JUDGMENT OF THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)
14 January 2004 *

In Case T-109/01,

Fleuren Compost BV, established in Middelharnis (Netherlands), represented by J. Stuyck, lawyer,

applicant,

v

Commission of the European Communities, represented by V. di Bucci and H. van Vliet, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for the annulment of Commission Decision 2001/521/EC of 13 December 2000 on the aid scheme implemented by the Kingdom of the Netherlands for six manure-processing companies (OJ 2001 L 189, p. 13),

* Language of the case: Dutch.

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

composed of: N.J. Forwood, President, J. Pirrung, P. Mengozzi, A.W.H. Meij and M. Vilaras, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 17 June 2003,

gives the following

Judgment

Legal framework

1 Article 87(1) EC provides:

'Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.'

2 Pursuant to Article 87(3)(c) EC, 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, may be considered to be compatible with the common market.

3 The Commission communication concerning Community guidelines on State aid for small and medium-sized enterprises (OJ 1996 C 213, p. 4, hereinafter 'the SME guidelines') provides, in point 4.2.1, that the Commission may grant exemptions pursuant to Article 87(3)(c) EC, for aid to SMEs situated outside regions eligible for national regional aid where the intensity of the aid measured in gross grant equivalent as a proportion of the eligible costs does not exceed:

— 15 % in the case of small enterprises,

— 7.5 % in the case of 'medium-sized enterprises'.

4 Under point 3.2 of the SME guidelines, in order for an enterprise to be considered small or medium-sized within the meaning of the guidelines, it must:

— have an annual turnover not exceeding EUR 40 million or an annual balance-sheet total not exceeding EUR 27 million,

— conform to the criterion of independence, namely, not have 25 % or more of the capital or of the voting rights owned by an enterprise falling outside the definition of a 'medium-sized enterprise' or of a small enterprise, whichever may apply, or jointly by several such enterprises.

5 In addition, in point 4.1 of the SME guidelines, under the heading 'General principles', the Commission points out that, in order to qualify for the exemption provided for in Article 87(3)(c) EC, a State aid 'must... be in the nature of an incentive: it must under no circumstances have the sole effect of continuously or periodically reducing the costs which the enterprise would normally have to bear, while otherwise leaving the status quo untouched, as in the case of operating aid, and it must be necessary in order to achieve objectives which market forces alone would not secure'. The Commission specifies that '[t]he objectives pursued must be in the Community interest' and that 'the aid must be proportionate to the handicaps which have to be overcome in order to secure the socio-economic benefits deemed to be desirable on grounds of the Community interest: the positive effect must outweigh the damaging effect which State aid has on competition and trade'.

6 The Commission's communication concerning the Community guidelines on State aid for environmental protection (OJ 1994 C 72, p. 3, hereinafter 'the environmental guidelines') defines the conditions under which State aid for environmental protection may be eligible for one of the exemptions provided for in Article 87 EC.

7 Under point 3.2.3.A of the environmental guidelines, aid for environmental investment to comply with new mandatory standards or other new legal obligations and involving adaptation of plant and equipment to meet the new requirements can be authorised up to the level of 15 % gross of the eligible costs.

However, that aid may be granted only for a limited period and only in respect of plants which have been in operation for at least two years when the new standards or obligations enter into force.

8 Under point 3.2.3.B of the environmental guidelines, aid for environmental investment which allows significantly higher levels of environmental protection to be attained than those required by mandatory standards may be authorised for up to a maximum of 30 % gross of the eligible investment costs.

Facts

9 By decision of 6 July 1989 (hereinafter 'the approval decision'), the Commission approved the Netherlands aid scheme known as 'Bijdrageregeling Proefprojecten Mestverwerking' (aid scheme for pilot projects in manure-processing, hereinafter 'the BPM scheme') for 1989 to 1990. By Decision C 17/90 (ex N 88/90) of 14 December 1990 (OJ 1991 C 82, p. 3, hereinafter 'the extension decision'), the Commission approved the extension of that scheme from 1990 to 1994 under the exemption provided for in Article 92(3)(c) of the EC Treaty (now, after amendment, Article 87(3)(c) EC). The Netherlands authorities were thus authorised to grant 'before 1995' investment aid of up to 35 % of eligible costs for about 20 large-scale manure-processing plants.

10 The applicant produces fresh compost intended for mushroom cultivation, by processing manure composed of a mix of horse manure, poultry dung, gypsum and straw.

11 On 1 December 1994, the applicant applied to the Netherlands authorities for aid under the BPM scheme for closed manure storage and processing facilities.

12 By letter of 5 December 1994, the authorities acknowledged receipt of that application in the following terms:

'I received your application for a grant of aid [under the BPM scheme] on 1 December 1994.

Your application will be dealt with.

...'

13 After various complaints had drawn the Commission's attention to aid granted by the Netherlands to manure-processing projects after the period covered by the extension decision, the Commission contacted the Netherlands authorities on that matter. In response to a letter of 7 August 1995 from the latter, the Commission, *inter alia*, sent them a letter on 21 August 1995 which was worded as follows:

'[The Commission] takes note that no aid was granted after 31 December 1994 under the [BPM scheme] but that five applications are still pending.

Since the Commission approved that scheme only for 1990 to 1994, it is your responsibility pursuant to Article [88](3) of the EC Treaty to inform us within the prescribed period of any implementation of that scheme after 31 December 1994. I would appreciate your confirming to the Commission within a month of receipt of this letter that you will comply with this notification requirement.

The Commission has also learned that some projects for which aid had been granted before 31 December 1994 can be carried out only by 31 December 1997 at the latest. The aid in those cases is covered by the Commission's approval.'

14 By letter of 21 December 1995, the Netherlands authorities informed the applicant that it had been granted aid in the amount of NLG 1 073 925, namely 4.5 % of the amount which could be covered by a subsidy, in accordance with its application and the provisions of the BPM scheme. The Commission was not informed of the grant of that aid.

15 By letter of 23 April 1996, the applicant was informed that a first instalment had been made available to it. By letter of 11 September 1997, the applicant presented its final account. By letter of 3 October 1997, it was definitively granted aid.

16 After receiving a further complaint, concerning aid granted to the undertaking Industriële Mestverwerkingsnetwerk Noord-Limburg in December 1997, the Commission, by letter of 22 January 1998 and two subsequent reminders of 15 April and 29 July 1998, asked the Netherlands authorities for additional information.

17 By letter of 6 August 1998, the Netherlands authorities sent the Commission a list of projects granted aid on dates which appeared to it to infringe the extension decision. The aid granted to the applicant was mentioned in that list.

18 By letter dated 15 July 1999 based on Article 10(3) of 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), the Commission enjoined the Netherlands authorities to provide, within 20 working days, all relevant information enabling it to determine whether the aid measures concerned were covered by the BPM scheme, as approved by it, and to disclose if any other aid had been granted to such projects.

