JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fifth Chamber, Extended Composition)
10 April 2003 *

In Case T-369/00,

Département du Loiret, represented by A. Carnelutti, lawyer,

applicant,

supported by

Scott SA, established in Saint-Cloud (France), represented by Sir Jeremy Lever QC, G. Peretz, Barrister, and R. Griffith, Solicitor, with an address for service in Luxembourg,

intervener,

* Language of the case: French.

Commission of the European Communities, represented by G. Rozet and J. Flett, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for partial annulment of Commission Decision 2002/14/EC of 12 July 2000 on the State aid granted by France to Scott Paper SA/Kimberly-Clark (OJ 2002 L 12, p. 1),

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

composed of: J.D. Cooke, President, R. García-Valdecasas, P. Lindh, N.J. Forwood and H. Legal, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 26 September 2002,

gives the following

Judgment

Legal framework

Regulation (EC) No 659/1999

1 Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1) establishes the procedural rules in matters of State aid.

2 Article 15 of that regulation provides:

'Limitation period

1. The powers of the Commission to recover aid shall be subject to a limitation period of 10 years.

2. The limitation period shall begin on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme. Any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid shall interrupt the limitation period. Each interruption shall start time running afresh. The limitation period shall be suspended for as long as the decision of the Commission is the subject of proceedings pending before the Court of Justice of the European Communities.

3. Any aid with regard to which the limitation period has expired, shall be deemed to be existing aid.'

3 Article 30 of Regulation No 659/1999 provides:

'Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Communities*.'

Facts of the case

4 The City of Orleans, the applicant and Scott Paper Company ('Scott') concluded an agreement on 31 August 1987 following certain offers made to Scott by the City of Orleans. By that agreement, Scott decided to establish a factory in the *département* of Le Loiret on a 48-hectare plot on La Saussaye industrial estate.

The agreement related inter alia to the acquisition of that plot and to the water treatment levy, which was to be calculated at a special rate, corresponding to 25% of the lowest rate paid by other industries. The City of Orleans also offered to carry out the preliminary site-work free of charge.

5 The agreement further provided that the applicant and the City of Orleans would contribute up to 80 million French francs (FRF) towards the preparation of the site for Scott. Last, the purchase price of the plot together with the preparatory work was fixed at FRF 31 million.

6 In November 1996, the French Court of Auditors published a public report entitled 'Local authority assistance for undertakings' (special public report of the Court of Auditors, November 1996, Paris). Its aim in publishing this report was to draw attention to potential aid granted by French local authorities to certain undertakings, and in particular the conveyance to the applicant of a 48-hectare plot on La Saussaye industrial estate.

7 Following publication of this report, the Commission received a complaint, by letter dated 23 December 1996, about the preferential conditions on which the City of Orleans and the General Council of Le Loiret had sold the 48 hectares to the applicant and the rate at which the water treatment levy had been set for the applicant.

8 By letter of 17 January 1997, the Commission requested the French authorities to provide further information. There followed an exchange of correspondence between the French authorities and the Commission, between January 1997 and April 1998, in the course of which the French authorities provided in part the

information and details requested, notably by letters of 19 March, 21 April and 29 May 1997. On 8 August 1997, the Commission again requested details from the French authorities. The Commission received further information from the French authorities on 3 November 1997 and from the complainant on 8 December 1997, 29 January 1998 and 1 April 1998.

9 By letter of 10 July 1998, the Commission informed the French authorities that it had taken a decision on 20 May 1998 to initiate the procedure provided for in Article 88(2) EC '[i]n view of... its doubts concerning the behaviour of the French authorities towards [Scott] and its compatibility with the Treaty' and invited them to submit their comments and also to answer certain questions (hereinafter 'the decision to initiate the procedure'). In that letter, the Commission also requested the French authorities to inform the applicant that the procedure had been initiated and that it might have to repay any aid unlawfully received. The interested parties were informed that the procedure had been initiated and invited to submit any observations on the measures in question, by the publication of the letter of 10 July 1998 in the *Official Journal of the European Communities* of 30 September 1998 (OJ 1998 C 301, p. 4).

10 By letter of 25 November 1998, the French authorities submitted observations on the decision to initiate the procedure.

11 After taking note of the observations of the French authorities and of third parties, the Commission again requested further information from the French authorities. The latter responded only in part and on 8 July 1999 the Commission enjoined them to provide the necessary information. The French authorities responded in part to that request on 15 October 1999.

12 On 22 March 1999, the Council adopted Regulation No 659/1999, which, in accordance with Article 30 thereof, entered into force on 16 April 1999.

The contested decision

13 On 12 July 2000, the Commission adopted Decision 2002/14/EC on the State aid granted by France to Scott Paper SA/Kimberly-Clark (OJ 2002 L 12, p. 1) ('the contested decision'), Article 1 of which provides:

'The state aid in the form of a preferential land price and a preferential rate of water treatment levy granted by France to Scott and amounting, in the case of the land price, to FRF 39.58 million (EUR 6.03 million) or, at present value, FRF 80.77 million (EUR 12.3 million)... is incompatible with the common market.'

