March 2004, the Netherlands notified the subsidy to the Commission in accordance with Article 88(3) EC and point 4.2.6 of the Community Guidelines for State aid in the agriculture sector (OJ 2000 C 28, p. 2; 'the Guidelines'). On 5 May 2005, the Commission initiated a procedure under Article 88(2) EC. Since that procedure delayed payment of the subsidy beyond the initial deadline for implementation set by the Netherlands Government, the applicant requested an extension of time until the adoption by the Commission of a decision on the subsidy.

6 On 26 September 2006, the Commission adopted Decision 2007/59/EC concerning the State aid granted by the Netherlands to Holland Malt (OJ 2007 L 32, p. 76; 'the contested decision').

7 In the contested decision, the Commission found that the measure at issue, concerning an investment to improve the quality of the applicant's products and increase its production capacity, constituted State aid within the meaning of Article 87(1) EC. It went on to consider whether that measure could nevertheless be declared compatible with the common market pursuant to Article 87(3)(c) EC.

8 In that context, the Commission found that there was no separate market for HTST malt or for premium malt. Next, it referred to point 4.2.5 of the Guidelines, according to which 'no aid may be granted [for investments in connection with the processing of agricultural products] unless sufficient evidence can be produced that normal market outlets for the products concerned can be found'. It found in that regard that there was

overcapacity in the world and Community malt markets, and that no evidence had been produced that normal market outlets existed.

9 On those grounds, essentially, the Commission found in Article 1 of the contested decision that the aid at issue was incompatible with the common market. Under Article 2 of the contested decision, the Kingdom of the Netherlands is required to withdraw the State aid. Article 3 of the contested decision requires the Kingdom of the Netherlands to recover from the recipient the aid unlawfully made available to it. Article 4 of the contested decision provides that the Kingdom of the Netherlands must inform the Commission of the measures taken to comply with the contested decision.

**Procedure and forms of order sought by the parties**

10 By application lodged at the Registry of the Court of First Instance on 7 December 2006, the applicant brought the present action.

11 By a document lodged at the Registry of the Court of First Instance on 6 April 2007, the Kingdom of the Netherlands applied for leave to intervene in the present proceedings in support of the applicant. By order of 12 June 2007, the President of the Third Chamber of the Court of First Instance granted leave to intervene.

12 The Kingdom of the Netherlands lodged its statement in intervention, and the other parties lodged their observations on that statement, within the prescribed periods.

13 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure. The parties presented oral argument and their answers to the questions put by the Court at the hearing on 12 November 2008.

14 The applicant claims that the Court of First Instance should:

— annul, in whole or in part, Articles 1, 2, 3 and 4 of the contested decision;

— order the Commission to pay the costs.

15 The Commission contends that the Court of First Instance should:

— dismiss the action;

— order the applicant to pay the costs.

16 The Kingdom of the Netherlands claims that the Court of First Instance should:

— annul the contested decision;

— order the Commission to pay the costs.

## Law

17 The applicant puts forward four pleas in law in support of its application. The first plea in law alleges infringement of Article 87(1) EC. The second alleges infringement of Article 87(3)(c) EC. The third and fourth pleas in law allege, respectively, breach of the principle of sound administration and breach of the duty to state reasons, provided for in Article 253 EC.

18 The Court considers it appropriate to examine the first plea in law, alleging infringement of Article 87(1) EC, in conjunction with the first part of the fourth plea in law, concerning the inadequacy of the reasons as to why the measure at issue should be classified as State aid.

### 1. *First plea in law, alleging infringement of Article 87(1) EC, and first part of the fourth plea in law, alleging breach of the duty to state reasons as to why the measure in question should be classified as State aid*

*Arguments of the parties*

19 In the first place, the applicant takes the view that, by failing to establish that the measure at issue constitutes aid within the meaning of Article 87(1) EC, the Commission infringed that provision as well as its duty to state reasons.

20 It submits that, in order to establish that a State measure constitutes an aid that can have an impact on competition and that can affect trade between Member States, the Commission must carry out a proper analysis of the situation of the relevant market, the position of the recipient and its competitors in that market and the patterns of trade between Member States, and indicate the advantage conferred by the measure in intra-Community trade. It refers, in that regard, to the judgments of the Court of Justice in Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809; Joined Cases C-329/93, C-62/95 and C-63/95 *Germany and Others* v *Commission* [1996] ECR I-5151; and Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2000] ECR I-8855.

21 The Commission must establish that the measure has a real, rather than wholly theoretical, effect on trading conditions between Member States. In addition, according to the judgment of the Court of Justice in Case 248/84 *Germany* v *Commission* [1987] ECR 4013, paragraph 18, it must ascertain whether the measure concerned grants 'an appreciable advantage to recipients in relation to their competitors and is likely to benefit in particular undertakings engaged in trade between Member States'.

22 Referring to the judgment in *Germany and Others* v *Commission*, cited in paragraph 20 above, the applicant submits that, by not presenting information concerning its exports outside the Community and its turnover in respect of destinations within the Community, the reasons for the contested decision are even less detailed than those of the decision at issue in that case which was annulled by that judgment on the grounds of an inadequate statement of reasons.

23 In the second place, the applicant complains that the Commission made an error of assessment by failing to take into account the existence of a separate market for premium malt. Owing to the innovative characteristics of its malt product, the applicant operates in a separate market segment, namely the premium malt market, on which it is not in competition with traditional Community malt producers. Consequently, the measure at issue is not liable to distort competition between standard malt producers engaged in the malt trade between Member States.

24 In the third place, according to the applicant, the Commission erred in its determination of the relevant period and in its conclusion that the malt market was in decline. These errors led it to consider, wrongly, that there could be a risk that the measure at issue would favour a company in a competitive market and, therefore, distort competition.

25 The applicant also submits that the Commission referred incorrectly to the situation of the malt market in 2004 as a basis for concluding that that market was in decline. According to the applicant, the trading conditions prevailing in the periods 2003/2004 and 2004/2005 are irrelevant because, during that period, there was nothing more than an intention on the part of the Kingdom of the Netherlands to grant a subsidy in relation to a production plant which, moreover, was not yet operational. Therefore, any competitive advantage and any impact on competition and trading conditions within the Community would have materialised only once the Kingdom of the Netherlands had granted the subsidy to the applicant.

26 It takes the view that, in order to assess the impact of the subsidy on competition and on trading conditions, the Commission should have taken into consideration either the years in which the subsidy was paid or the year in which the Eemshaven plant became fully operational and its products were placed on the market, namely 2006 and the subsequent period.

27 In the fourth place, the applicant maintains that, since production at the new Eemshaven plant is almost exclusively intended for export to third countries, the aid does not have a meaningful impact on intra-Community trade. It submits that the volume of sales in 2005 to intra-Community destinations projected in its 2003 business plan amounted to 71 540 tonnes, whereas the volume of sales to intra-Community destinations was approximately 50 000 tonnes in 2003. That merely means that it was planning at that time to increase its volume of sales — in respect of the entire company — by approximately 20 000 tonnes to intra-Community destinations after the Eemshaven plant had become operational.

28 Moreover, the projected sales to destinations within the Community included sales made from the Lieshout production plant, which is irrelevant for the purposes of the Commission's assessment. The sales made from the Eemshaven plant related also to the utilisation of that plant's capacity, which replaced the capacity that was closed at Lieshout.

29 The Kingdom of the Netherlands endorses the applicant's arguments concerning the existence of a discrete segment of the malt market in which the applicant is not in competition with traditional Community malt producers.

30 The Commission contends that the first plea in law is inadmissible on the ground that, apart from a vague indication that the subsidy did not have an appreciable impact on trade or a meaningful impact on competition, the matters of law and of fact on which it is based are not clear from the arguments put forward. As to the remainder, it also denies that the applicant's arguments are valid.

*Findings of the Court*

Admissibility of the first plea in law

31 As a preliminary point, it must be noted in regard to the doubts expressed by the Commission concerning the admissibility of the first plea in law, that, in accordance with the first paragraph of Article 21 of the Statute of the Court of Justice, applicable to the Court of First Instance by virtue of the first paragraph of Article 53 of that Statute, and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance, all applications must contain the subject-matter of the dispute and a brief statement of the pleas in law on which the application is based. That statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the

application, if necessary, without any further information. In order to guarantee legal certainty and sound administration of justice, it is necessary, in order for an action to be admissible, that the basic legal and factual particulars relied on be indicated, at least in summary form, coherently and intelligibly in the application itself (order in Case T-85/92 *De Hoe* v *Commission* [1993] ECR II-523, paragraph 20).

32 In the present case it must be held that the Commission responded in detail, in its defence, to the applicant's first plea and, moreover, that the applicant was entitled to develop that plea and to set out any relevant further details in the reply (see, to that effect, Case 74/74 *CNTA* v *Commission* [1975] ECR 533, paragraph 4), which is exactly what it did in substantiating the plea with allegations of fact and with complaints relating to the Commission's assessment which were already included in the application under the second plea in law.

33 Consequently, it must be concluded that the Commission's objections to the first plea in law are not such as to prevent it from defending its interests effectively or to hinder the Court in the exercise of its judicial review. Since the first plea in law is admissible, therefore, it must be examined as to its substance.

Infringement of Article 87(1) EC

34 The applicant submits, adopting a line of argument that overlaps with that put forward in respect of the first part of the fourth plea, that the Commission failed to establish in the contested decision that the measure at issue constituted State aid, and that it made errors of assessment in that regard.

35 It has consistently been held that, in order for a measure to qualify as State aid for the purposes of Article 87(1) EC, four conditions must be met. First, there must be an

intervention by the State or through State resources; second, that intervention must confer an advantage on its recipient; third, it must be liable to affect trade between Member States; and, fourth, it must distort or threaten to distort competition (Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, paragraph 75, and Case T-442/03 *SIC* v *Commission* [2008] ECR II-1161, paragraph 44).