19 By letters of 12 and 19 October 1999, the Dutch authorities forwarded certain information to the Commission, without, however, answering all the questions raised in the Commission's demand for information.

20 By letter of 17 May 2000, the Commission informed the Netherlands that it had decided to initiate the formal review procedure laid down in Article 88(2) EC in respect of six cases in which aid had been paid after the period covered by the extension decision (hereinafter 'the decision to initiate the procedure').

21 That decision was published on 23 September 2000 (OJ 2000 C 272, p. 22), in accordance with Article 26(2) of Regulation No 659/1999, and interested parties were invited to submit their comments on the aid at issue within one month of the date of publication (hereinafter 'the invitation to submit comments').

22 The Commission received no comments from the applicant or any other interested party in reaction to that publication.

23 On 13 December 2000, the Commission adopted Decision 2001/521/EC on the aid scheme implemented by the Kingdom of the Netherlands for six manure-processing companies (hereinafter 'the contested decision'). That decision, notified to the Netherlands under the number C(2000) 4070, was published on 11 July 2001 (OJ 2001 L 189, p. 13).

24 Under Article 1 of the contested decision, '[t]he State aid which the Kingdom of the Netherlands has implemented in favour of the manure-processing companies Ferm-o-Feed BV, Fleuren Compost BV, Vloet Oploo BV, Smith Markelo, Arev Venhorst and Memon KPI, amounting to EUR 2 501 089, is incompatible with the common market'.

25 According to Article 2(1) of the contested decision, '[t]he Kingdom of the Netherlands shall take all necessary measures to recover from the recipients the aid referred to in Article 1 and unlawfully made available to them'.

26 The applicant was informed of the contested decision by a letter from the Netherlands authorities dated 9 March 2001, which it states it received on or about 12 March 2001.

Proceedings and forms of order sought

27 By application lodged at the Registry of the Court of First Instance on 18 May 2001, the applicant brought this action, in which it claims that the Court should:

— annul the contested decision, at least in so far as it concerns the applicant;

— order the Commission to pay the costs.

28 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

29 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber, Extended Composition) decided to open the oral procedure and, by way of measures of organisation of procedure under Article 64 of the Rules of Procedure of the Court of First Instance, requested the Commission to submit certain documents. The Commission complied with that request within the period allowed.

30 The parties presented oral argument and replied to the questions put by the Court of First Instance at the hearing on 17 June 2003.

Law

31 In support of its claim for annulment, the applicant relies on seven pleas in law, alleging, first, infringement of Article 87(1) EC and manifest error of assessment; second, infringement of Article 88 EC and of the principle of legal certainty; third, infringement of the extension decision; fourth, infringement of Article 87(3)(c) EC and manifest error of assessment; fifth, infringement of the requirement to state reasons; sixth, infringement of the principle of the protection of legitimate expectations; and seventh, infringement of the right to a fair hearing.

First plea in law: infringement of Article 87(1) EC and manifest error of assessment

Contested decision

32 The Commission states, in paragraphs 21 to 24 of the contested decision:

'(21) The investment aid granted by the Dutch Government was designed to allow and promote investment in manure facilities and hence favoured the companies in question. Processed animal manure is sold primarily as dry

organic fertiliser in the form of manure pellets. The manure-processing plants are in competition with other manufacturers of organic and chemical fertilisers. Because this financial incentive strengthens those plants' financial position, it threatens to distort competition within the European Union in that farmyard manure used as fertiliser competes with other organic fertilisers.

(22) According to a study on the sales potential in other countries for Dutch processed animal manure, carried out for the Dutch ministry in question in 1990, animal and vegetable fertilisers compete not only on a local basis but also on the French, Spanish, Portuguese, Italian and Greek markets. From 1988 to 1990 the Dutch share of total intra-Community trade in those products amounted to between 44 % and 60 %. Dutch exports of processed animal manure to other Member States can be expected to increase, primarily as a result of the aforementioned projects.

(23) In spite of the information injunction, the Dutch authorities failed to provide the requisite details on the market situation of the individual companies. Such details would have made it possible to assess each company's impact on the manure-processing and fertiliser markets. For that reason, the Commission based its assessment on data for the market as a whole, as indicated above.

(24) Consequently, the aid is likely to affect trade between Member States in the sector concerned and thus constitutes State aid within the meaning of Article 87(1) EC.'

Arguments of the parties

33 The applicant claims, first, that the aid at issue does not serve to increase its production capacity but its sole objective and effect is to make it possible to equip its production plants in an environmentally-friendly manner.

34 Secondly, the applicant maintains that the aid at issue does not affect trade between Member States.

35 The obligation imposed on the applicant by the Netherlands authorities to produce fertiliser in closed facilities, in order to avoid nuisances caused by odours, increases the cost of the product which makes its export difficult, if not impossible. In its reply, it states that it exports barely 2 % of its compost, and exclusively to Belgium. It also states that as a result of the high cost of transporting compost and the risk that it will ferment during transport, there is no economic interest in shipping it for distances greater than 200 km.

36 Thirdly, the applicant claims that the aid at issue neither distorts nor threatens to distort competition in the internal market.

37 The applicant maintains that, given their special character and specific purpose, that is to say, mushroom cultivation, the products which it manufactures do not compete against organic and chemical fertilisers. In its reply, it also challenges the relevance of the study cited in paragraph 22 of the contested decision. That study relates only to animal fertilisers, which, according to the applicant, are not suitable for mushroom cultivation.

38 In parallel to those three arguments, the applicant claims that, before taking an unfavourable decision in its regard, the Commission should have insisted that the Netherlands authorities provide it with the information which would have allowed it to assess the real impact of the aid at issue on inter-State trade and, if those authorities persisted in their refusal, should have asked the applicant to provide that information. In that context, the applicant maintains that it cannot be charged with having failed to observe or, therefore, react to the invitation to submit comments. It takes the view that it could reasonably expect the Netherlands to take the requisite measures and make appropriate observations. It also considers that the Member State which grants aid has the obligation to inform the recipients of those measures. In that regard, it points out that, in the letter initiating the procedure, the Commission had asked the Netherlands authorities to send a copy of that letter to potential recipients without delay.

39 The Commission disputes those arguments in their entirety and in essence refers back to paragraphs 21 to 24 of the contested decision.

Findings of the Court

40 First, as regards the applicant's argument based on the Commission's alleged failure to insist that it be provided with information (see paragraph 38 above), it must be pointed out that during the review phase provided for in Article 88(2) EC, the Commission must give the interested parties an opportunity to submit their comments.