14 Article 2 of the contested decision provides:

'1. France shall take all necessary measures to recover from the beneficiary the aid referred to in Article 1 and already made available to it unlawfully.

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective

execution of this Decision. The aid to be recovered shall include interest from the date on which it was made available to the beneficiary until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.'

15 In the contested decision, the Commission considered that the limitation period applicable to its power concerning the recovery of aid granted unlawfully, under Article 15 of Regulation No 659/1999, had been interrupted in this case. It stated that any action taken by the Commission with regard to an unlawful aid interrupts the limitation period (see recital 219 of the preamble to the contested decision).

16 The Commission found that the aid in issue had been granted on 31 August 1987. The first measure taken by the Commission, in the form of a formal request for information made to the French authorities, dated from 17 January 1997. The limitation period had therefore been interrupted before the 10-year period provided for had expired, so that the Commission had the power to recover the aid in question (see recital 220 of the contested decision).

17 In the contested decision, the Commission also rejected Scott's argument that the limitation period is designed to protect the beneficiary of the aid and that, consequently, it is interrupted only where the beneficiary has been informed that the Commission is investigating the aid. According to the Commission, the question as to who ultimately benefits from the limitation period is a separate matter from how that period is calculated. It further states that Article 15 of Regulation No 659/1999 does not refer to third parties, but is confined to the relations between itself and the Member States. The Commission is therefore under no obligation to provide information to third parties, who do not derive any specific right from Article 15 of that regulation. In proceedings relating to State aid, third parties enjoy only the procedural rights deriving from Article 88(2) EC (see recitals 221 to 223 of the contested decision).

18 When Article 15 of Regulation No 659/1999 refers to the beneficiary of the aid, it does so solely in order to determine the date from which the limitation period starts to run, i.e. 'the day on which the unlawful aid is awarded to the beneficiary' (see recital 223 of the contested decision).

19 The Commission also observes that the beneficiary of aid must check whether the aid it was granted was notified. If the aid was not notified and not approved, there is no legal certainty (see recital 224 of the contested decision).

Procedure and forms of order sought by the parties

20 By application lodged at the Registry of the Court of First Instance on 4 December 2000, the applicant brought the present action. In its application, the applicant requested that the present case be joined forthwith with Case T-366/00, brought by Scott against the contested decision on 30 November 2000.

21 By a document lodged at the Registry on 19 March 2001, Scott sought leave to intervene in the present proceedings in support of the form of order sought by the applicant.

22 On 25 April 2001, the Court of First Instance held a joint informal meeting in respect of both the present case and Case T-366/00, under Article 64(3)(e) of the Rules of Procedure, at which the request to join the two cases submitted by the applicant in the present case and the possibility of deciding the limitation issue

prior to any arguments on the merits of the case, as requested by Scott in Case T-366/00, were discussed.

23 Upon hearing the report of the Judge-Rapporteur and in light of the views expressed at the informal meeting, the Court of First Instance (Fifth Chamber, Extended Composition) decided to open the oral procedure and to confine it to the grounds of annulment alleging that the Commission's power to order recovery of the State aid granted by France in the form of the preferential price of a 48-hectare plot at La Saussaye was time-barred.

24 By order of the President of the Fifth Chamber, Extended Composition, of 10 May 2001, Scott was granted leave to intervene in the present case in support of the form of order sought by the applicant.

25 The parties presented oral argument and replied to the questions put to them by the Court at the hearing on 26 September 2002.

26 In the present judgment, the Court will therefore confine itself to considering the application for annulment of Article 2 of the contested decision in so far as that application is based on the plea alleging breach of Article 15 of Regulation No 659/1999.

27 In that context, the applicant claims that the Court should:

— annul Article 2 of the contested decision, in so far as it declares the State aid granted in the form of a preferential price of a plot unlawful and orders

repayment of the sum of FRF 39.58 million (EUR 6.03 million) or, at present value, FRF 80.77 million (EUR 12.3 million);

— order the Commission to pay the costs.

28 The Commission contends that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay the costs.

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

— declare the application well founded;

— order the Commission to pay the costs.

The law

30 In support of its grounds of annulment relating to limitation, the applicant raises a single plea in law alleging infringement of Regulation No 659/1999. This plea is divided into two parts. The first part concerns the application of Regulation No 659/1999 in the present case and the second relates to the fact that only a 'formal act' adopted by the Commission, and not mere requests for information addressed to the French authorities, is capable of interrupting the limitation period.

First part of the plea, relating to the application of Regulation No 659/1999 to the present case

Arguments of the parties

31 The applicant claims that the Commission's intervention as regards recovery of the aid in respect of the plot at La Saussaye from its beneficiary, Scott, is time-barred under Article 15 of Regulation No 659/1999.