36 In the present case, the applicant does not deny that the first two conditions have been satisfied. It claims, however, that the Commission did not establish that the measure at issue affected trade between Member States and distorted or threatened to distort competition.

37 In assessing those two conditions, the Commission is required, not to establish that such aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition (Case C-372/97 *Italy* v *Commission* [2004] ECR I-3679, paragraph 44, and Case C-66/02 *Italy* v *Commission* [2005] ECR I-10901, paragraph 111).

38 In the present case, the Commission put forward in recitals 35 to 38 to the contested decision the following grounds in relation to the effect on intra-Community trade and the possibility of a distortion of competition:

‘(35) The measure consists of a direct subsidy for investment …

(36) … improvement in the competitive position of an undertaking resulting from a State aid generally points to a distortion of competition compared with other competing undertakings not receiving such assistance.

(37) A measure affects trade between Member States adversely if it hampers imports from other Member States or facilitates exports to other Member States. The deciding factor is whether there is a risk that intra-Community trade will develop differently or is liable to develop differently as a result of the measure [at issue].

(38) The product to which the aid in question relates (malt) is subject to significant intra-Community trade. In 2004, some 1.3 million tonnes of malt were traded [between the 25 Member States of the EU]. This represented some 15% of total 2004 Community malt production. The sector is thus exposed to competition …'

39 In the first place, it is appropriate to consider the applicant's argument that, owing to the innovative characteristics of its HTST malt produced at the Eemshaven malting plant, it is operating in a separate market, namely the premium malt market, where it is not in competition with the other Community producers.

40 In responding to the arguments of the applicant and of the Kingdom of the Netherlands which were put forward in that respect during the administrative procedure, the Commission considered the question of the existence of a separate market for premium malt in recitals 78 to 89 to the contested decision. On the basis of the observations of a number of national maltsters' associations (the Finnish, United Kingdom, French and Danish associations), which were of the opinion that there is no separate market for premium malt (recitals 18, 19, 21 and 22 to the contested decision), the Commission concluded that malt was, if anything, a product of a generic nature, with small variations in characteristics and subject to quality standards imposed by the brewing industry (recital 81 to the contested decision). It stated that all the statistical sources for production submitted during the administrative procedure (Eurostat (Statistical Office

of the European Communities), Euromalt, International Grains Council) provide data only on the general malt market. The Kingdom of the Netherlands and the applicant themselves had not provided data on existing capacity for, or the production of, premium malt (recital 87 to the contested decision).

41 It is common ground that, during the proceedings before the Court of First Instance, neither the applicant nor the Kingdom of the Netherlands provided separate statistical data specifically relating to the production or marketing of premium malt. Furthermore, they referred only to figures relating to malt in general, without making a distinction between 'standard malt' and the 'premium malt' that is the applicant's HTST malt.

42 The applicant merely referred to a report by Frontier Economics of October 2005 entitled 'Holland Malt' ('the Frontier Economics report') which, according to the applicant, 'confirmed that, to the extent that HTST sales [displaced] existing sales of standard malt, this [was] part of a natural process of market innovation that [was] expected to occur in any event'. In addition, it should be noted that the Frontier Economics report, which, moreover, according to information supplied by the parties at the hearing, was commissioned by the applicant, also contains the following observation: 'it is … expected that the HTST malt … produced at Eemshaven will, at least in part, displace sales … by other suppliers of standard malt — including those European suppliers holding excess capacity'.

43 It must be held that, in making those statements, the applicant and the Frontier Economics report clearly indicate that the HTST malt, which is a type of premium malt, can be substituted for 'standard' malt, which reinforces the Commission's finding that the applicant's HTST malt competes with the malt of other producers.

44 Accordingly, it must be concluded that the applicant's claims as to the existence of a separate market for premium malt or HTST malt are unfounded and that the Commission did not make an error of assessment in that regard.

45 In the second place, the applicant submits that the Commission failed to establish that the measure at issue had a real effect on trading conditions between Member States and, in particular, that it made an error of assessment in failing to take account of the fact that the output of the new Eemshaven plant will almost exclusively be exported to third countries.

46 First, it should be borne in mind that, according to the case-law cited in paragraph 37 above, the Commission is not required to establish that such aid has a real effect on intra-Community trade, but only to examine whether that aid is liable to affect such trade.

47 Second, it must be borne in mind that, when aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid (Case 730/79 *Philip Morris Holland* v *Commission* [1980] ECR 2671, paragraph 11; Case C-53/00 *Ferring* [2001] ECR I-9067, paragraph 21; and Case C-372/97 *Italy* v *Commission*, cited in paragraph 37 above, paragraph 52).

48 Since the measure at issue is an investment subsidy for the modernisation of and increase in the applicant's production capacity, it necessarily strengthens the applicant's competitive position compared with its competitors who have to finance such investments from their own resources or forgo them altogether. Furthermore, the statement in the Frontier Economics report (see paragraph 42 above) that the malt produced at the Eemshaven plant is expected to displace sales by other European suppliers, expressly indicates that the applicant's competitors include Community undertakings.

49 In addition, the applicant itself admits that it participates in Community trade. Thus, during the administrative procedure, it stated that, in 2005, it had intended to sell 71 540 tonnes of malt in Europe and that intra-Community trade accounted for 42% of its sales. Moreover, the argument that the Eemshaven plant alone is to be taken into

consideration in that regard cannot be accepted since, according to the case-law cited in paragraph 47 above, it is the strengthening of the recipient undertaking's position that must be examined, not the situation of its individual production units.

50 In any event, by repeatedly declaring in the documents submitted to the Court that production at the new Eemshaven plant is directed 'almost exclusively' at third countries, the applicant implicitly acknowledged that part of that production was sold in the Community. The reduction in total sales involving intra-Community trade, or the limited proportion of such sales as against an undertaking's overall production, is irrelevant to the assessment of the effect of that trade, given that, according to the case-law, there is no threshold or percentage below which it may be considered that trade between Member States is not affected (Case C-172/03 *Heiser* [2005] ECR I-1627, paragraph 32).

51 For the sake of completeness, it should be borne in mind that the Commission was not obliged to demonstrate that the applicant was in fact exporting malt to other Member States, since, according to the case-law, the strengthening of an undertaking which has not previously participated in intra-Community trade may place it in a position which enables it to penetrate the market of another Member State, and therefore a measure which results in such strengthening may affect such trade (see, to that effect, Case C-66/02 *Italy* v *Commission*, cited in paragraph 37 above, paragraph 117).

52 Accordingly, it must be held that the circumstances mentioned by the Commission (see paragraph 38 above), namely the strengthening of the applicant's position compared with its competitors and the fact that a significant volume of malt was traded within the Community, are sufficient to establish that the measure at issue is liable to affect intra-Community trade. The applicant's arguments in that respect are, therefore, entirely unfounded.

53 In the third place, the applicant submits that the Commission failed to establish that the measure at issue distorted competition. In particular, the Commission erred in its determination of the relevant period for its examination, and in concluding that the relevant market was in decline. These errors led it to consider, wrongly, that the measure at issue distorted competition.

54 It must be borne in mind in that regard that aid which is intended to relieve an undertaking of the expenses which it would normally have had to bear in its day-to-day management or its usual activities in principle distorts competition (Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraphs 48 and 77; Case T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717, paragraph 43; and Case T-217/02 *Ter Lembeek* v *Commission* [2006] ECR II-4483, paragraph 177).

55 The Court has also held that aid which reduced the costs of converting the recipient's production facilities gave it a competitive advantage over manufacturers who had completed or intended to complete at their own expense a similar conversion in the capacity of their plant (see, to that effect, *Philip Morris Holland* v *Commission*, cited in paragraph 47 above, paragraph 11). It is therefore clear from the case-law that it is not only the reduction, by virtue of State resources, of the expenses of the day-to-day management or the usual activities of an undertaking which is, in itself, liable to distort competition, but also a subsidy which relieves the recipient of all or part of the costs of an investment.

56 Therefore, it must be held that the matters to which the Commission refers in recitals 35 and 36 to the contested decision (set out in paragraph 38 above), namely the fact that the measure at issue is intended to subsidise an investment and that it improves the competitive position of the recipient compared with that of its competitors, necessarily means that the measure at issue is liable to distort competition. It follows from this that the applicant's arguments as to the relevant period to be taken into consideration for the Commission's assessment and for the question whether the market was in decline are irrelevant to the assessment of the effect on competition in the present case, since they do not alter the fact that the subsidy improves the applicant's position compared with that of its competitors. The arguments must, therefore, be rejected as having no bearing on the issue.

57 In view of the foregoing, it must be held that the Commission correctly established that the measure at issue was liable to affect intra-Community trade and to distort competition and, therefore, that the measure at issue constituted State aid within the meaning of Article 87(1) EC, with the result that all the applicant's arguments concerning infringement of that provision must be rejected.

The statement of reasons for the contested decision concerning the effect on intra-Community trade and on competition

58 As regards the obligation to state reasons provided for in Article 253 EC, it must be borne in mind that, according to settled case-law, the scope of the duty to provide a statement of reasons is dependent upon the nature of the act at issue and on the context in which it was adopted (Case T-266/94 *Skibsværftsforeningen and Others* v *Commission* [1996] ECR II-1399, paragraph 230, and Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission* [2003] ECR II-435, paragraph 278). The statement of reasons for a measure must disclose clearly the reasoning followed by the institution which adopted it, in such a way as to enable the persons concerned to understand the basis for the measure and the courts to review its substance, although it is not necessary for it to go into all the relevant facts and points of law, since the question whether the statement of reasons satisfies Article 253 EC must be assessed with regard not only to the wording of that measure but also to its legal and factual context (Case 2/56 *Geitling* v *High Authority* [1957] ECR 3, at page 16, and Case C-42/01 *Portugal* v *Commission* [2004] ECR I-6079, paragraph 66).