41 The Court has held, in proceedings concerning the application of that provision, that publication of a notice in the *Official Journal of the European Communities* is an appropriate means of informing all the parties concerned that a procedure has been initiated (Case 323/82 *Intermills* v *Commission* [1984] ECR 3809,

paragraph 17, and Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraph 80). That communication is intended to obtain from the persons concerned all the information needed to guide the Commission with regard to its future action (Case 70/72 *Commission* v *Germany* [1973] ECR 813, paragraph 19). Such a procedure also guarantees to the other Member States and the sectors concerned an opportunity to make their views known (Case 84/82 *Germany* v *Commission* [1984] ECR 1451, paragraph 13).

42 However, the procedure for reviewing State aid is, in view of its general scheme, a procedure initiated in respect of the Member State responsible, in light of its Community obligations, for granting the aid (Case 234/84 *Belgium* v *Commission* ('*Meura*') [1986] ECR 2263, paragraph 29, and *Falck and Acciaierie di Bolzano*, cited in paragraph 41 above, paragraph 81).

43 Under the procedure for reviewing State aid, interested parties other than the Member State concerned have only the role mentioned in paragraph 41 above and, in that regard, they cannot themselves lay claim to an exchange of arguments with the Commission such as that initiated in regard to that Member State (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 59, and *Falck and Acciaierie di Bolzano* v *Commission*, cited above, paragraph 82).

44 Of the interested parties, the recipient of the aid does not play a special role pursuant to any provision governing the procedure for the review of State aid. The procedure for the review of State aid is not a procedure initiated 'against' the recipient or recipients of aid by virtue of which it or they could rely on rights as extensive as the rights of the defence as such (*Falck and Acciaierie di Bolzano* v *Commission*, paragraph 83).

45 Therefore, since the decision to initiate the procedure provided for in Article 88(2) EC contains an adequate preliminary analysis by the Commission setting out the reasons for its doubts regarding the compatibility of the aid in question with the common market, it is for the Member State concerned and, where appropriate, the recipient of the aid to adduce evidence to show that the aid is compatible with the common market and, if necessary, to plead specific circumstances relating to recovery of the aid already paid should the Commission require its repayment (see, by analogy, *Falck and Acciaierie di Bolzano* v *Commission*, paragraph 170).

46 In the present case, the applicant does not claim that the reasons given in the decision to initiate the procedure were not adequate to allow it properly to exercise its rights. Moreover, the Court of First Instance points out that the matters set out in paragraphs 21 to 24 of the contested decision had, in essence, already been set out in point 3.2 of the decision to initiate the procedure.

47 It is therefore appropriate to conclude that when the Commission has published the notice referred to in paragraph 41 of this judgment, as it has in the present case, that is to say, when in particular it has invited the recipient of aid to submit its comments and, as observed in paragraph 22 above, the recipient has failed to make use of that opportunity, the Commission has not infringed any of the recipient's rights (*Falck and Acciaierie di Bolzano*, paragraphs 84 and 169). Nor can the Commission be held responsible for the failure by the Member State concerned to send the recipient of the aid a copy of the letter initiating the procedure.

48 In addition, while Article 88(2) EC requires the Commission to seek comments from interested parties before it reaches a decision, it does not prevent the Commission from determining aid to be incompatible with the common market

in the absence of any such comments (Case C-113/00 *Spain* v *Commission* [2002] ECR I-7601, paragraph 39).

49 Moreover, it cannot be complained that the Commission failed to take into account matters of fact or of law which could have been submitted to it during the administrative procedure but which were not, since it is under no obligation to consider, of its own motion and on the basis of prediction, what information might have been submitted to it (see to that effect *Commission* v *Sytraval and Brink's France*, cited in paragraph 43 above, paragraph 60).

50 To the extent that the applicant relies, in support of its application, on information which was not available at the time when the contested decision was adopted or was not brought to the Commission's attention during the pre-litigation procedure, it must be recalled that in an action for annulment based on Article 230 EC, the lawfulness of the Community measure concerned must be assessed in the light of the matters of fact and of law existing at the time when that measure was adopted (Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 7, and Joined Cases T-371/94 and T-394/94 *British Airways and Others* v *Commission* [1998] ECR II-2405, paragraph 81).

51 Therefore, in accordance with the case-law, the legality of a decision concerning aid is to be assessed in the light of the information available to the Commission when the decision was adopted (Cases *Meura*, cited in paragraph 42 above, paragraph 16, and *Falck and Acciaierie di Bolzano*, paragraph 168). A Member State therefore cannot rely before the Community judicature on matters of fact which were not put forward in the course of the pre-litigation procedure laid down in Article 88 EC (see to that effect Joined Cases C-278/92 to C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 31, and Case C-382/99 *Netherlands* v *Commission* [2002] ECR I-5163, paragraphs 49 and 76).

52 However, it does not appear, on the basis of the matters of fact and of law which were brought to its attention or which were available to it when it took the contested decision, that the Commission committed any error of assessment in finding, for the reasons set out *inter alia* in paragraphs 21 to 24 of that decision, that the aid at issue constitutes State aid within the meaning of Article 87(1) EC, that it affects trade between Member States and that it distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods.

53 As regards the applicant's arguments which were put forward for the first time in the present application, even if they could be taken into consideration by the Court of First Instance despite the case-law referred to above, it must first of all be pointed out that the concept of aid encompasses advantages granted by public authorities which, in various forms, mitigate the charges which are normally included in the budget of an undertaking (Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 34). The granting of aid under the BPM scheme indisputably meets that definition.

54 On the other hand, it is irrelevant that the objective of that scheme is to assist undertakings to meet their legal obligations as regards protection of the environment. According to settled case-law, Article 87(1) EC does not distinguish between measures of State intervention by reference to their causes or aims but defines them in relation to their effects (Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 27, and *Netherlands* v *Commission*, cited in paragraph 51 above, paragraph 61). Leaving aside the question whether the environmental guidelines apply in the present case, a question which will form part of the consideration of the fourth plea, the fact that aid granted under the BPM scheme promotes regard for the environment is not sufficient to exclude it outright from being categorised as aid for the purposes of Article 87 EC.

55 Second, the applicant's arguments based on the absence of an effect on trade between Member States must also be rejected, since, according to the information provided by the applicant itself to the Netherlands authorities in its application for a grant of aid under the BPM scheme, its exports were 'satisfactory, given the demand from Belgium and Germany'. Similarly, the report of the advisory committee on manure-processing ('Adviescommissie Mestverwerking') of 22 May 1995, presented to the Netherlands authorities in the context of an evaluation of the aid application, mentions that the compost produced by the applicant is exported by it 'to Germany, among others'. The Court therefore finds that even if the exact percentage of the applicant's exported production is not known, the applicant engages fully in intra-Community trade by exporting substantial amounts of compost to other Member States.

56 Third, it is not possible to uphold the applicant's argument that the aid at issue does not distort or threaten to distort competition in the common market, since that aid in any event takes the form of a reduction in the production costs borne by recipient producers and is therefore likely to affect trade in the products in question.