32 It disputes the Commission's argument that Regulation No 659/1999 is not applicable in the present case. It maintains that the Commission recognised the applicability of Regulation No 659/1999 in the contested decision, since, after referring to its content, it concluded that there had been an interruption of the limitation period when it sent the French authorities requests for information, in particular on 17 January 1997. Judicial review of the legality of the contested

decision should relate to its content, as determined by its express words. In that regard, the applicant maintains that the Commission altered its own reasons for the contested decision in its defence, since it now states that the interruption of the limitation period was justified by the decision of 20 May 1998 to initiate the proceedings. That argument, introduced in the defence but not to be found in the grounds of the contested decision, should therefore not be accepted after the event.

33 The applicant submits that Regulation No 659/1999, the procedural nature of which is scarcely in doubt, applies to procedures relating to State aid which are current and in which a definitive decision had not been taken before it entered into force. That regulation is also characterised by the absence of any transitional provision. It codifies and supports a constant practice in the application of Article 88 EC and constitutes 'an indissociable procedural whole' intended to apply immediately to all pending proceedings save express exceptions laid down in the actual wording of the regulation. It has consistently been held that procedural rules are generally held to apply to all proceedings pending at the time when they enter into force (Joined Cases 212/80 to 217/80 *Salumi and Others* [1981] ECR 2735, paragraph 9). The applicant observes that the Commission itself has since April 1999 applied Regulation No 659/1999 to current cases.

34 The applicant further submits that the 10-year limitation period provided for in Article 15 of Regulation No 659/1999 is of 'absolute scope' and that a measure interrupting that period must be taken within 10 years of the date on which the unlawful aid was granted. If more than 10 years have elapsed between the date on which the regulation entered into force and the date on which the aid was granted without an act interrupting the limitation period having been taken, the limitation must be deemed to be effective. Consequently, the absence of an injunction to communicate information or of a decision to initiate a formal examination procedure before the 10th anniversary of grant of the aid has the effect that recovery of the aid is prohibited by Article 15 of Regulation No 659/1999.

35 The applicant maintains that the present case has assumed an 'extreme nature' in the light of the period which elapsed between the date on which the aid was granted, 31 August 1987, and the date on which the French authorities were called upon to respond to the Commission's investigations in 1997. That 'extreme nature' is all the more marked because it took a further three and a half years to adopt the contested decision. The applicant contends that both the Member States and the Commission are to be criticised for that period of three and a half years. That time which thus elapsed led to problems in reconstituting the economic data for the period, not to say made it impossible to do so. The lapse of a very long period makes it particularly difficult to justify a contested measure in the light of the system of State aid. In that regard, the applicant contends that 10 years is the maximum limitation period acceptable.

36 The applicant further emphasises the major inconveniences occasioned by the 'exclusively bilateral' procedure in respect of State aid. That procedure is illustrated by a thorough and satisfactory dialogue between the Commission and the Member States where the aid is granted by the central administration of the State or its components. However, that is not necessarily the case where the aid is granted by territorial authorities. In such a situation, the decentralised authorities suffer the consequences of the conduct of the central State where the latter does not act diligently in responding to the Commission. The applicant consequently maintains that the dialogue between the Commission and the Member State should be systematically extended to the territorial authority which has taken the contested measure.

37 The Commission contends that the applicant's allegation that its action in the present case was time-barred is manifestly unfounded. There is no need in the present case to ascertain whether Regulation No 659/1999 constitutes a corpus of procedural provisions applying generally to all procedures pending when they entered into force, or a body of substantive provisions which, in this case, apply to earlier situations only in so far as it is clear from their terms, objectives or general scheme that such an effect is to be attributed to them.

38 At the time when the aid was granted, on 31 August 1987, and throughout 1997, when the Commission addressed a number of requests for information to the French authorities, no limitation period had been set by the Community legislature in respect of the Commission's action in regard to non-notified State aid. There was no specific legal basis capable of establishing that the Commission's actions were time- barred. It is clear from the judgment in Joined Cases T-126/96 and T-127/96 *BFM and EFIM* v *Commission* [1998] ECR II-3437, paragraph 68, that a limitation period is not applicable by analogy. Thus, the Commission contends that neither the public authorities which grant the State aid nor the beneficiaries of the aid can found a legitimate expectation that its action was subject to a limitation period.

39 The Commission also observes that it is common ground that when it adopted its decision to initiate the procedure, on 20 May 1998, no limitation period was in force, so that its action was not time-barred. Nor was the Commission subject to the limitation period when it notified to the French authorities its decision to initiate a formal examination procedure on 10 July 1998 or when it published that decision in the *Official Journal of the European Communities* on 30 September 1998. The entry into force on 16 April 1999 of Regulation No 659/1999 and of Article 15 thereof cannot have had the effect of retroactively altering that situation. From those observations, the Commission concludes that its action could not be time-barred when it adopted the contested decision on 12 July 2000. The entry into force of Regulation No 659/1999 and of Article 15 thereof could not prevent the Commission from adopting such a decision or from drawing all the inferences of law in regard to aid granted in breach of the obligation to notify the aid laid down in Article 88(3) EC.