59 With regard, more specifically, to a decision on State aid, it has been consistently held that, even if in certain cases the very circumstances in which the aid is granted are sufficient to show that the aid is capable of affecting trade between Member States and of distorting or threatening to distort competition, the Commission must at least set out those circumstances in the statement of reasons for its decision (*Netherlands and Leeuwarder Papierwarenfabriek* v *Commission*, cited in paragraph 20 above, paragraph 24; *Italy and Sardegna Lines* v *Commission*, cited in paragraph 20 above, paragraph 66; and *Westdeutsche Landesbank Girozentrale and Land-Nordrhein Westfalen* v *Commission*, cited in paragraph 58 above, paragraph 292).

60 In the present case, the Commission set out clearly the relevant circumstances, which, as the Court has held in paragraphs 52 and 56 above, are sufficient to demonstrate that the measure at issue was liable to affect intra-Community trade and to distort competition.

61 The applicant cannot legitimately claim that the case-law to which it refers (see paragraphs 20 to 22 above) requires the Commission to undertake a more extensive examination in that regard.

62 With regard to *Netherlands and Leeuwarder Papierwarenfabrik* v *Commission*, cited in paragraph 20 above (paragraph 24), the Court of Justice stated that the decision at issue did not contain the slightest information concerning the situation of the relevant market, the recipient's position in that market, the pattern of trade or the undertaking's exports. In so doing, the Court referred to the factors which might be relevant to an assessment of the effect on intra-Community trade in the case giving rise to that judgment, pointing out that the Commission had not examined any of them. However, there is nothing in the judgment to indicate that the Commission should assess each of those factors in every case.

63 Similarly, the Court of Justice and the Court of First Instance have already held in that regard that the Commission merely needs to establish that the aid in question is of such a kind as to affect trade between Member States and threatens to distort competition. It does not have to define the market in question or analyse its structure and the ensuing competitive relationships (see, to that effect, *Philip Morris Holland* v *Commission*, cited in paragraph 47 above, paragraphs 9 to 12, and Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta and Others* v *Commission* [2000] ECR II-2319, paragraph 95).

64 As regards the judgment in *Italy and Sardegna Lines* v *Commission*, cited in paragraph 20 above, it is clear from paragraph 69 of that judgment that the reason for the annulment of the decision at issue, which dated from 1997 and concerned the shipping sector in Sardinia (Italy), was that the Commission had failed to explain why an aid scheme for Sardinian ship owners could have affected intra-Community trade in the

sector concerned, having regard in particular to the fact that cabotage was not liberalised at Community level until two years after that decision was adopted. That ground for annulment, which was particular to that case, cannot therefore have any bearing on the assessment of the contested decision, which concerns an industry to which the rules on free movement of goods apply.

65 Nor can the applicant rely on the judgment in *Germany and Others* v *Commission*, cited in paragraph 20 above, in support of its arguments. First of all, the case which gave rise to that judgment concerned a bank guarantee that was intended to allow the recipient undertaking to acquire the majority of the share capital of another undertaking, which means that there is an appreciable difference between the facts of that case and the present case. In the present case, the measure at issue consists of an investment that is intended to improve and increase the recipient's production, and therefore the relevant circumstances which the Commission is required to set out in the contested decision are not the same as those applying in the case giving rise to the judgment in *Germany and Others* v *Commission*. Next, while it is true that the Commission had, in that case, provided certain specific information in respect of the undertaking acquired, the Court, in its assessment leading to the finding of an inadequate statement of reasons, nevertheless attached great significance to the fact that the Commission's examination had been restricted to the undertaking acquired and that no assessment of the recipient's situation had been carried out. In the present case, the Commission's examination relates entirely to the recipient undertaking.

66 Having regard to the foregoing, it must be held that the reasons for the contested decision are adequate as regards the effect on intra-Community trade and on competition.

67 Accordingly, the first plea in law and the first part of the fourth plea in law put forward by the applicant must be rejected.

2. *Second plea in law, alleging infringement of Article 87(3)(c) EC, and the second part of the fourth plea in law, concerning the inadequacy of the statement of reasons in that regard*

68 The Court considers it appropriate to examine the second plea in law, alleging infringement of Article 87(3)(c) EC, in conjunction with the second part of the fourth plea in law, alleging that the statement of reasons is inadequate as regards the application of Article 87(3)(c) EC.

69 The second plea in law is divided into four parts. The first part alleges misinterpretation and misapplication of the Guidelines. The second part alleges a failure adequately to balance, on the one hand, the beneficial effects of the measure at issue and, on the other, its impact on intra-Community trading conditions. The third part alleges an error of assessment concerning the impact of the subsidy on production capacity in the malt industry. The fourth part alleges a failure to take account of events and developments occurring between the adoption of the decision to grant the subsidy and adoption of the contested decision.

70 The first and third parts of the second plea in law must be examined together, given that the analysis of the first part also requires an assessment of issues relating to existing and expected capacity, and to the fact that the measure at issue seeks to increase the applicant's production capacity.

*First and third parts, alleging misinterpretation and misapplication of the Guidelines, and an error of assessment in regard to overcapacity*

Arguments of the parties

71 The applicant claims that the type of investment and of the products involved clearly indicates that it can find normal market outlets for its products within the meaning of point 4.2.5 of the Guidelines. This mainly concerns outlets in growing markets outside the Community, so that the impact of the investment on capacity in the malt market inside the Community is neutral, or marginal at the very most.

72 As regards the products concerned, the applicant submits that the malting plant in question will produce only HTST malt, an innovative type of malt. It criticises the Commission for not assessing the broader question of whether normal market outlets can be found for premium malt.

73 As regards the type of investment, the applicant submits that the investment enabled it to modernise its malt production facilities and to move its available capacity from inefficient, land-locked locations to a coastal location with easy access to malting barley. It maintains that the new capacity available at Eemshaven thus enables it to direct a significant proportion of sales to the export business and to cater to the increased demand from brewing companies for bulk malt supplies, which confirms that normal market outlets are and will be found for its products.

74 With regard to the assessment of existing and expected capacity in the Community malt market, the applicant considers, in essence, that the Commission erroneously

prohibited the aid in question when it was clear that the overcapacity in the Community and world malt market was not structural and would be remedied in the near future.

75 In that regard, it maintains that the Community malt industry is characterised by a trend towards moving inefficient, land-locked malt production capacity to modern malting facilities located in seaports or along major waterways, with easy access to malting barley. Relying on the report by RM International of 22 April 2005 on the malt market ('the RM International report') and on the various reports by H.M.G., it claims, first, that this modernisation process has resulted in capacity being directed increasingly towards exporting malt to third countries rather than intra-Community trade, and in a clearer split between land-locked malt houses which supply domestic markets inside the Community and modernised malt houses which supply growing export markets outside the Community. Second, this process is reinforced by the trend whereby malt producers have to meet the increased demand from brewing companies for bulk malt supplies, and only modern malt houses located in ports can meet that demand. Third, the applicant argues that this process results in the increasing establishment of locations which have easy access to malting barley, rather than locations that do not, the effect of which is that malt houses which do not have sufficient access to malting barley have to shut down capacity and be replaced by modernised capacity in close proximity to malting barley.

76 In that regard, the applicant takes the view, first of all, that there is nothing to support the Commission's conclusion that the investment concerned can have an adverse impact on malt production capacity and trading conditions within the Community. It submits that the part of the new capacity at Eemshaven that is directed at European destinations replaces the capacity of land-locked sites which have been closed at Lieshout and Wageningen. It states that the additional capacity at Eemshaven would be 55 000 tonnes.

77 In support of that argument, it refers to the table of sales reproduced in the 'HM Sales overview by Deloitte' of 6 December 2006, according to which, in 2006, the Eemshaven malting plant will have an output of almost 112 220 tonnes, of which 79 449 tonnes will be shipped to destinations outside the Community and 32 767 tonnes to destinations

within the Community, from which it is clear that any additional capacity at Eemshaven will be almost exclusively directed towards destinations outside the Community.

78 The applicant criticises the Commission for not adopting a dynamic approach and for not assessing the impact of the subsidy in the light of the evolution of the market and the cyclical nature of that market in general. It observes that the need for a forward-looking focus also follows from the wording of point 4.2.5 of the Guidelines, which states that the Commission must assess whether normal market outlets can be found for malt in the light of existing and expected capacity. It refers to the judgment of the Court of First Instance in Case T-380/94 *AIUFFASS and AKT* v *Commission* [1996] ECR II-2169, in which the Court gave its approval to the dynamic method of assessment applied by the Commission, concerning likely dynamic trends over time even beyond the date when new capacity in textiles would be introduced into the market.

79 The applicant takes the view that the Commission did not carry out such an assessment in the present case because it did not take account of the reports on the malt market — in particular the RM International report — which stated that, in 2005 and 2006, the malt market inside the Community was undergoing substantial structural changes and that demand would very soon exceed supply as a result of the prospects for increased beer production and demand for malt. It considers that the Commission should have concentrated on the period after the time when the Eemshaven plant would reach its full capacity, namely 2006 and beyond.

80 The applicant also criticises the Commission for not taking account of the reports by H. M.G., in particular the report of 13 July 2006 on the state of the malt market ('the G report of July 2006') which states that, 'as to the S[upply]/D[emand] balance of malt, it can be said that there is no great overcapacity any more […;] any remaining overcapacity is within a permissible margin'. The applicant also claims that, at its meetings with the Commission, H.M.G. drew the Commission's attention to a visible dramatic change in

the market between the beginning of 2006 and July 2006, which had resulted in the supply and demand situation for malt being much more balanced.