57 When aid granted by a State or through State resources 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* v *Commission* [1980] ECR 2671, paragraph 11, and Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 27). That is the case in this instance, since any undertaking other than those to which the measure at issue applies can finance new investments only on less advantageous terms, whether it is established in the Netherlands or in another Member State.

58 Contrary to the applicant's claim, the statement of reasons for the contested decision, as reproduced in paragraph 32 of this judgment, is sufficient to show the

effect of the aid at issue on trade between Member States, since the aid concerns a product which is inherently likely to be the subject of trade between Member States. As the Commission rightly points out in its defence, a 200-km field of operation around the applicant's production plant allows the applicant to reach various parts of Belgium and Germany. Moreover, the aid at issue also provides the applicant with an advantage in relation to foreign competitors who wish to export to the Netherlands. Finally, the study referred to in paragraph 22 of the contested decision nowhere indicates that the study relates only to animal fertiliser which cannot be used for mushroom cultivation.

59 It follows from the foregoing that the Commission has sufficiently demonstrated the effect of the aid at issue on competition and on trade between Member States.

60 In the light of all those considerations, the first plea must be rejected.

Second and third pleas in law: infringement of Article 88 EC and the principle of legal certainty and infringement of the extension decision

61 It is appropriate to consider jointly the second and third pleas, since they relate essentially to whether the aid at issue falls within the scope of application *ratione temporis* of the extension decision.

Contested decision

62 In paragraphs 17 to 20 of the contested decision, the Commission states:

'(17) In order to determine whether the aid for the six companies in question had to be classified as existing aid, the Commission first examined to what extent the BPM scheme applied to the aforementioned projects.

(18) The main legal question in these six cases is the difference in interpretation as to what constitutes the legally binding act granting the aid. Although the Dutch Government argues that the legally binding act by which the competent authorities undertake to grant aid is the grant letter, it takes the view that all the grants for which a grant letter was issued after 31 December 1994 are covered by the [BPM] scheme because the letter of confirmation was sent before that deadline.

(19) Having scrutinised the documentation on the administrative procedure in the relevant cases, the Commission takes the view that the legally binding act is the grant letter. The letter of confirmation was merely an acknowledgement of receipt of the aid application without any prior examination of whether the conditions of the aid scheme had been met. Furthermore, the granting of aid was conditional on an evaluation by an advisory committee comprising representatives of various ministries. Only

after this committee had made an assessment at national level did the Ministry of Agriculture, Fisheries and Nature Management, which is competent in this matter, issue a grant letter indicating the amount of the eligible costs, the amount of the aid and the conditions under which it was granted. The analysis of the procedural steps showed that the aid was not granted automatically to all applicants, but on the basis of a discretionary decision by the competent authorities.

(20) The Commission therefore considers that the date on which the aid was granted is the date on which the grant letter was sent, as confirmed by the Dutch authorities in the first instance. Accordingly, the aid granted to the six manure-processing companies was not covered by the [BPM] scheme and should be regarded as unlawful aid which was implemented in breach of Article 88(3).'

Arguments of the parties

63 The applicant maintains in essence that, in contrast to what is stated in the contested decision, the Netherlands authorities confirmed the granting of the aid at issue before 31 December 1994. That aid must therefore be considered existing aid within the meaning of Article 88(3) EC and Article 1(b) of Regulation No 659/1999, so that, by adopting the contested decision, the Commission infringed Article 88 EC and the principle of legal certainty (second plea) as well as its own extension decision (third plea).

64 According to the applicant, the principle of legal certainty requires that when national authorities confirm the granting of aid to an applicant within the period for which the Commission has approved an aid scheme, the latter cannot

subsequently object that the aid is not covered *ratione temporis* by the approval when, as in this case, it has been demonstrated that all the conditions for the granting of the aid were met.

65 In its reply, the applicant also refers to a document by the Netherlands authorities entitled 'Statement of reasons for the Official Gazette relating to the amendment of 13 October 1994', which clearly shows that, according to those authorities, applications submitted before 1 January 1995 would be dealt with under the BPM scheme and would be covered by the Commission's approval.

66 In its observations at the hearing concerning the documents produced by the Commission at the request of the Court of First Instance (see paragraph 29 above), the applicant also called in question the lack of clarity of the extension decision as regards the final date for granting aid under the BPM scheme. The applicant maintains that it is not clear from that decision or from the correspondence between the Commission and the Netherlands authorities which preceded its adoption that national decisions to grant aid under the BPM scheme had to be taken before 31 December 1994.

67 The Commission disputes those arguments in their entirety and refers, in essence, to paragraphs 17 to 20 of the contested decision.

Findings of the Court

68 In order to reply to the second and third pleas of the application, it is first necessary to delimit the scope *ratione temporis* of the extension decision.

69 The letter of 1 March 1990 sent to the Commission by the Permanent Representation of the Kingdom of the Netherlands to the European Communities, which notified the plan to extend the BPM scheme, states that '[t]he decision to grant this aid is prompted by the urgent need to establish a manure-processing capacity of at least 6 million tonnes before 1995'.

70 Moreover, a letter of 17 April 1990 which the Permanent Representation sent the Commission, setting out the changes made to the BPM scheme at the time it was extended, states in response to a question by the Commission as to how long the altered scheme would apply that it would in principle remain in force 'until 1995' ('tot 1995'). It is anticipated that the specific support measures provided for under that scheme will be granted 'up to and including 1994' ('tot en met 1994'). Finally, in reply to a question by the Commission concerning the number of pilot plants intended to benefit under the scheme, it states that some 20 factories are involved 'during the period up to 1995' ('in de periode tot 1995').

71 As is clear from its wording, the extension decision sought to approve investment aid which the Netherlands Government 'intended to grant to manure-processing plants [for the period] 1990-1994' for the purpose of establishing a 'first group of 20 large-scale manure-processing plants before 1995'.

72 Only aid granted under the BPM scheme during 1990 to 1994, and in any event before 1995, is therefore covered by the extension decision.

73 In order to assess whether the aid at issue falls within the scope of application *ratione temporis* of that decision, as defined in the preceding paragraph, it is necessary to examine whether it can be considered as having been granted before 1995.

74 In that regard, the Commission rightly takes the view that the relevant criterion is 'the legally binding act by which the competent [national] authorities undertake to grant aid' (see paragraph 19 of the contested decision, cited in paragraph 62 above).

75 By contrast, it cannot be accepted that the mere notification to the applicant, on 5 December 1994, of a letter confirming receipt of the application for the aid at issue is a sufficient basis for considering that the aid was granted before 1995, as suggested by the argument of the Netherlands Government (see paragraph 18 of the contested decision, cited in paragraph 62 above). Both the wording of the extension decision and the rule that exceptions to the general principle prohibiting State aid must be strictly interpreted preclude such an extension of the temporal scope of the approved aid scheme.