40 In the Commission's submission, the application of Regulation No 659/1999 and of the limitation period provided for in Article 15 thereof to aid granted before it entered into force depends on two conditions which must both be fulfilled, namely the lapse of a period of 10 years from the date on which the aid was granted and the absence of measures interrupting the running of time prior to the

date of entry into force of that regulation. The Commission acknowledges that 10 years elapsed from the date on which the aid was granted but contends that various measures interrupting the running of time were taken before Regulation No 659/1999 entered into force. In any event, the decision to initiate the procedure was taken at a time when there was no legal basis on which to consider that the Commission's action was time-barred.

41 The Commission contends that the applicant is applying Article 15 of Regulation No 659/1999 retroactively. That regulation, which contains no transitional provisions and is therefore immediately applicable, cannot be applied retroactively. It is settled case-law that in order to be able to fulfil their function, limitation periods should be fixed in advance (see Case 41/69 *ACF Chemiefarma* v *Commission* [1970] ECR 661 and Case 48/69 *ICI* v *Commission* [1972] ECR 619). In the Commission's contention, Regulation No 659/1999 lays down a rule on prescription only as regards aid unlawfully granted after its entry into force. The prescription rule concerns 'new' cases of unlawfully-granted aid and not 'old' cases of aid granted before the regulation entered into force. Community measures are not to be applied retroactively, save in exceptional cases, where it is clear from their terms and their general scheme that that was the legislature's intention, which is not so in the case of Article 15 of Regulation No 659/1999. The only way of ensuring that Article 15 of Regulation No 659/1999 applies immediately to 'old' cases, while taking care not to engage in an unlawful retroactive application, is that described at paragraph 40 above.

42 In its rejoinder, the Commission contends that the applicant has not proved either that the present case assumed an 'extreme nature' owing to the time between the date on which the aid was granted, 31 August 1987, and the date on which it was called upon to respond to its investigations, in 1997, or that the length of the proceedings in the present case was distinguished by being significantly prolonged. The three and a half years which elapsed following receipt of the complaint are also due to the absence of response from the French authorities, to their requests for further time and to the holding of an informal meeting.

43 The Commission also observes that any decision to initiate the procedure must, in accordance with Article 88(2) EC, be preceded by an initial examination which leads it to form the conviction that a State aid is incompatible with the Treaty. The material which it had acquired as a result of its requests for information led to the adoption of the decision to initiate the procedure on 20 May 1998, or less than 17 months after the complaint was lodged.

44 The Commission further states that it was not in a position to issue an injunction to communicate information in August 1997, owing in particular to the fact that the French authorities had not adopted the approach of manifestly refusing to cooperate, which alone could have justified the adoption of such an injunction. It submits that it thus reacted diligently by contacting the French authorities on 17 January 1997 in order to request them to forward to it any information of use in the investigation of the case.

45 The Commission further claims that although its conduct may be examined under the head of compliance with the principle of good administration, the application contains no plea alleging any breach of that principle. If the arguments which the applicant raised at the stage of the reply and which are set out at paragraph 35 above, concerning the 'extreme nature' of the present case, should none the less be regarded as raising such a plea, they would constitute a fresh plea and would, consequently, be inadmissible.

46 The applicant's allegation that the dialogue between the Commission and the French authorities was neither thorough nor satisfactory in the present case from the aspect of the territorial authorities who granted the aid in issue is not correct, since the City of Orleans, which is also involved in the grant of the aid, has not brought an action for annulment. In any event, the French authorities' letters in

response to the requests for information consistently indicated that the information in question had been obtained from, *inter alia*, the applicant. Furthermore, the applicant did not submit observations to the Commission following the publication in the *Official Journal of the European Communities* of the decision to initiate the procedure under Article 88(2) EC.

47 The Commission also contends that the right recognised by the Treaty to submit to it any observation on the measures in issue in the context of the procedure under Article 88(2) EC is the 'direct palliative' of the consequences which the dilatory conduct of the Member State is capable of having in relation to the territorial authority which granted the aid in question and in relation to its beneficiary. The territorial authority and the beneficiary of the aid also have a legal solution in the legal remedies available to them before the national courts for the purpose of establishing the liability of the central State for its lack of diligence on the basis of its duty of loyal cooperation with the Commission. It is not without reason that the Treaty, in the context of control of State aid, defined the particular situation of the Member State as an organ of the public authority. Basically, any shortcomings in the constitutional or administrative structures of a Member State must be resolved within the domestic legal order.

Findings of the Court

48 It should be pointed out at the outset 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 on the date on which the measure was adopted (see Case T-123/97 *Salomon* v *Commission* [1999] ECR II-2925, paragraph 48, and Case T-126/99 *Graphischer Maschinenbau* v *Commission* [2002] ECR II-2427, paragraph 33).