81 The applicant takes the view that the Commission erred in its assessment of the growth prospects of the export markets outside the Community. According to the applicant, the Commission mistakenly concluded that the growing demand for malt in South-East Asia could be satisfied by Australia and that the growing malt markets in South America and Africa would be served by new capacity being built in Argentina and by the enlargement of Mercosur to include Venezuela and 'possibly' other South American countries.

82 It takes the view that its commercial outlets in emerging markets outside the Community should be regarded as additional commercial outlets. It submits that, even if it were to some extent to compete for those outlets with Community malt producers, the decisions that the Commission customarily takes pursuant to the Guidelines show that that cannot justify a refusal to declare the measure at issue compatible with the common market.

83 As regards the possibility of redirecting its business towards the Community market, mentioned in recital 76 to the contested decision, the applicant maintains that that is not reasonably foreseeable in so far as it has found, and still finds, sufficient market outlets for its products and will continue to profit from market growth in countries outside the Community.

84 It refers to the H.M.G. report of November 2006 on the state of the malt industry, according to which theoretical world capacity will be fully absorbed, and even exceeded, by world malt demand in 2007, with the result that the market will be characterised by a shortage of malt in the future.

85 It doubts whether the number of export licences is a reliable source to support findings as to the Community's share in the world malt trade. It considers that a decrease in the number of export licences obtained in the Community can also be related to temporary malting barley shortages within the Community. Therefore, that figure does not give a proper indication as to the potential for the Community to increase its share of the world malt trade. It takes the view that the figures relating to capacity should always be interpreted and analysed in the light of the structural changes that have occurred in the Community malt industry.

86 The applicant objects to the method used by the Commission to define the overcapacity in the malt market, in particular the reference to a 98% utilisation rate, which, according to the applicant, does not correctly reflect capacity within the Community. The Commission failed to take account of the fact that hardly any factory will produce all year round since repair and improvement works take place regularly. Whilst acknowledging that it does not have precise information concerning manufacturing capacity utilisation overall, the applicant believes that it is probably less than 98%.

87 It criticises the Commission for the fact that the latter's assessments in the contested decision concerning the impact of the investment on Community malt market capacity are based mainly on figures provided by Euromalt, an association of malt producers who are the applicant's competitors and who therefore have a commercial interest in opposing the modernisation of its capacity. The applicant submits that the letters from Euromalt do not specify how malt capacity and malt demand were calculated, and that the Commission should have checked the methods used to make these calculations and considered whether they correctly reflected existing capacity in the malt industry.

88 The Kingdom of the Netherlands supports the applicant's arguments.

89 The Commission contests the arguments of the applicant and the Kingdom of the Netherlands.

Findings of the Court

90 Article 87(3)(c) EC allows the Commission, in derogation from the general prohibition laid down in Article 87(1) EC, to declare compatible with the common market 'aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest'.

91 According to point 4.2.5 of the Guidelines, 'no aid may be granted under points 4.2.3 or 4.2.4 unless sufficient evidence can be produced that normal market outlets for the products concerned can be found[;] this must be assessed at the appropriate level in relation to the products concerned, the types of investments, and existing and expected capacities'.

92 The Commission has a wide discretion in applying Article 87(3) EC, the exercise of which involves complex economic and social assessments which must be made in a Community context. Judicial review of the manner in which that discretion is exercised is confined to establishing that the rules of procedure and the rules relating to the duty to give reasons have been complied with and to verifying the accuracy of the facts relied on and that there has been no error of law, manifest error in the assessment of the facts or misuse of powers (Case C-372/97 *Italy* v *Commission*, cited in paragraph 37 above, paragraph 83, and Case T-17/03 *Schmitz-Gotha Fahrzeugwerke* v *Commission* [2006] ECR II-1139, paragraph 41).

93 The Commission may lay down for itself guidelines for the exercise of its discretionary powers by way of documents, such as the Guidelines, provided that they contain directions on the approach which it intends to follow (see, to that effect, *Vlaams Gewest* v *Commission*, cited in paragraph 54 above, paragraph 79, and *Schmitz-Gotha Fahrzeugwerke* v *Commission*, cited in paragraph 92 above, paragraph 42).

94 In the present case, the Commission first considered whether there was overcapacity in the Community and world malt markets, together with its causes and consequences.

95 In recital 56 to the contested decision, the Commission reproduced a table from Euromalt relating in particular to overcapacity in the world malt market. According to that table, the overcapacity was 534 000 tonnes in 2004 and 1 950 000 tonnes in 2006.

96 The Commission states in recital 68 to the contested decision that:

'… the profitability of the Community malting industry in 2005/2006 will be at its lowest, with many companies making a loss and covering only part of their costs. Probably as a result of this low profitability, the largest German malt producer, Weissheimer in Andernach, filed for bankruptcy in spring 2006. In addition, other malt production plants have shut permanently, including four in the United Kingdom, two in Germany and one in France. These are older units of large companies. Other malt producers have decided to shut part of their capacity temporarily. In other cases, old malt production capacity has been replaced by new …'

97 In recital 71 to the contested decision, the Commission held as follows:

'… [there was] a utilisation of at least 98% of total [Community] capacity during the years 2002-2004 … In 2005, the utilisation rate was lower, with malt production in the Community at 8.4 million tonnes and capacity at 8.8 million tonnes. For [the] marketing year 2006/2007, total production is expected to be 8.0 million tonnes and capacity 8.8 million tonnes. These lower rates of utilisation appear, however, to reflect

the reaction of malting plants to low profitability, i.e. their decision to produce less malt and temporarily to shut production capacity …'

98 Lastly, in recital 72 to the contested decision, the Commission states:

'… By mid-2006, production of malt in the Community appears to have been brought into equilibrium again with actual demand, as malt producers have learned to limit their production to possible sales volumes. However, even after the abovementioned permanent closure of old malt production facilities, total malt production capacity in the Community still exceeds actual demand by some 600 000 tonnes … The Commission does not have clear evidence, therefore, that the current situation of overcapacity will change soon.'

99 Having thus explained that significant Community overcapacity exists essentially because of the insufficiency of Community and world malt market outlets, the Commission examined the arguments of the Kingdom of the Netherlands and of the applicant that the characteristics of the investment concerned meant that the aid would have more of an influence on trade with third countries than on intra-Community trade. In that regard, the Commission stated in recital 75 to the contested decision that, 'in addition, there [were] large groups in the Community malt industry which [sold] their malt both inside and outside the Community[; the applicant] [fell] into this category, being located at a deep sea port from which it [could] serve both the Community and non-Community markets[…; and] in its business plan of August 2003, [the applicant] mentioned that it expected to sell 71 540 tonnes to European destinations in 2005'. The Commission states, in recital 76 to the contested decision, that 'situations may well occur in which malt companies concentrating primarily on exports to third countries (such as [the applicant]), may not be able to find buyers for the output intended for those destinations, in which case they might seek to sell it inside the Community[;] the opposite may also occur …[;] linkages exist, with developments outside the Community having an effect on developments inside, and vice versa'.

100 In addition, with regard to the products concerned, the Commission considered and rejected the arguments of the applicant and of the Kingdom of the Netherlands in relation to the existence of a separate market and, therefore, of separate outlets for premium malt.

101 Finally the Commission stated in recital 89 to the contested decision:

'Based on the … findings on overcapacity in the malt market, possible effects on trade between Member States of the aid measure in question and the lack of a clearly distinctive separate market for premium malt, the Commission considers the aid not to comply with point 4.2.5 of the [G]uidelines, which provides that no aid may be granted for investments in products for which normal market outlets cannot be found.'

102 By the first and third parts of the second plea in law, the applicant claims, in essence, that the Commission misinterpreted and misapplied the Guidelines as regards the assessment of the existence of normal outlets and, moreover, that it made manifest errors of assessment in its examination of overcapacity in the malt market.

103 Given that the Commission's conclusion as to the absence of normal market outlets is essentially based on its finding that there was overcapacity in the production of malt as against demand, it is necessary, first of all, to consider the substance of the contested decision in that regard.

— Overcapacity in the malt market

104 It is common ground that the malt market is a world market, as the sources annexed to the parties' written pleadings attest. In addition, as has been established in paragraph 44 above, the applicant has not demonstrated that a separate market exists for HTST malt or premium malt. Further, its assertion that 'HTST sales displace existing sales of standard malt', which essentially suggests that it can sell HTST malt to buyers who were previously supplied, wholly or partly, with 'standard' malt, confirms the Commission's finding that the applicant is in competition with the other producers for the same market outlets.

105 In the first place, the applicant alleges that the Commission found that there was overcapacity in the Community market mainly on the basis of Euromalt's sources — Euromalt being an organisation that represents the interests of the applicant's competitors — while disregarding contrary information.

106 In that regard, it must be noted that the Commission looked, in the contested decision, at capacity and actual Community production figures in the period from 2002 to 2005, taking into account the figures included in the H.M.G. report in respect of 2004/2005, which uses national statistics, Euromalt and Eurostat as sources. Those figures indicate that the overcapacity in 2002 and in 2004 amounted to less than 200 000 tonnes, which, in relation to a capacity of 8.6 million tonnes in 2002 and 8.8 million tonnes in 2004, represented a utilisation rate of 98%. In 2003, the overcapacity was only 37 000 tonnes, which represented a capacity utilisation rate of 99.6%. The Commission added that the figures in the Frontier Economics report showed a comparable level of utilisation. Next, citing as its source a report by H.M.G. of 2 May 2006 ('the G report of May 2006'), it stated that 'in 2005, the utilisation rate was lower, with malt production in the Community at 8.4 million tonnes and capacity at 8.8 million tonnes[;] for [the] marketing year 2006/2007, total production is expected to be 8.0 million tonnes and capacity 8.8 million tonnes'. The Commission found that the lower rates of utilisation appeared to reflect the reaction of malting plants to low profitability, that is, their decision to produce less malt and temporarily to shut production capacity. It added that, for the marketing year 2006/2007, part of the explanation was also provided by the poor harvest of malting barley. It stated that the figures for 2002 to 2004 showed that it

was technically possible to use at least 98% of the total production capacity (recitals 70 and 71 to the contested decision).