76 As for the argument which the applicant claims is based on the principle of legal certainty, it is founded on the premiss that the Netherlands authorities confirmed the grant of the aid to it by letter of 5 December 1994. However, that premiss is incorrect, so that the argument has no factual basis. As is apparent from its very terms (see paragraph 12 above), the Netherlands authorities' letter of 5 December 1994 is simply an acknowledgement of receipt of the aid application submitted by the applicant, sent without any other form of examination. Such a letter in no way commits its author as to the grant of the aid applied for, which must be the subject of a subsequent evaluation and decision by the competent authorities, as the Commission rightly pointed out in paragraph 19 of the contested decision. In this case, the decision to grant aid was adopted on or about 21 December 1995, the date when it was notified to the applicant (see paragraph 14 above).

77 It follows from the foregoing that the aid at issue cannot be considered as having been granted before 1995 and is therefore not covered by the extension decision.

78 That conclusion cannot be invalidated by the fact that, in its consolidated version resulting from the amendments of 7 August 1989, 15 May 1991, 13 April 1992, 8 March 1994 and 19 October 1994 to the original version of 29 April 1988, the BPM scheme provides, in Article 15(4), that '[A]pplications [for the granting of aid] may be submitted until 31 December 1994'.

79 The Court observes that, in contrast to this consolidated version, the earlier versions of the BPM scheme, and in particular those which formed the basis for the adoption of both the approval decision and the extension decision, did not contain any such reference. It was first introduced into Article 15(4) of the BPM scheme by the amendment of that scheme dated 13 October 1994, published in the *Nederlandse Staatscourant* of 19 October 1994. It was brought to the Commission's attention by a letter from the Netherlands authorities of 10 November 1994. In its letter of reply of 16 December 1994, the Commission immediately challenged it, insisting on the fact that any commitments under the BPM scheme after 31 December 1994 must be considered as an extension that had to be communicated to the Commission pursuant to Article 93(3) of the EC Treaty.

80 It cannot be accepted that a Member State can, by amending an aid scheme after its approval by the Commission, unilaterally extend the scope of that approval.

81 Finally, as regards the applicant's argument derived from the document entitled 'Statement of reasons for the Official Gazette relating to the amendment of 13 October 1994' (see paragraph 65 above), it is sufficient, for the purpose of rejecting it, to refer to paragraph 143 below, since that argument rests solely on whether or not there was a legitimate expectation on the part of the applicant that the aid at issue is lawful because of the assurances provided to it by the Netherlands authorities.

82 In the light of those considerations as a whole, it has not been shown that the Commission infringed Article 88(3) EC, the extension decision or the principle of legal certainty by declaring in the contested decision that the aid at issue is incompatible with the common market.

83 The second and third pleas must therefore be rejected.

Fourth plea in law: infringement of Article 87(3)(c) EC and manifest errors of assessment

84 This plea is divided into three parts, relating to the infringement of Article 87(3)(c) EC, a manifest error in assessing the compatibility of the aid at issue with the SME guidelines and a manifest error in assessing the compatibility of the aid at issue with the environmental guidelines.

First part: infringement of Article 87(3)(c) EC

— Arguments of the parties

85 In the context of the first part of the plea, the applicant claims in essence that the aid at issue satisfies the basic conditions of the BPM scheme, so that the Commission should have applied to it the exemption provided for in Article 87(3)(c) EC.

86 The Commission contests that argument.

— Findings of the Court

87 In so far as the applicant takes as a premiss that the aid at issue was covered by the extension decision, the first part of the fourth plea is associable with the third plea and must therefore be rejected for the same reasons as those which led to the rejection of that plea.

88 Moreover, in its reply the applicant itself admits that the BPM scheme was valid only until the end of 1994. Nevertheless, it again stresses the fact that it was informed of this only in the course of the proceedings, since, it maintains, the Netherlands authorities had always let it be understood that it was sufficient to submit an aid application before 1 January 1995 in order for the measure granting aid to fall within the approved BPM scheme.

89 In that regard, suffice it to refer once again to paragraph 143 below, since this argument is not essentially different from that already put forward in paragraph 65 above and rejected in paragraph 81 above.

90 Moreover, in this connection it should be remembered, first, that the Commission, for the purposes of applying Article 87(3) EC, enjoys a wide discretion, the exercise of which involves assessments of an economic and social nature which must be made within a Community context (see, *inter alia*, Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 67, and Case C-310/99 *Italy* v *Commission* [2002] ECR I-2289, paragraph 45), and second, that the Community judicature, in reviewing whether such a power was lawfully exercised, cannot substitute its own assessment for that of the competent authority but must restrict itself to examining whether the authority's assessment is vitiated by a manifest error or misuse of powers (see *Italy* v *Commission*, cited above, paragraph 46; Case C-456/00 *France* v *Commission* [2002] ECR I-11949,

paragraph 41; and Joined Cases T-204/97 and T-270/97 *EPAC* v *Commission* [2000] ECR II-2267, paragraph 97).

91 In the present case, apart from the alleged conformity of the aid at issue with the basic conditions of the BPM scheme, which is of no relevance since, as observed above, that aid did not fall within the scope of the extension decision, the applicant has not, in the context of the first part of the fourth plea, adduced any evidence which would make it possible to conclude that the Commission exceeded its power of assessment by taking the view that the aid did not meet the conditions for an exemption pursuant to Article 87(3) EC.

92 The first part of the fourth plea must therefore be rejected.

Second part: manifest error in assessing the compatibility of the aid at issue with the SME guidelines

— Contested decision

93 In paragraphs 34 and 35 of the contested decision, given over to examining the compatibility of the aid at issue with the SME guidelines, the Commission states:

'(34) Only in the case of Fleuren Compost BV was the aid intensity below the ceiling laid down in the SME guidelines. However, in spite of the doubts expressed by the Commission regarding the size of the companies

concerned in the information injunction which accompanied its decision to initiate proceedings, the Dutch authorities failed to show that the company complied with the criteria set out in point 3.2 of those guidelines.

(35) The Dutch authorities did not therefore provide evidence that the six companies complied with the SME criteria laid down in the guidelines or justify the aid on that basis. Nor did they provide evidence that the ... principles enshrined in point 4.1 of the guidelines had been respected. The Commission therefore takes the view that the SME guidelines do not apply.'

— Arguments of the parties

94 In its application, the applicant states that it is prepared to show the Court that it meets the criteria set out in point 3.2 of the SME guidelines, in contrast to what is stated in the contested decision. It therefore maintains that the Commission committed a manifest error of assessment in declaring that the aid at issue is incompatible with the common market. After the Commission pointed out in its defence that the applicant had not submitted any evidence to that effect in the context of the administrative procedure and that it had still not done so in these proceedings, the applicant stated in its reply that it would do so only 'in the alternative'. At the hearing, the applicant maintained that it was a small family undertaking, but did not provide any additional evidence to support that statement.