49 It is also settled case-law that although procedural rules are generally held to apply to all proceedings pending at the time when they enter into force, this is not the case with substantive rules. The latter are usually interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, objectives or general scheme that such an effect must be given to them. This interpretation ensures respect for the principles of legal certainty and the protection of legitimate expectations, by virtue of which the effect of Community legislation must be clear and predictable for those who are subject to it (see, in particular, Joined Cases 212/80 to 217/80 *Salumi and Others* [1981] ECR 2735, paragraphs 9 and 10, and Joined Cases C-121/91 and C-122/91 *CT Control (Rotterdam) and JCT Benelux* v *Commission* [1993] ECR I-3873, in particular paragraphs 22 and 23).

50 Regulation No 659/1999, which is a procedural regulation relating to the application of Article 88 EC, was adopted in the light of the practice developed by the Commission in that sphere with a view, particularly, to ensuring effective and efficient procedures pursuant to that article and to increasing transparency and legal certainty (see recitals 2 and 3 to that regulation). Chapter III, entitled 'Procedure regarding unlawful aid', sets out the Commission's powers relating, in particular, to the examination of State aid, to the request for information, to information injunctions and to the recovery of unlawful aid. It follows from the very wording of those provisions, including Article 15, that they are of a procedural nature and that, in application of the case-law cited above, they therefore apply to all administrative procedures in the matter of State aid pending before the Commission at the time when Regulation No 659/1999 entered into force, namely on 16 April 1999.

51 Furthermore, since Article 15 of Regulation No 659/1999 contains no transitional provision as regards its application *ratione temporae*, unlike the second subparagraph of Article 11(2) of that regulation, concerning the Commission's power to order provisional recovery of aid paid unlawfully, it applies to any definitive action ordering recovery of aid taken after the date on which the regulation entered into force, including aid granted before that date.

52 As for the Commission's argument that the application of Article 15 of Regulation No 659/1999 to aid granted before its entry into force depends on two conditions which were not satisfied together in the present case, it must be held, as a subsidiary consideration, that it follows from the wording of the contested decision, and in particular from an analysis of the question of the application of the limitation period set out at recitals 219 to 224, that when it adopted that decision the Commission itself took the view that its action relating to the recovery of the aid in question fell within the scope of Article 15 of Regulation No 659/1999. Furthermore, the fact that the Commission issued an information injunction to the French authorities under Article 10(3) of the regulation on 8 July 1999 shows that it conducted the State aid procedure initiated pursuant to Article 88(2) EC on 20 May 1998 on the basis of the new procedural rules as soon as Regulation No 659/1999 entered into force, i.e. on 16 April 1999.

53 Therefore, as the Commission expressly based its analysis of the limitation of the action to recover the aid in question on Article 15 of Regulation No 659/1999 in the contested decision (see recitals 219 to 224), it cannot rely on other arguments unfavourable to the applicant which call in question its own analysis set out in the contested decision in the context of the present proceedings before the Court of First Instance.

54 It follows that the Commission's power to order recovery of the aid in question was governed by Article 15 of Regulation No 659/1999.

55 As regards the applicant's argument concerning the 'extreme nature' of the present case, the Court finds that it is unfounded, without there being any need to consider whether it constitutes a new plea, as the Commission claims at paragraph 45 above.

56 In that regard, the question whether the conduct of the administrative procedure in respect of the contested aid was characterised by excessive delay cannot be examined, as the applicant claims, on the basis of a consideration of the time which elapsed between the date on which the aid in question was granted and the date on which the contested decision was adopted. That examination must take as the starting date the date on which the Commission became aware that the aid in question had been granted. It is common ground that the Commission was not informed of the grant of the aid in question until 23 December 1996, the date on which the complaint was lodged in this case, or at the earliest in November 1996, the date of publication by the French Court of Auditors of the report on 'Local authority assistance for undertakings'. It is apparent from the contested decision that the Commission, acting on the basis of the complaint of 23 December 1996, requested further information from the French authorities on 17 January 1997. There followed an exchange of correspondence between the French authorities and the Commission, in which the Commission attempted, not without certain difficulties, to supplement its file by requesting further information, until it adopted its decision to initiate the procedure, on 20 May 1998. Accordingly, even after the administrative procedure had been initiated, the French authorities proved reluctant to provide the information requested by the Commission (see paragraphs 8 to 11 above). In the light of the chronology of the events between November 1996 and the adoption of the contested decision (see recitals 2 to 11 of the preamble to the contested decision), the Commission cannot be criticised for excessive delay or for lack of diligence in the conduct of the administrative procedure in the present case.

57 In any event, the recovery of unlawful aid, for the purpose of restoring the previously existing situation, cannot constitute a penalty not provided for in Community law, even if it is implemented long after the aid in question was granted (see Case T-*55/99 CETM* v *Commission* [2000] ECR I-3207, paragraph 164).