107 First, it must be noted that the Commission relied on a variety of sources, all of which indicated that there was significant overcapacity in the Community malt market, which increased in 2005 as compared with the period from 2002 to 2004. Furthermore, the Commission stated that, according to the G report of May 2006, the overcapacity in the Community market would reach a record level in 2006/2007, rising to 800 000 tonnes, or 9% of total capacity. Consequently, the applicant's argument that the Commission's conclusion as to the existence of overcapacity is based mainly on Euromalt's observations is entirely unfounded.

108 Second, it must be observed that the Commission's argument that there was structural overcapacity in the Community as against market outlets is clearly confirmed by the G report of July 2006, to which the applicant refers several times. That report states:

'Starting in 2004, but strongest in 2005 and 2006, the [Community] industry was faced with an unsaleable overcapacity of more than a [million] [tonnes].... Maltsters' losses in 2005 were bad[;] they will probably be worse in 2006. However, maltsters in a number of countries, in France, Germany and the [United Kingdom], started to wind down production instead of selling malt at totally unrewarding malting margins.'

109 Third, the applicant and the Kingdom of the Netherlands complain that the Commission disregarded the statements in the G report of July 2006, that 'as to the S[upply]/D[emand] balance of malt, it can be said that there is no great overcapacity any more' and that 'any remaining overcapacity is within a permissible margin'.

110 It must be noted that the relevant passage in the G report of July 2006 is worded as follows:

'New construction and closures resulted in a present EU malting capacity of 8.8 [million] [tonnes] [versus] an estimated usage [including] exports of 8.2 [million] [tonnes] or 93.2% of capacity. … As to the S[upply]/D[emand] balance of malt, it can be said that there is no great overcapacity any more. Maltsters in less favoured markets have learned to restrict production to the possible sales volume[;] any pressure on malt prices would not be due to oversupplies any more.'

111 It follows from this that, even according to the report in question, which was dated 13 July 2006, the overcapacity which existed in the Community market when the report was drawn up amounted to 600 000 tonnes. That figure was at its highest during the period on which the Commission focused in its examination (2003 to 2006) and, moreover, showed that the tendency to overcapacity within the Community was still increasing, given that in 2005, according to the contested decision, that figure was only 400 000 tonnes (see paragraph 106 above). The validity of the assertion that, 'as to the S[upply]/D[emand] balance of malt, it can be said that there is no great overcapacity any more' is undermined by its immediate context. In view of (i) the record level of overcapacity (600 000 tonnes) referred to in the same paragraph of the report; (ii) the statement that some of the producers have learned to limit their production to possible sales; and (iii) the reference to the balance between supply and demand, instead of to the balance between capacity and demand, the Court finds that the change which the passage in question is intended to communicate is not a reduction in overcapacity, but a lowering of Community overproduction (or oversupply).

112 It must be noted that the Commission referred to the reduction in Community overproduction when it found, in recital 72 to the contested decision, that 'by mid-2006, production of malt in the Community appears to have been brought into equilibrium again with actual demand, as malt producers have learned to limit their production to possible sales volumes'. It cites as its source in that respect the G report of July 2006.

However, while the Commission can take into account the reports and expertise of independent experts, it is not thereby exempted from assessing their work, given that, subject to judicial review, ensuring that Article 87 EC is observed and Article 88 EC is implemented is the central and exclusive responsibility of the Commission (see, to that effect, Case T-274/01 *Valmont* v *Commission* [2004] ECR II-3145, paragraph 72 and the case-law cited). The Commission could not refer to the statements contained in the G report of July 2006 cited in paragraph 109 above, relating to a reduction in overcapacity, without committing a manifest error of assessment, since — given the stable level of Community capacity in 2005 and in 2006 (8.88 million tonnes) — the decline in Community production (from 8.4 million tonnes in 2005 to 8.2 million tonnes in 2006) effectively results in an increase in overcapacity.

113 As far as the meetings between H.M.G. and the Commission in 2006 are concerned, it must be noted that, according to the information provided by the applicant in that respect, H.M.G. drew the Commission's attention to a visible dramatic change in the market, which resulted in the supply and demand situation for malt being much more balanced. Suffice it to point out in that regard that the Commission referred to this change in the contested decision when it stated in recital 72 to the contested decision that 'by mid-2006, production of malt in the Community appears to have been brought into equilibrium again with actual demand, as malt producers have learned to limit their production to possible sales volumes'.

114 Finally, in so far as the applicant's arguments must be understood as also seeking to challenge the Commission's conclusion that there was overcapacity in the world malt market, that argument is also unfounded. First, the applicant has not supplied any statistical source challenging the existence of overcapacity in the world market. Second, the G report of July 2006 refers to the recent construction of significant capacity in third countries which, in conjunction with the construction of new Community capacity, resulted in the Community industry having to face an 'unsaleable overcapacity of more than a [million] [tonnes]' in 2005 and in 2006.

115 Therefore, it must be found that the Commission was fully entitled to determine that there was overcapacity in the Community and world malt markets at the time of the adoption of the contested decision, and the applicant's arguments challenging the reliability of the sources supporting the Commission's conclusion in the contested decision with regard to the overcapacity must be rejected in their entirety.

116 In the second place, the applicant claims that the Commission failed to take account of the fact that production capacity had been brought into equilibrium again with demand, which was already foreseeable at the time of the adoption of the contested decision. It refers in particular in that regard to the judgment in *AIUFFASS and AKT* v *Commission*, cited in paragraph 78 above, and to the various experts' reports annexed to the application.

117 First, contrary to the applicant's claims, the Commission carried out a prospective assessment in the contested decision. It analysed the production capacity and production volume of malt not only in 2005, but also in the marketing year 2006/2007, relying on the G report of May 2006 (recitals 70 and 71 to the contested decision). It examined future trends concerning the production of malt at Community and at a global level, the structure and foreseeable changes in demand for malt from breweries, and even referred to the International Grains Council in regard to the change in the volume of the malt trade forecast for 2010 (recitals 58, 59, 62 to 68 and 72 to the contested decision).

118 In view of the fact that the Commission carried out a prospective assessment concerning the production capacity for malt and the development of Community trade, it must be found that the contested decision is compatible with the principle identified in the judgment in *AIUFFASS and AKT* v *Commission*, cited in paragraph 78 above, and that the applicant's arguments concerning the absence of a prospective analysis are unfounded.

119 Second, it must be noted that, at the time of the adoption of the contested decision, neither the table of sales reproduced in the sales overview by Deloitte dated 6 December

2006, nor the H.M.G. report of November 2006 on the state of the malt industry, both of which were annexed to the application, was available to the Commission. It must be borne in mind that, in accordance with settled case-law, the legality of a Community measure falls to be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted and the complex assessments made by the Commission must be examined solely on the basis of the information available to it at the time when those assessments were made (Case T-126/99 *Graphischer Maschinenbau* v *Commission* [2002] ECR II-2427, paragraph 33; *Schmitz-Gotha Fahrzeugwerke* v *Commission*, cited in paragraph 92 above, paragraph 54; and see, to that effect, Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 16). Accordingly, for the purposes of challenging the legality of the contested decision, the applicant cannot rely on matters that were not known to the Commission during the administrative procedure.

120 Third, as regards the applicant's arguments concerning the failure to take account of the RM International report, it must be noted at the outset that that report did not put forward a complete analysis supported by specific data, existing trends and future developments relating to the malt market. In any event, the Commission refers to the RM International report in recitals 27 and 59 to the contested decision. In addition, it must be observed that the RM International report does not refer to the fact that the malt market was rapidly reaching the point at which demand would exceed supply as a result of the positive prospects for increased beer production and demand for malt, as the applicant claims. On the contrary, according to the report, 'taking into account the fact that the pace of increase of world beer production over the last few years has slowed down, it can be seen [that] new malt output is less quickly absorbed by demand'.

121 Therefore, the applicant's argument in that regard must also be rejected.

122 Having regard to all the foregoing considerations, it must be held that the Commission did not make a manifest error of assessment in its analysis of overcapacity.

— The lack of normal outlets

123 The applicant nevertheless submits that the Commission overlooked factors affecting the utilisation rate of available capacity, such as works in factories and the shortage of malting barley, with the result that it mistakenly took the view that the existence of overcapacity was attributable to the lack of normal outlets. Moreover, the applicant considers that it can easily find normal outlets for its products, in view of the improved quality of HTST malt and the fact that the type of investment concerned allows it to supply buyers outside the Community.

124 With regard to the applicant's first argument, it must be observed that the growing overcapacity identified by the Commission in respect of 2005 and 2006 cannot be explained by H.M.G.'s assertion that 'hardly any factory will produce all year round; repair and improvement works happen regularly'. In that regard, suffice it to note that the overcapacity in 2003 was no more than 37 000 tonnes, which rules out the suggestion that normal repair or improvement works could be responsible for a Community overcapacity of 400 000 to 600 000 tonnes in 2005 and in 2006, let alone an overcapacity of 800 000 tonnes for the marketing year 2006/2007, referred to in the G report of May 2006.

125 As regards the reference to the alleged shortage of malting barley, the Commission refers to that factor in recital 71 to the contested decision, stating that, 'for [the] marketing year 2006/2007, part of the explanation [for the decline in the utilisation rate] is also provided by the poor harvest of malting barley'. The applicant does not, however, put forward any source or any specific figure that would make the proposition that the shortage of malting barley was the determining factor leading to the significant decline in the utilisation rate more plausible.