95 The Commission refers essentially to paragraphs 34 and 35 of the contested decision and points out that the applicant has still not provided any evidence in support of its statements.

— Findings of the Court

96 It should be recalled that the legality of a decision concerning aid is to be assessed in the light of the information available to the Commission when the decision was adopted (see the case-law cited in paragraph 51 above and Joined Cases T-126/96 and T-127/96 *BFM and EFIM* v *Commission* [1998] ECR II-3437, paragraph 88).

97 In the present case, it is therefore necessary to determine what information was available to the Commission during the administrative procedure.

98 The Commission, in support of its defence, produced the letters of 12 and 19 October 1999 in which the Netherlands authorities responded to its demand for the requisite information. It does not emerge from those letters that the Netherlands authorities relied on the SME guidelines for the purpose of justifying the aid at issue, even though it was described as being intended for 'large-scale manure-processing plants'.

99 In point 3.3.2 of the decision to initiate the procedure, the Commission nevertheless carried out a preliminary assessment of the compatibility of the six grants of aid in question with the SME guidelines. In particular, it stated, after referring to the relevant provisions of the SME guidelines:

'Only in the case of Fleuren Compost BV was the aid intensity below the ceiling laid down in the SME guidelines.

The Dutch authorities did not therefore provide evidence that the six companies complied with the SME criteria laid down in the guidelines or justify the aid on that basis, the Commission therefore takes the view that the SME guidelines do not apply.'

100 As stated in paragraph 22 above, the Commission did not receive any information from either the Netherlands authorities or the applicant in response to the publication of the invitation to submit observations.

101 Since it therefore found itself unable, despite its demand pursuant to Article 10(3) of Regulation No 659/1999 and its invitation to submit comments pursuant to Article 88(2) EC, to assess whether the aid at issue met the conditions of the SME guidelines, the Commission could validly consider, given the information available to it, that the guidelines did not apply to the aid in question.

102 In any event, even supposing that the applicant did meet the conditions set out in point 3.2 of the SME guidelines, as it claims — without, however, providing any formal evidence to that effect — it must still, in order for its plea to succeed, establish that the Commission committed a manifest error of assessment in taking the view, paragraph 35 of the contested decision, that no evidence had been provided that the principles enshrined in point 4.1 of those guidelines had been respected. However, the applicant has not put forward any information whatever to that effect or even alleged that the defendant had committed such an error, so that its argument must be considered of no consequence.

103 In those circumstances, the second part of the fourth plea must be rejected.

Third part: manifest error in assessing the compatibility of the aid at issue with the SME guidelines

— Contested decision

104 In paragraphs 39 and 40 of the contested decision, given over to assessing the compatibility of the aid at issue with the environmental guidelines, the Commission states:

'(39) However, even if the environmental guidelines were to apply, aid may, pursuant to point 3.2.3 (B) concerning aid to encourage firms to improve on mandatory environmental standards, be authorised only for investment that allows significantly higher levels of environmental protection to be attained than those required by mandatory standards. The Dutch authorities did not produce any evidence that this was the case for the measures in question. The Commission doubts whether the manure-processing plants can help to attain higher targets than those set out in Directive 91/676/EEC [of the Council, of 12 December 1991, concerning the protection of waters against pollution caused by nitrates from agricultural sources (OJ 1991 L 375, p. 1)], given that at least four of the pilot plants which received aid when the [BPM] scheme was still operating have since been closed. The Commission does not therefore believe that the aid paid out after the [BPM] scheme expired can be justified on the same grounds as those that led to its exceptional extension.

(40) The Commission also scrutinised the measures as aid to help firms adapt to new mandatory standards. On the basis of the information available, it

takes the view that the requirements set out in point 3.2.3 (A) of the environmental guidelines have not been met. The guidelines indicate that aid may be authorised up to a level of 15 % gross of the eligible costs, for a limited period and only in respect of a plant which has been in operation for at least two years when the new standards enter into force. In violation of these conditions, aid was granted to new manure-processing plants with an aid intensity of up to 35 %.'

— Arguments of the parties

105 The applicant maintains that the contested aid meets the requirements of the environmental guidelines, contrary to what is stated in the contested decision.

106 First of all, it is apparent from the environmental impact assessment of 25 August 1994 appended to the applicant's aid application and from the positive opinion on that application given by the advisory committee on manure-processing on 22 May 1995 that the investment at issue genuinely aimed at a significantly higher level of environmental protection than that required by mandatory standards, in particular in that it was to make it possible to reduce ammonia emissions and olfactory nuisances to zero. The applicant assumes that the Commission was aware of that information. It adds that, if this was not the case, the Commission should have asked the Netherlands for that information.

107 Secondly, the Commission itself acknowledges, in paragraph 11 of the contested decision, that the intensity of the aid granted to the applicant was only 4.5 %.

The applicant therefore claims that the Commission could not reasonably conclude, in paragraph 40 of that same decision, that the intensity of the aid in question was up to 35 % and that the environmental guidelines therefore did not apply. The applicant states in its reply that it never claimed that the aid at issue was intended for the purpose of adapting existing plants to new standards.

108 The Commission challenges these arguments in their entirety and essentially refers to paragraphs 39 and 40 of the contested decision and to point 3.3.2 of the decision to initiate the procedure.

— Findings of the Court

109 First, as regards whether point 3.2.3.A of the environmental guidelines applies to the contested aid, it is sufficient to point out that that provision refers only to aid granted 'in respect of plant which has been in operation for at least two years when the new standards or obligations enter into force'.

110 However, it is common ground that the aid at issue was granted in order to construct a new manure-processing plant.

111 Since that condition for the application of point 3.2.3.A of the environmental guidelines has not been met, it is irrelevant whether or not the intensity of the contested aid exceeds the limit of 15 % gross of the eligible costs which is laid down in that provision.

112 Secondly, as regards whether point 3.2.3.B of the environmental guidelines applies to the aid at issue, it must be pointed out that that provision provides for the grant of aid only in favour of action 'that allows significantly higher levels of environmental protection to be attained than those required by mandatory standards'.

113 However, despite the doubts expressed by the Commission in point 3.3.2 of the decision initiating the procedure, neither the applicant nor the Netherlands authorities provided any information which could establish that the contested aid met that requirement.