58 As regards the applicant's argument concerning the major inconveniences which the 'exclusively bilateral' procedure in respect of State aid presents for the territorial authorities, it must be pointed out that Article 88(3) EC places the Member State concerned under an obligation to notify any plans to grant or alter

State aid. Furthermore, since, according to settled case-law, save in exceptional circumstances, a recipient cannot have a legitimate expectation that aid was properly granted unless it has been granted in compliance with the provisions of Article 88 EC (Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 14, and Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraph 51) and since a diligent economic operator must normally be capable of ensuring that that procedure was observed, all the third parties, including the territorial authorities, are unable to rely on such a legitimate expectation or criticise the Commission for the fact that the administrative procedure relating to non-notified aid takes place principally between the Commission and the Member State concerned. If the central administration of a Member State has not complied with its obligation to notify the aid, to the detriment of the territorial authorities or of the beneficiary of aid granted by them, those circumstances constitute a problem internal to the parties, which cannot be criticised by the Commission. To decide otherwise would amount to impeding or to constituting an unjustified barrier to the achievement by the Commission of its task of ensuring compliance with Articles 87 EC and 88 EC.

59 It follows from the foregoing considerations that the first part of the plea must be rejected.

Second part of the plea, alleging that a request for information cannot interrupt the limitation period

Arguments of the parties

60 The applicant maintains that a request for information from the Commission cannot interrupt the limitation period provided for in Article 15 of Regulation

No 659/1999, even if it is accompanied by 'a number of standard paragraphs setting out the possible legal consequences of the grant of unlawful aid'. It would be contrary to the principle of legal certainty for such a request for information to have such an effect on the limitation period.

61 In support of the form of order sought, the applicant states that, according to the laws of most Member States, in the sphere of economic law 'only a "formal act", carried out in application of a power legally enshrined in a specific measure to that effect, [is] capable of interrupting a limitation period'.

62 The applicant also states that in Community law Article 46 of the Statute of the Court of Justice, which establishes a limitation period in matters arising from non-contractual liability, clearly states that a simple request made to the competent institution cannot interrupt the limitation period unless it is followed by the lodging of an application before the Community Court. In that regard, the applicant maintains that the solution adopted in relation to the implementation of Articles 81 EC and 82 EC in Regulation (EEC) No 2988/74 of the Council of 26 November 1974 concerning limitation periods in proceedings and the enforcement of sanctions under the rules of the European Economic Community relating to transport and competition (OJ 1974 L 319, p. 1), constitutes an exception.

63 The applicant observes that at the time when the complaint was lodged, on 23 December 1996, and until the formal examination procedure was initiated, in May 1998, the Commission could not rely on any specific legal basis for its requests for information. Those requests, issued as a matter of practice and sent to the French authorities in 1997, formed part, in the applicant's submission, of the preliminary stage of the examination of the possible State aid, a stage which may remain purely internal or bilateral, or which may simply result in no further action being taken in the case. Nor did the Commission adopt in the procedure in issue a 'formal act of investigation', which alone can interrupt the limitation period.

64 The applicant maintains that, taking account of the context and the objective of Article 15 of Regulation No 659/1999, the Commission's argument that any request for information interrupts the limitation period cannot give full practical effect to that article. Such an interpretation would lead to a virtually systematic interruption of the limitation period following a complaint.

65 The applicant therefore observes that the Commission has available a number of 'formal' means which permit the interruption of the limitation period. It has two legitimate means. First, the Commission may adopt decisions allowing it, after having given the Member State the opportunity to express its views, to enjoin it to provide, within a period determined by the Commission, all the documentation, information and additional data in order that it may examine the compatibility of the aid with the common market (Case C-301/87 *France* v *Commission* [1990] ECR I-307). The applicant observes, in that regard, that the Commission had given France the opportunity to express its views during the first quarter of 1997, on two occasions, but that it had not decided to issue an injunction until in 1999. Second, the Commission may interrupt the limitation period by adopting a 'decision to initiate the formal examination procedure'. However, the applicant contends that the Commission could have initiated that formal procedure in June 1997, or two months before the expiry of the limitation period applicable in the present case.

66 Such an interpretation, which would comply with the principle of legal certainty, would not deprive the Commission of its means of action, but, rather, would constitute a major incentive to expedite the treatment of cases and comply with the principle of diligence and of good administration, as expressed since the judgment of the Court in Case 120/73 *Lorenz* [1973] ECR 1471.

67 The applicant concludes that an interpretation which gave the limitation mechanism its full practical effect, while preserving the Commission's capacity to intervene, means accepting that only a 'formal act', in the form of the adoption of a measure characterised as a decision adversely affecting the person concerned, is capable of constituting a 'measure' of such a kind as to interrupt the limitation period.

68 In support of its interpretation of the word 'measure', the applicant also refers to the national laws of the Member States. It thus maintains that only the adoption of a legal instrument designated by name and constituted in application of domestic law (law, decree, order or specific administrative act for which express provision is made) allows the limitation period to be interrupted. On the other hand, a request for information, except in a particular case which is always subject to precise, specific provisions, cannot constitute a measure interrupting the limitation period. In the present case, therefore, the Commission did not interrupt the limitation period before it expired. In those circumstances, the aid in question must be regarded as existing aid.