126 In addition, it must be pointed out that the applicant does not contest the Commission's finding in the contested decision — which, moreover, is supported by the G report of July 2006 — that, owing to strong competition, the price of malt fell to a level at which production was no longer profitable and that these market conditions led to the closure of some production units and the restriction of production at other units. Furthermore,

a poor malting barley harvest in a particular year does not explain the permanent closure of factories in the Community.

127 Similarly, the G report of July 2006, to which the applicant refers several times, explains the emergence of overcapacity in the Community by, on the one hand, Community producers' expectations of rapid growth in demand outside the Community, which encouraged them to develop new capacity, and, on the other hand, subsequent changes in market conditions, the effect of which was that the new capacity created a surplus over demand in the world market. In that regard the report states:

'The relation of domestic and export sales was 70:30 in favour of domestic sales, but domestic markets were stagnant at best, and export markets seemed to be insatiable. Almost all expansion or new construction plans of the industry concerned export locations, Rouen, Antwerp, Rulsbroek, Eemshaven, Halmstad. When construction of the new capacities started and when record export numbers were achieved, the mood had already changed. Domestic beer sales were disappointing, Japan's industry brewed and sold low-malt and later no-malt beer, the Brazilian brewers purchased increasing quantities from their Mercosur-neighbour Argentina. The most important change, however, occurred in Russia, where international and Russian companies built a malting industry of almost 1.5 [million] [tonnes], making any malt imports unnecessary, except small quantities from direct neighbours.'

128 Similarly, the Frontier Economics report attributes the fall in utilisation rates of Community capacity to the decline in outlets outside the Community, stating that 'a key cause of this export drop has been falling demand for imports of malt by Russia …[;] although estimates of EU production for 2004-05 are not currently available, it is expected that the decline in exports … may have led to substantially reduced levels of capacity utilisation in Europe'.

129 Consequently, it must be held that the documents in the case support the existence of the causal connection identified by the Commission between overcapacity and the lack of normal market outlets for malt, and therefore the applicant's arguments concerning an error of assessment in that regard must be rejected.

130 By its second argument, the applicant submits that it can easily find normal outlets for its products, particularly in view of the improved quality of HTST malt and the fact that the type of investment — in particular the geographic position of the Eemshaven malting plant, close to areas of malting barley production and to a deep-sea port — enables it to supply buyers outside the Community.

131 In that regard, it must be noted at the outset that the applicant bases its argument on a misreading of the Guidelines when it maintains that point 4.2.5 of the Guidelines, according to which evidence must be produced that 'normal market outlets for the products concerned can be found', essentially relates to evidence of the existence of outlets for the products of the recipient of the aid.

132 According to the case-law, the Guidelines cannot be understood on the basis of their wording alone. They must be interpreted in the light of Article 87 EC and of the objective sought by that provision, namely undistorted competition in the common market (see, to that effect, Case T-27/02 *Kronofrance* v *Commission* [2004] ECR II-4177, paragraph 89).

133 Likewise, although the Commission is bound by the guidelines and notices that it issues in the field of State aid, that is so only to the extent that those texts do not depart from the proper application of the rules in the Treaty, since the texts cannot be interpreted in a way which reduces the scope of Articles 87 EC and 88 EC or which contravenes the aims of those articles (see Joined Cases C-75/05 P and C-80/05 P *Germany and Others* v *Kronofrance* [2008] ECR I-6619, paragraph 65 and the case-law cited).

134 It must also be noted that exceptions to the general rule that State aid is incompatible with the common market, laid down in Article 87(1) EC, must be interpreted strictly (Case T-348/04 *SIDE* v *Commission* [2008] ECR II-625, paragraph 62; see, as regards the ECSC Treaty, Joined Cases C-280/99 P to C-282/99 P *Moccia Irme and Others* v *Commission* [2001] ECR I-4717, paragraph 40, and Case T-150/95 *UK Steel Association* v *Commission* [1997] ECR II-1433, paragraph 114).

135 By its very nature, aid for investment strengthens the competitive position of the recipient compared with that of its competitors, since the amount granted reduces the investment costs to be borne by the recipient and therefore favours it in comparison with other producers in the sector who have completed or intend to complete a similar investment at their own expense (see, to that effect, *Philip Morris Holland* v *Commission*, cited in paragraph 47 above, paragraph 11, and Case 310/85 *Deufil* v *Commission* [1987] ECR 901, paragraph 8). Therefore, owing to the enhanced competitiveness of the recipient by reason of the aid, the aid in itself has the effect of enabling that recipient to find outlets for its products more easily than in the case of production that is unsubsidised. The more substantial the subsidy, the more likely it is that outlets for the recipient's products can be easily found.

136 It follows from this that, if the assessment for the purposes of point 4.2.5 of the Guidelines were essentially to be carried out on the basis of the existence of outlets for the subsidised production of the recipient of the aid in question, rather than by taking into account the situation of the market in general in which the recipient is competing with other producers for the same outlets, that would allow aid to be approved which distorts competition and thereby ensures that there are outlets for the recipient's products even in a market characterised by overproduction or overcapacity in which unsubsidised competitors have difficulty marketing their products. Such an interpretation of the Guidelines would therefore be contrary to Article 87 EC.

137 It follows from this that the applicant's arguments by which it seeks to demonstrate that, because of the improved quality of HTST malt, the geographic location of the Eemshaven plant and its capacity to deliver malt in bulk, it will easily find normal market outlets for its products must be rejected as having no bearing on the issue.

138 In view of the foregoing, it must be concluded that the Commission did not make a manifest error of assessment in attributing the existence of an overcapacity in the Community and world malt markets to the lack of normal outlets for production.

139 The other arguments put forward by the applicant in this context cannot affect that conclusion.

140 In the first place, the applicant claims that virtually all its output will be directed at destinations outside the Community, and, therefore, it is not in competition with other Community producers for the same outlets.

141 This proposition cannot be accepted. First, the applicant does not deny that the malt market has worldwide geographic coverage. In addition, as was stated in paragraph 44 above, there is no separate product market for premium malt or for HTST malt. Accordingly, since the applicant is competing with the other Community producers in the same product and geographic markets, it is, in consequence, competing with them for the same outlets. Second, the Frontier Economics report commissioned by the applicant states that 'it is … expected that the HTST malt … produced at Eemshaven will, at least in part, displace sales … by other suppliers of standard malt — including those European suppliers holding excess capacity'. That statement clearly indicates that the applicant intends to acquire some of the existing sales outlets of other Community producers.

142 In the second place, the applicant claims that the Commission wrongly took the view that the markets outside the Community would be unable, in future years, to absorb Community overcapacity and that the number of export licences issued is not a reliable source for monitoring the development of exports.

143 In that regard, it must be held that the G report of July 2006 and the Frontier Economics report clearly indicate (see paragraphs 127 and 128 above) that the opportunities for the sale of Community malt in third countries declined dramatically towards the end of the period considered by the Commission (in 2005 and in 2006), and that it is clear from those reports that that decline, together with the construction of new Community capacity, was the main factor responsible for Community overcapacity. In addition, the applicant has not provided any source available to the Commission at the time of the adoption of the contested decision that would have indicated a rapid and foreseeable increase in outlets outside the Community. Therefore, the Commission did not make a manifest error of assessment in finding that markets outside the Community could not, in the foreseeable future, absorb Community overcapacity.

144 In the third place, the applicant claims that, as a result of the recent foreseeable closure of factories that were obsolete or located in less favourable geographic areas, the overcapacity will disappear, and that there will therefore be normal outlets for Community production.

145 Suffice it to note in that regard that, according to the Commission in the contested decision and the G report of July 2006, the permanent closure of numerous factories in the Community in 2005 and in 2006 was principally the result of overcapacity, which caused a drop in malt prices, making production no longer profitable in certain plants. In those circumstances, the fact that numerous factories were forced to cease production merely confirms the Commission's finding as to the lack of normal outlets. Likewise, the applicant's claim that other permanent closures were foreseeable owing to increased competition essentially means that many Community malt producers were unable to sell their products profitably, which is effectively equivalent to the notion of a lack of normal market outlets.

146 Having regard to all the foregoing considerations, it must be held that the Commission applied the Guidelines correctly and did not make a manifest error of assessment in its assessment of overcapacity. Consequently, the first and third parts of the second plea in law must be rejected.

*Fourth part of the second plea in law, alleging a failure to take account of events occurring between the adoption of the decision to grant the aid and adoption of the contested decision*

Arguments of the parties

147 The applicant criticises the Commission for relying exclusively on its business plan drafted in 2003, which was nothing more than a plan for future operations, without assessing what truly occurred between the time when that plan was drawn up and the adoption of the contested decision. Referring to the case-law, it maintains that the Commission should take account of actual developments in the relevant industry that occurred between the moment that the alleged aid was granted and the adoption of the contested decision. The applicant takes the view that the information available to the Commission does not need to be provided only by the Member States or other parties to the proceedings but that it should also take into account information in the public domain.

148 As regards the date on which the plant became fully operational, the applicant criticises the Commission for holding that this was in April 2005. It objects to the fact that the Commission based that finding on information found on the internet from sources outside the applicant, without checking its findings with the applicant or with the Netherlands Government, even though other information obtained from the internet that was available to the Commission directly contradicted its account of the facts. The applicant takes the view that the Bavaria 2005 annual report, also cited by the Commission, indicates that the Eemshaven malting plant did not start operating until December 2005 at a minimal operational capacity, whereas the plant was officially opened in June 2006.