114 Similarly, none of the documents put forward by the applicant in the context of the present application, even if they could be taken into consideration by the Court of First Instance despite the case-law referred to in paragraphs 50 and 51 above, proves that the aid at issue would allow a significantly higher level of environmental protection to be attained than required by mandatory standards. As the Commission points out, the environmental impact assessment of 25 August 1994 carried out by the applicant and appended to its aid application merely states, at the bottom of page 23, that '[e]missions have been compared with the standards and it appears that they amply meet requirements'. Similarly, the opinion given on 22 May 1995 by the advisory committee on manure-processing merely states that 'in an air purification plant, the elimination of ammonia and odours meets the standards of provisional directives'. In addition, the applicant itself states in its application that it is 'by order of the Netherlands authorities [that it] produces its fertilisers in closed installations in order to avoid nuisances arising from odour' and that, accordingly, its 'high production costs result from legal requirements'.

115 Since the applicant has not been able to prove that the environmental guidelines apply to the aid at issue, the third part of its fourth plea must be rejected as unfounded.

116 The fourth plea must therefore be rejected in its entirety.

Fifth plea in law: infringement of the requirement to state reasons

Arguments of the parties

117 The applicant complains that the Commission failed to give sufficient reasons for its conclusion that the aid at issue does not fall within the scope of application of the BPM scheme, the SME guidelines and the environmental guidelines. In addition, the Commission failed to provide sufficient reasons in law for its conclusion that the contested aid could affect trade between Member States or distort competition in the common market.

118 The Commission takes the view that the statement of reasons for the contested decision is sufficient.

Findings of the Court

119 According to settled case-law, the statement of reasons required by Article 253 EC must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure, so as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to exercise its power of review (see, in particular,

Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, paragraph 19, and *Commission* v *Sytraval and Brink's France*, cited in paragraph 43 above, paragraph 63).

120 Applied to the characterisation of a measure as aid, that principle requires a statement of the reasons which led the Commission to consider that the measure at issue falls within the scope of Article 87(1) EC. In that respect, even in cases where the circumstances in which the aid has been granted show that it is liable to affect trade between Member States and to distort or threaten to distort competition, the Commission must at least set out those circumstances in the statement of the reasons for its decision (Case 57/86 *Greece* v *Commission* [1988] ECR 2855, paragraph 15, and Joined Cases C-329/93, C-62/95 and C-63/95 *Germany and Others* v *Commission* [1996] ECR I-5151, paragraph 52).

121 Finally, while it is established that in the statement of reasons for its decision the Commission is bound to refer at least to the circumstances in which aid has been granted where those circumstances show that the aid is such as to affect trade between Member States (Case 248/84 *Germany* v *Commission* [1987] ECR 4013, paragraph 18, and *Spain* v *Commission*, cited in paragraph 48 above, paragraph 54), it is not bound to demonstrate the real effect of aid already granted. If it were, that requirement would ultimately favour Member States which grant aid in breach of the duty to notify laid down in Article 88(3) EC, to the detriment of those which do notify aid at the planning stage [Case C-301/87 *France* v *Commission* ('*Boussac*') [1990] ECR I-307, paragraphs 32 and 33, and *Spain* v *Commission*, cited in paragraph 48 above, paragraph 54].

122 In the light of that case-law, it does not appear that the Commission failed in this case to fulfil its obligation to provide a sufficient statement of reasons for the contested decision.

123 In paragraphs 21 to 24 of the decision, the Commission set out in a clear and unequivocal fashion the reasons why it was of the opinion that the measure in question amounted to State aid and was liable to affect trade between Member States and to distort or threaten to distort competition within the meaning of Article 87(1) EC.

124 The Commission also gave a sufficient account in paragraphs 13 and 14, 17 to 20 and 25 of the contested decision of the reasons for which it considered, contrary to the submissions of the Netherlands, that the measure did not fall within the scope of application of the BPM scheme and must therefore be considered new aid, unlawfully implemented in breach of Article 88(3) EC.

125 Similarly, the Commission adequately explained the reasons which led it to consider that the measure at issue did not fall within the scope of application of the SME guidelines (paragraphs 32 to 35 of the contested decision) and the environmental guidelines (paragraphs 36 to 44 of the contested decision).

126 Moreover, in accordance with the case-law cited in paragraph 121 above, the statement of reasons for the contested decision did not need to demonstrate the real effect of the aid at issue.

127 In addition, the statement of reasons clearly enabled the applicant to ascertain the reasons for the measure taken and the Court of First Instance to exercise its power of review.

128 It follows that the fifth plea must be rejected.

Sixth plea in law: infringement of the principle of the protection of legitimate expectations

Arguments of the parties

129 The applicant claims, in essence, that in the light of its character as a small family undertaking, its ignorance of the applicable legislation and the circumstances in which the aid at issue was granted, it could reasonably expect the measure to be lawful. In particular, it points out that it received confirmation of its eligibility to receive aid before the end of 1994 and that the letter of 21 December 1995 in which the Netherlands authorities notified it of the definitive grant of aid (see paragraph 14 above) did not mention that the aid was subject to the condition of approval by the Commission. The applicant also relies on the matters set out in paragraphs 64 to 66 above.

130 In addition, the applicant maintains that the Commission infringed the principle of the protection of legitimate expectation by deciding to initiate the procedure pursuant to Article 88(2) EC on 23 September 2000, that is to say, more than three years after the final grant of aid to the applicant, more than four years after the letter confirming that grant and almost six years after the application for aid was made and its receipt acknowledged by the Netherlands authorities.

131 The applicant adds that the Commission itself notes that it received a complaint of unlawful grants of aid under the BPM scheme in December 1997. The applicant maintains that, in the light of the time when the contested aid was promised and paid and the precedent of the approval of the BPM scheme, the Commission should not have waited until mid-1999 before asking the Netherlands to provide information under Article 10(3) of Regulation No 659/1999.

132 In its reply, the applicant also notes that on 21 August 1995 the Commission sent the Netherlands a letter which shows that it knew of the five aid applications pending at that time, which it required to be notified within one month. The applicant maintains that anyone benefiting from an aid measure is entitled to think that the body dispensing the aid will comply with such an explicit request by the Commission.

133 The Commission challenges those arguments in their entirety.

Findings of the Court

134 Since the aid at issue does not fall within the extension decision, the SME guidelines or the environmental guidelines, as already found, the failure to notify it to the Commission is in breach of the provisions of Article 88 EC.

135 It is settled case-law that, in view of the mandatory nature of the supervision of State aid by the Commission under Article 88 EC, undertakings to which aid has been granted cannot, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article. A diligent operator should normally be able to determine whether that procedure has been followed, even if the State in question was responsible for the illegality of the decision to grant aid to such a degree that its revocation appears to be a breach of good faith (see Case C-5/89 *Commission* v *Germany* [1990] ECR I-3437, paragraph 14, and Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591, paragraph 25).

136 Admittedly, the case-law does not preclude the possibility that, in order to challenge its repayment, the recipients of unlawful aid may, in the procedure for the recovery of the aid, plead exceptional circumstances which could legitimately have given rise to a legitimate expectation that the aid was lawful (*Commission* v *Germany*, cited in paragraph 135 above, paragraph 16; Case C-183/91 *Commission* v *Greece* [1993] ECR I-3131, paragraph 18; *BFM and EFIM* v *Commission*, cited in paragraph 96 above, paragraph 69).