69 Scott maintains that the Commission's action does not interrupt the limitation period in respect of the beneficiary of the aid unless the requests for information which it sent to the Member State are notified to the beneficiary.

70 Scott also observes that the limitation period provided for in Article 15 of Regulation No 659/1999 is particularly long. It submits that, by fixing such a long limitation period for State aid cases and by conferring such a prolonged effect on an event interrupting the limitation period owing to the application of that provision, the Council cannot have intended to make it easy to interrupt the limitation period.

71 The Commission contends that requests for information addressed to the Member States are acts which have the effect of interrupting the limitation period. The Community legislature cannot have used the word 'measure' in Article 15 of Regulation No 659/1999 by chance in a context such as that of this regulation, which was adopted in order to increase transparency and legal certainty and also to codify and bolster the consistent practice developed by the Commission and the case-law of the Court in State aid matters. Regulation No 659/1999 specifies the circumstances in which the Commission may adopt decisions and recommendations and also the various requests for information and communications from Member States. Furthermore, the terms used by the

legislature in Regulation No 659/1999 reflect the context of control of State aid, the special procedure for which is focused on a dialogue between the Commission and the Member States. According to a consistent line of decisions, the Member States are the only addressees of decisions of the Commission; and that is confirmed by Regulation No 659/1999. This *inter partes* procedure between the Member State and the Commission is not directed against the beneficiaries of the unlawful aid. Furthermore, the beneficiaries enjoy rights delimited by the provisions of Article 88(2) EC and of Regulation No 659/1999.

72 In the Commission's submission, the fact that Article 15 of Regulation No 659/1999 refers to '[a]ny measure taken by the Commission' means that it refers to all the means placed at the Commission's disposal by that regulation. Accordingly, the requests for information which the Commission sends to the Member States are 'instruments wholly apt to interrupt the limitation period now provided for in Article 15' and inform the Member States, in compliance with the principle of legal certainty, that the Commission is preparing a case on a measure.

73 The Commission also claims that the applicant's argument that only a 'formal act' may constitute a measure susceptible of interrupting the limitation period has the effect of considerably restricting its capacity to intervene. The adoption of 'formal acts' requires that a number of conditions be satisfied. Thus, an injunction to communicate information can be issued only after a simple request for information followed by a reminder (see Article 10 of Regulation No 659/1999). Likewise, in order to initiate a formal examination procedure, the Commission must have first assembled and obtained the appropriate information and must have carried out a preliminary examination of the measure in issue. The Commission therefore contends that the applicant has misconstrued Article 15 of Regulation No 659/1999.

74 The Commission observes that in referring to the limitation arrangement introduced by Regulation No 2988/74, the applicant contended that that

regulation appeared to constitute an exception among the numerous examples which in national laws illustrate the concept that the limitation of action by a public authority cannot be interrupted by a request for information. However, the applicant, which has not pleaded the illegality of Regulation No 659/1999 or of Article 15 thereof, has not sought to demonstrate, or to establish, that the requests for information which the Commission sent to the French authorities cannot constitute a valid measure interrupting the limitation period in the context of the regime defined by the Community legislature as a means of controlling State aid.

75 Scott's argument that it was not the Council's intention to allow the limitation period to be interrupted easily, which it chose to establish a 10-year limitation period for the recovery of unlawfully-granted aid, is merely the result of Scott's subjective approach. Only the Community legislature has the power to lay down, in the exercise of its discretion, a rule on limitation and to adopt the procedural rules.

Findings of the Court

76 As stated when the Court was examining the first part of the plea, the 10-year limitation period laid down in Article 15 of Regulation No 659/1999 is applicable to the present case and, consequently, as the aid in issue was granted on 31 August 1987 and the contested decision was adopted on 12 July 2000, that period should be deemed to have been exceeded. The Commission based its decision to order recovery of the aid in issue on the fact that the limitation period had been interrupted by measures which it had adopted between January and August 1997 and in particular by its letter of 17 January 1997, in which it formally requested information from the French authorities (see recital 220 to the contested decision).

77 The applicant refers to examples taken from national law and from Community law, in particular the judgment in *France* v *Commission*, cited above, paragraph 19, as authority for the idea that a mere request for information cannot interrupt the limitation period. It maintains that only a 'formal act', adopted in application of a power legally enshrined in a specific text adopted for that purpose, such as a decision to initiate the procedure provided for in Article 88(2) EC or an injunction to provide information addressed to the French authorities, is capable of constituting an act interrupting the limitation period. That conclusion cannot be inferred from that judgment, which concerned the conservatory measures which the Commission may adopt in order to counteract any infringement of Article 88(3) EC. Those measures have their source in the power to issue an interim decision requiring the Member State to suspend immediately the payment of such aid pending the outcome of the examination of the aid and to provide the Commission, within such period as it may specify, with all such documentation, information and data as are necessary in order that it may examine the compatibility of the aid with the common market.