149 The Kingdom of the Netherlands did not put forward any arguments in that regard.

150 The Commission contests the applicant's arguments.

Findings of the Court

151 It must be borne in mind, as a preliminary point, that, for the purposes of having new aid approved, in derogation from the rules of the Treaty, the Member State concerned must, in order to fulfil its duty to cooperate with the Commission pursuant to Article 10 EC, provide all the information necessary to enable the Commission to verify that the conditions for the derogation from which it seeks to benefit are satisfied (see Case T-171/02 *Regione autonoma della Sardegna* v *Commission* [2005] ECR II-2123, paragraph 129, and *Schmitz-Gotha Fahrzeugwerke* v *Commission*, cited in paragraph 92 above, paragraph 48 and the case-law cited).

152 It cannot be complained that the Commission failed to take into account information which could have been submitted to it during the administrative procedure but which was 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 (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 60, and *Ter Lembeek* v *Commission*, cited in paragraph 54 above, paragraph 83).

153 Consequently, the applicant cannot legitimately complain that the Commission failed to take into account information that is allegedly in the public domain, but which was not submitted to it in the course of the administrative procedure.

154 Furthermore, the applicant's argument concerning the allegedly incorrect reference in the contested decision to the date on which the Eemshaven plant became operational cannot have any effect on the legality of the contested decision. The contested decision was based on the existence of overcapacity and on the lack of normal outlets in the

Community and world malt markets, a situation which existed in 2005 and in 2006, and it could not have been concluded from the documents available to the Commission at the time of the adoption of the contested decision that that situation would change in subsequent years. According to all the sources referred to in the contested decision and by the applicant, the opening of the Eemshaven plant must have happened during that period which was characterised by overcapacity and a lack of normal outlets.

155 Therefore, the fourth part of the second plea in law must be rejected as unfounded.

*Second part of the second plea in law, alleging a failure adequately to balance the beneficial effects of the aid and its impact on intra-Community trading conditions*

Arguments of the parties

156 The applicant, in essence, criticises the Commission for failing to strike a balance in the contested decision between the beneficial effects of the subsidy and its possible adverse impact on trading conditions within the Community, thereby misinterpreting and misapplying Article 87(3)(c) EC. It maintains that the investment concerned has a major beneficial impact on the attainment of common agricultural policy objectives, in particular the rural development policy, and on Community actions relating to regional development and cohesion.

157 It considers that the Commission cannot legitimately state that, following the adoption of the Guidelines, it has waived its discretion and is not therefore free to strike a balance that takes account of the beneficial effects of the aid. It considers that the fact that the

Guidelines are based on Article 87(3) EC necessarily implies that the Commission cannot unduly limit its discretion or waive it. It infers from that that point 4.2.5 of the Guidelines must be interpreted in the light of the criterion laid down in the Treaty, namely whether trading conditions are affected to an extent contrary to the common interest. It submits that the Commission did not assess whether, in the light of the benefits generated by the planned subsidy, that impact is truly contrary to the common interest within the meaning of Article 87(3) EC.

158 It considers that the Guidelines, in their existing form, leave the Commission all the room it needs to ensure a proper balance between the benefits and the alleged competitive impact of the subsidy. Referring to the Opinion of Advocate General Alber in Case C-204/97 *Portugal* v *Commission* [2001] ECR I-3175, point 46, it considers that, if that were not the case, the Guidelines would not strike a proper balance as required by Article 87(3) EC between the positive impact of aid and its alleged adverse impact, so that recourse should have been had to Article 87(3) EC directly. The applicant maintains in any event that the Commission wrongly applied the criteria which it laid down for itself in the Guidelines.

159 It claims that the subsidy was intended, first, to compensate for the higher costs of setting up the malting plant in Eemshaven rather than in a location that it would have chosen in another region of the Netherlands and, second, to encourage it to establish the plant in a region in need of economic development. It submits that any competitive advantage which it would have gained as a result of the subsidy was reduced by the higher costs it had to bear and that the true position is that a large part of the subsidy was necessary to ensure that it could operate on a level playing field vis-à-vis its competitors. It considers that, through the investment in question, it actively participated in the development of a malting barley growing region in the north of the Netherlands which offers important new prospects for growers in that region and contributes to the process of modernising malt production capacity by replacing inefficient land-locked capacity by modern capacity, directed towards third countries outside the Community.

160 It claims that the subsidy brings in new, future-oriented technology, leading to better health and environmental standards and a higher quality malt and, in consequence, better quality beer. That investment therefore has a positive rather than a negative impact on Community competitive capacity in export markets and on existing and expected capacity within the Community malt market.

161 The applicant refers to point 1.6 of the Guidelines which requires consistency between control of State aids from the Member States and Community measures adopted under the Community's rural development policy. Article 25 of Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations (OJ 1999 L 160, p. 80) provides that investment aid for the processing of agricultural products is to contribute to the attainment of the objectives of the Community rural development policy.

162 The Kingdom of the Netherlands considers that the Commission is losing sight of the fact that the project in question falls perfectly within the general objectives of its rural development policy. It further submits that the project in fact provides for the revival of the agricultural sector in the north of the Netherlands and in particular the replacement of sugar beet by other crops. It considers that the Commission must not only assess the subsidy in relation to point 4.2.5 of the Guidelines but also examine 'whether the aid does not adversely affect trading conditions to an extent contrary to the common interest'. Referring to the judgment in *Alzetta and Others* v *Commission*, cited in paragraph 63 above, it claims that it is incumbent on the Commission, when carrying out an examination under Article 87(3)(c) EC, to strike a balance between the beneficial effects of the aid and its adverse effects on trading conditions and the maintenance of undistorted competition. It infers from that that the Commission remains under an obligation to take account of Article 87(3)(c) EC even if it has restricted its discretion in the assessment of cases of aid to agriculture in the Guidelines.

163 The Kingdom of the Netherlands states that the Commission is required to ensure that Articles 87 EC and 88 EC are applied consistently with other provisions of the Treaty (Case C-110/03 *Belgium* v *Commission* [2005] ECR I-2801, paragraph 64). One of those

'other provisions of the Treaty' is Article 158 EC, which provides that the Community is to aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions, including rural areas. It is therefore incumbent on the Commission to ensure that the required link is forged between its aid policy and Community action to reduce regional disparities.

164 The Kingdom of the Netherlands submits that the grant of aid for such an innovative facility falls within the objectives laid down at the Lisbon European Council whereby the European Union should, by 2010, become the most competitive and dynamic economy in the world. It criticises the Commission for not mentioning that essential point in the contested decision.

165 The Commission contests the arguments of the applicant and of the Kingdom of the Netherlands.

Findings of the Court

166 As a preliminary point, it must be borne in mind that the contested decision was adopted pursuant to the provisions both of Article 87(1) and (3) EC and of the Guidelines, in particular section 4.2 of the latter, which seeks to clarify those provisions in the case of 'aids for investments in connection with the processing and marketing of agricultural products'.

167 Where guidelines have been adopted, the Commission is governed by them (*Deufil* v *Commission*, cited in paragraph 135 above, paragraph 22, and *Regione autonoma della Sardegna* v *Commission*, cited in paragraph 151 above, paragraph 95). It is therefore for the Community judicature to check that the Commission has observed the rules which it adopted (Case T-35/99 *Keller and Keller Meccanica* v *Commission* [2002] ECR II-261, paragraph 77, and *Regione autonoma della Sardegna* v *Commission*, cited in paragraph 151 above, paragraph 96).

168 In the first place, it must be noted that the applicant expressly stated in its observations on the statement in intervention that it did not call into question the binding nature of the Guidelines or their compatibility with the provisions of the EC Treaty.

169 According to point 3.7 of the Guidelines, 'because the very specific conditions of agricultural production must be taken into account during the assessment of aid which is intended to favour the less-favoured regions, the Commission's guidelines on national regional aid do not apply to the agricultural sector[;] where they are relevant for the agricultural sector, regional policy considerations have been incorporated into the present guidelines'. It follows that any positive aspect of the aid in question can be considered only in the context of the application of the criteria laid down in the Guidelines.

170 It will be recalled that point 4.2.5 of the Guidelines provides that 'no aid may be granted … unless sufficient evidence can be produced that normal market outlets for the products concerned can be found'.

171 Therefore, having found that the aid in question falls within the scope of the Guidelines, the Commission was required, first of all, to consider whether sufficient evidence had been produced that normal market outlets for the products concerned could be found.

172 Given that that preliminary condition was not met in the present case, the Commission could not have approved the aid at issue, having regard to its objectives and possible beneficial effects, without infringing its own guidelines and, in consequence, the principles established in the case-law cited in paragraph 167 above. Therefore an assessment of those objectives and beneficial effects was superfluous.

173 In the second place, the applicant cannot legitimately claim that the non-application of the Guidelines and the direct application of Article 87(3)(c) EC would have entailed taking into account the objectives and beneficial effects of the aid at issue.

174 According to the judgment in *Deufil* v *Commission*, cited in paragraph 167 above (paragraph 18), in the application of Article 87(3) EC the Commission has a discretion the exercise of which involves economic and social assessments which must be made in a Community context. The Court held in that judgment that the Commission had not exceeded the limits of its discretion by considering that the granting of aid for an investment which increased production capacity in a sector in which there was already considerable overcapacity was contrary to the common interest and that aid of that sort was not of such a nature as to promote the economic development of the area at issue.

175 Furthermore, the Court did not express any doubts in respect of the economic considerations underlying the Commission's decision set out in paragraph 16 of the judgment in *Deufil* v *Commission*, cited in paragraph 167 above, according to which, 'having regard to the surplus of capacity …, any artificial lowering of investment costs for manufacturers of those products would weaken the competitive position of other producers and would, if it led to increased capacity, have the effect of reducing capacity utilisation and depressing prices[;] it cannot therefore be denied that the aid in question has an adverse effect on trading conditions to an extent contrary to the common interest within the meaning of [Article 87(3)(c) EC]'.

176 Therefore, the criterion referred to in point 4.2.5 of the Guidelines, whereby no aid may be granted unless sufficient evidence can be produced that normal market outlets for the products concerned can be found, reflects the condition under Article 87(3)(c) EC that any aid adversely affecting trading conditions to an extent contrary to the common interest cannot be compatible with the common market.

177 Having regard to the foregoing, it must be concluded that the Commission did not infringe Article 87(3)(c) EC when it based the contested decision on the existence of Community overcapacity and on the failure to produce evidence of the existence of normal outlets, without having assessed the objectives and beneficial effects of the aid for the area concerned.

178 That conclusion cannot be affected by the applicant's argument that the aid at issue merely compensates for the economic disadvantages of the Eemshaven area as against the Terneuzen area (Netherlands) which it would have preferred in the absence of the aid.

179 In that regard, it must be noted that undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been approved by the Commission in a procedure covered by Article 88 EC (see Joined Cases C-183/02 P and C-187/02 P *Demesa and Territorio Histórico de Álava* v *Commission* [2004] ECR I-10609, paragraphs 44 and 45 and the case-law cited, and Case C-148/04 *Unicredito Italiano* [2005] ECR I-11137, paragraph 104). In the absence of such a legitimate expectation, from the point of view of the Community control of State aid, any commercial decision based on the prospect of aid that has not been approved by the Commission pertains to risks associated with the economic activities of the aspiring aid recipient, and therefore any detriment suffered as a result of that decision cannot be taken into account in the Commission's assessment.

180 Having regard to the foregoing considerations, the second part of the second plea in law must also be rejected, as, therefore, must the second plea in law in its entirety.

*Second part of the fourth plea in law, alleging an inadequate statement of reasons in the contested decision as regards the application of Article 87(3) EC*

181 The applicant, supported by the Kingdom of the Netherlands, takes the view that, since the calculations on the basis of which the figures relating to surplus capacity in the malt market mentioned in the contested decision are not specified, it is impossible to verify whether overcapacity actually existed in the Community malt market, and to what extent the investment at issue would have had an impact on that situation. It concludes from this that the contested decision is vitiated by a lack of adequate reasoning, which is an infringement of the Commission's obligation to state reasons, laid down in Article 253 EC.

182 The Commission contests the applicant's arguments.

183 In that regard, suffice it to note that, as is apparent from paragraph 106 above, the Commission stated the sources of the figures relating to the overcapacity which existed in the Community market during the period assessed, contrary to the applicant's assertions.

184 Therefore, the second part of the fourth plea in law must also be rejected as unfounded.

3. *Third plea in law, alleging breach of the principle of sound administration*

Arguments of the parties

185 The applicant criticises the Commission for not duly investigating all aspects of the grant of the subsidy, including developments and events occurring between the adoption of the decision to grant aid and the adoption of the contested decision. Referring to the case-law, it considers that information does not need to be provided only by the Member State or other parties to the proceedings but that the Commission should also investigate information in the public domain.

186 It contends that the contested decision is mainly based on figures relating to capacity provided by Euromalt, an interest group that represents its competitors, who have a commercial interest in opposing the modernisation of its capacity. It accepts that a number of national malt producers' associations supported Euromalt's conclusions, but those associations did not specify how their figures relating to capacity were calculated, or referred to the figures set out in Euromalt's letter of 3 August 2005. It criticises the Commission for failing to take account of reports on the malt market drawn up by RM International, H.M.G. and Rabobank, which confirmed that the Community malt sector was undergoing rapid structural changes and that supply and demand for malt within the Community would be in balance by 2006.

187 It considers that the arguments concerning the beneficial effects of the subsidy, inasmuch as they further the objectives of the Community common agricultural policy, in particular the rural development policy, and Community action on regional development and cohesion, were not properly investigated.

188 In support of its argument alleging inadequate investigation it submits, by way of example, that the Commission's determination of the date on which the Eemshaven plant became operational was based on information from the internet and from sources other than the applicant, and that the Commission did not check that finding with the applicant or with the Netherlands Government.

189 The applicant concludes from this that the Commission infringed its duty to investigate carefully and impartially all the relevant aspects of the present case and that it should have undertaken a more extensive and more diligent investigation.

190 The Kingdom of the Netherlands did not put forward any arguments in this respect.

191 The Commission contests the applicant's arguments.

Findings of the Court

192 By this plea, the applicant, in essence, complains that the Commission infringed the principle of sound administration, inasmuch as it was required to investigate carefully and impartially all the relevant aspects of the case.

193 As regards the issue of the burden of proof, it must be borne in mind at the outset that it is for the Member State concerned to provide all the information necessary to enable the Commission to verify that the conditions for the derogation are satisfied, and that

the Commission 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 paragraph 152 above).

194 It follows from this that, as has already been held in paragraph 153 above, the applicant's argument that the Commission should have taken into account information available in the public domain cannot be accepted. Furthermore, the applicant has not even identified the evidence which is in the public domain and which the Commission should have taken into account.

195 With regard to the principle of sound administration in the case of State aid, it is settled case-law that observance of that principle requires a diligent and impartial investigation by the Commission of the measure at issue. The Commission is therefore under an obligation to obtain all the necessary points of view, in particular by requesting information from the recipients, in order to make a finding in full knowledge of all the facts relevant at the time of adoption of its decision (see, to that effect, *Commission* v *Sytraval and Brink's France,* cited in paragraph 152 above, paragraph 62, and Case T-198/01 *Technische Glaswerke Ilmenau* v *Commission* [2004] ECR II-2717, paragraph 180).

196 In the present case, it is clear from the foregoing considerations that the Commission demonstrated diligence and impartiality in its conduct of the investigation of the measure at issue. As is apparent from the analysis of the second plea in law, the Commission actively gathered and assessed the evidence throughout the procedure and organised meetings with H.M.G.

197 With regard to the applicant's argument that the Commission did not duly investigate developments and events that occurred between the adoption of the decision to grant the aid and the adoption of the contested decision, suffice it to point out that that argument has no basis in fact (see paragraph 116 et seq. above).

198 As regards the reliability of the figures supplied by Euromalt and the alleged failure to take into consideration the reports on the malt market drawn up by RM International, H.M.G. and Rabobank, the Court refers to its analysis in respect of the first and third parts of the second plea in law. It is clear from this that the Commission duly took into account the various sources which were available to it at the time of the adoption of the contested decision, and that none of the main findings — as regards the assessment of the legality of the contested decision — was founded exclusively on the Euromalt figures, with the result that the Court does not find it necessary to consider the objectivity of the documents from that association. It should also be borne in mind that the applicant has not produced any document available to the Commission at the time of the adoption of the contested decision that would have contradicted the findings contained in that decision.

199 As regards the argument relating to the failure adequately to investigate the beneficial effects of the subsidy and the determination of the date on which the Eemshaven plant became operational, the examination of the second and fourth parts of the second plea in law has clearly demonstrated that these matters have no particular significance in relation to the assessment of the compatibility of the aid with the common market, and therefore the Commission was not required to undertake a more extensive assessment in that regard.

200 For all these reasons, the third plea, alleging breach of the principle of sound administration, must be rejected as unfounded and the action as a whole must be dismissed.

**Costs**

201 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 Commission's costs in accordance with the form of order sought by the Commission. Under the first subparagraph of Article 87(4) of the Rules of Procedure, the Member States which intervened in the proceedings are to bear their own costs. Accordingly, the Kingdom of the Netherlands shall bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

**1. Dismisses the action;**

2. **Orders Holland Malt BV to bear its own costs and to pay those incurred by the Commission;**

3. **Orders the Kingdom of the Netherlands to bear its own costs.**

Czúcz Labucka Soldevila Fragoso

Delivered in open court in Luxembourg on 9 September 2009.

[Signatures]

## Table of contents

Background to the dispute . . . . . II - 3319

Procedure and forms of order sought by the parties . . . . . II - 3321

Law . . . . . II - 3323

1. First plea in law, alleging infringement of Article 87(1) EC, and first part of the fourth plea in law, alleging breach of the duty to state reasons as to why the measure in question should be classified as State aid . . . . . II - 3323

Arguments of the parties . . . . . II - 3323

Findings of the Court . . . . . II - 3326

Admissibility of the first plea in law . . . . . II - 3326

Infringement of Article 87(1) EC . . . . . II - 3327

The statement of reasons for the contested decision concerning the effect on intra-Community trade and on competition . . . . . II - 3334

2. Second plea in law, alleging infringement of Article 87(3)(c) EC, and the second part of the fourth plea in law, concerning the inadequacy of the statement of reasons in that regard . . . . . II - 3337

First and third parts, alleging misinterpretation and misapplication of the Guidelines, and an error of assessment in regard to overcapacity . . . . . II - 3338

Arguments of the parties . . . . . II - 3338

Findings of the Court . . . . . II - 3343

— Overcapacity in the malt market . . . . . II - 3347

— The lack of normal outlets . . . . . II - 3353

Fourth part of the second plea in law, alleging a failure to take account of events occurring between the adoption of the decision to grant the aid and adoption of the contested decision . . . . . II - 3359

Arguments of the parties . . . . . II - 3359

Findings of the Court . . . . . II - 3360

Second part of the second plea in law, alleging a failure adequately to balance the beneficial effects of the aid and its impact on intra-Community trading conditions . . II - 3361

Arguments of the parties . . . . . II - 3361

Findings of the Court . . . . . II - 3364

Second part of the fourth plea in law, alleging an inadequate statement of reasons in the contested decision as regards the application of Article 87(3) EC . . . . . II - 3368

3. Third plea in law, alleging breach of the principle of sound administration . . . . . II - 3369

Arguments of the parties . . . . . II - 3369

Findings of the Court . . . . . II - 3370

Costs . . . . . II - 3373