78 In its letter of 17 January 1997, the Commission requested the French authorities to provide information '[i]n order to be able to ascertain the truth of the matters alleged and to determine whether the measures awarded in favour of Scott [constituted] aid within the meaning of Article [87(1) EC]'. In that letter, moreover, the Commission clearly drew the French authorities' attention to the letter which it had sent to the Member States on 3 November 1983 concerning their obligations under Article 88(3) EC 'and also to the notice published in *Official Journal of the European Communities* C 318 of 24 November 1983, p. 3, reminding the Member States that any aid granted unlawfully was liable to be subject to a demand for repayment'.

79 It follows that when the French authorities received the letter of 17 January 1997 they were advised by the letter that the lawfulness of the aid in issue was being examined by the Commission and that it might, if necessary, be subject to a demand for repayment.

80 In any event, it must be held that, even though Regulation No 659/1999 was not applicable on 17 January 1997, so that the letter sent to the French authorities on that date did not then have the effect of interrupting the limitation period, since no limitation period was provided for at that time, the legal effect of the letter must none the less be examined in the context of the exercise by the Commission, after 16 April 1999, of its power to recover the aid in issue.

81 In that regard, Article 10(2) of Regulation No 659/1999, like Article 15 of that regulation, appears in Chapter III of the regulation on the rules applicable to the procedure regarding unlawful aid. Article 10(2) provides that the Commission is to request information from the Member State concerned. It follows from Article 10(2) of Regulation No 659/1999, read with Articles 2(2) and 5(1) and (2) thereof, that it imposes an immediate obligation on the Member State concerned to provide all necessary information following a request from the Commission. When it addresses a request for information to a Member State, the Commission is informing that State that it has in its possession information concerning aid alleged to be unlawful and, if necessary, that that aid will have to be repaid.

82 Accordingly, the simplicity of the request for information does not have the consequence of depriving it of legal effect as a measure capable of interrupting the limitation period provided for in Article 15 of Regulation No 659/1999. That interpretation does not seek to confer retroactive effect on Articles 10 and 15 of that regulation but merely to ensure the uniform application of those articles from 12 July 2000 to a series of past facts or events which have been examined.

83 As regards Scott's argument that the measures adopted by the Commission between January and August 1997 could not have the effect of interrupting the limitation period pursuant to Article 15 of Regulation No 659/1999, on the

ground that it was not aware of those measures at the time, it must be pointed out that Article 15 introduced a single limitation period for recovery of aid which applies in the same way to the Member States concerned, to the beneficiary of the aid and to third parties.

84 In that regard, the procedure established in Article 88(2) EC takes place primarily between the Commission and the Member States concerned, while the persons concerned, including the beneficiaries of the aid, are entitled to be warned and to have the opportunity to put forward their arguments (see, to that effect, Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraphs 16 and 17). According to settled case-law, the interested parties essentially have the role of information sources for the Commission in the administrative procedure instituted under Article 88(2) EC (Case T-266/94 *Skibsvaerftsforeningen and Others* v *Commission* [1996] ECR II-1399, paragraph 256, and Joined Cases T-371/94 and T-394/94 *British Airways and Others and British Midland Airways* v *Commission* [1998] ECR II-2405, paragraph 59). The Commission is not obliged to warn potentially interested persons, including the beneficiary of the aid, of the measures which it is taking in respect of unlawful aid before it initiates the administrative procedure.

85 It follows that the mere fact that Scott was not aware of the existence of the Commission's requests for information from the French authorities beginning on 17 January 1997 does not have the effect of depriving them of legal effect *vis-à-vis* Scott. Consequently, the letter of 17 January 1997, sent by the Commission before the initiation of the administrative procedure and requesting further information from the French authorities, constitutes, under Article 15 of Regulation No 659/1999, a measure interrupting the 10-year limitation period, which in this case began to run on 31 August 1987, before that period expired, even though the applicant and Scott were not at the time aware of the existence of such correspondence.

86 In the light of the foregoing considerations, the second part of this plea must be rejected.

87 In those circumstances, the application for annulment of Article 2 of the contested decision, in so far as it is based on infringement by the Commission of Article 15 of Regulation No 659/1999, must be dismissed.

Costs

88 Since the present judgment is confined to the limitation issue and the proceedings are to continue, costs must be reserved.

On those grounds,

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

hereby:

1. Dismisses the application for annulment of Article 2 of Commission Decision 2002/14/EC of 12 July 2000 on the State aid granted by France to Scott

Paper SA/Kimberly-Clark in so far as it alleges that the Commission infringed Article 15 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC];

2. **Orders that the remainder of the proceedings be continued;**

3. **Reserves the costs.**

Cooke García-Valdecasas Lindh

Forwood Legal

Delivered in open court in Luxembourg on 10 April 2003.

H. Jung

Registrar

J.D. Cooke

President