137 However, it is implicit in the case-law of the Court of Justice (*Commission* v *Germany*, cited in paragraph 135 above, paragraphs 13 to 16, and *Alcan Deutschland*, cited in paragraph 135 above, paragraphs 24 and 25) and has expressly been held on two occasions by the Court of First Instance (Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraphs 104 and 105, and Case T-67/94 *Ladbroke Racing* v *Commission* [1998] ECR II-1, paragraph 83) that those recipients can rely on such exceptional circumstances, on the basis of the relevant provisions of national law, only in the framework of the recovery procedure before the national courts, and it is for them alone to assess the circumstances of the case, if necessary after obtaining a preliminary ruling on interpretation from the Court of Justice.

138 In any event, none of the circumstances put forward in this case by the applicant can be held to justify annulment of the contested decision.

139 First of all, it must be pointed out that Article 16 of the BPM scheme states that a right to aid is subject to approval by the Commission.

140 As regards the applicant's alleged ignorance of the applicable rules, suffice it to recall that recipients of aid cannot, on grounds of their size, be relieved of the obligation to keep themselves informed of the rules of Community law, otherwise the practical effect of Community law would be undermined (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 172, and Case T-55/99 *CETM* v *Commission* [2000] ECR II-3207, paragraph 127).

141 Nor can the fact that the applicant was not informed by the Netherlands authorities of the administrative procedure, even if true, be regarded as an exceptional circumstance capable of giving rise to a legitimate expectation that the aid was lawful (*CETM* v *Commission*, cited in paragraph 140 above, paragraph 127).

142 Nor does the applicant maintain that the Commission gave it specific assurances of such a kind as to give rise to a justified expectation on its part that the aid concerned was lawful (Case T-129/96 *Preussag Stahl* v *Commission* [1998] ECR II-609, paragraph 78, and Case T-6/99 *ESF Elbe-Stahlwerke Feralpi* v

Commission [2001] ECR II-1523, paragraph 185). To the contrary, it is apparent from Decision C 17/90 (ex N 88/90) of 14 December 1990 that the Commission had intended to limit its approval of the BPM scheme to the period 1990-1994, pointing out that it had an *a priori* negative attitude towards all further aid plans envisaged by the Netherlands. Moreover, by letter of 21 August 1995 the Commission asked the Netherlands to notify it separately of each item of aid granted under the BPM scheme after 31 December 1994.

143 As regards the argument that the Netherlands authorities clearly indicated in the 'Statement of reasons for the Official Journal relating to the amendment of 13 October 1994' that aid applications submitted before 1 January 1995 would be dealt with under the BPM scheme and would be covered by the Commission's approval, it must be pointed out that any hopes wrongly raised by the Netherlands authorities, without the Commission even being informed of them, cannot under any circumstances affect the lawfulness of the contested decision. If that were possible, Articles 87 and 88 EC would be deprived of all practical force, since national authorities would thus be able to rely on their own unlawful conduct or negligence in order to render decisions taken by the Commission under the provisions of the Treaty ineffectual (see, to that effect, Case C-5/89 *Commission* v *Germany*, cited in paragraph 135 above, paragraph 17, and Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraph 48; Advocate General Sir Gordon Slynn's Opinion in Case 223/85 *RSV* v *Commission* [1987] ECR 4617, 4639 and 4652).

144 However unfortunate it may be, the information provided by the Netherlands authorities in their communication of 13 October 1994 is therefore not capable of giving rise to legitimate expectations on the part of the applicant of specific action by the Commission.

145 As regards the duration of the administrative procedure, the fundamental requirement of legal certainty prevents the Commission from indefinitely delaying the exercise of its powers (Case 52/69 *Geigy* v *Commission* [1972] ECR 787, paragraph 21, and *Falck and Acciaierie di Bolzano* v *Commission*, cited in paragraph 41 above, paragraph 140). In Case 223/85 *RSV* v *Commission* [1987] ECR 4617, the Court held that where, in the case of State aid which is intended to meet the additional costs of an operation previously the subject of authorised aid and the examination of which did not call for thorough research, the Commission had taken a decision declaring the said aid to be incompatible with the common market and ordering its cancellation only 26 months after its notification, that delay could establish on the part of the beneficiary of the aid a legitimate expectation of such a nature as to prevent the Commission from ordering the national authorities to order the refund of the aid.

146 It is therefore necessary to ascertain whether, in the present case, the Commission's action was unreasonably late.

147 After examination of the file, the Court must reject the claim that the Commission's action was unreasonably late. After several complaints had drawn the Commission's attention to aid granted by the Netherlands after the period covered by the extension decision, it immediately contacted the Netherlands authorities in that regard. On 21 August 1995, the Commission began to question those authorities concerning five grants of such aid which it was told were still being assessed. At that time, it asked the Netherlands authorities to notify it of any application of the BPM scheme after 31 December 1994. The aid at issue was the subject-matter of a grant decision communicated to the applicant on 21 December 1995 and was paid to it in several instalments between 23 April 1996 and 3 October 1997, without the Commission being advised of that fact. After receiving a further complaint, concerning similar aid granted to another undertaking in December 1997, the Commission, by letter of 22 January 1998 and two subsequent reminders of 15 April and 29 July 1998, asked the Netherlands authorities for additional information. The Commission officially learned of the existence of the aid at issue only as the result of the letter of 6 August 1998 from the Netherlands authorities informing it of a list of projects

subsidised on dates which appeared to infringe the extension decision. After preparatory inquiries concerning the entire dossier, on 15 July 1999 the Commission sent the Netherlands authorities an injunction pursuant to Article 10(3) of Regulation No 659/1999, and as the result of partial information obtained from those authorities on 12 and 19 October 1999 it initiated, by letter of 17 May 2000, the formal investigation procedure laid down in Article 88(2) EC in respect of the six grants of aid made after the expiry of the BPM scheme. Finally, the Commission adopted the contested decision on 13 December 2000.

148 It follows from all those circumstances that the applicant cannot claim that the Commission acted after an unreasonable delay.

149 The sixth plea must therefore be rejected.

Seventh plea in law: infringement of the right to a fair hearing

Arguments of the parties

150 The applicant claims that the Commission, after it found that the Netherlands authorities had not provided it with sufficient information, could and should have asked the undertakings concerned to furnish evidence that the conditions of application for the SME guidelines or the environmental guidelines had been met.

151 In its reply, the applicant does not deny that interested parties were informed through the publication of the communication in the Official Journal, which it nevertheless claims not to have been aware of. The applicant takes the view that it is impossible and even absurd to check the Official Journal on a daily basis. It adds that the Netherlands should have informed it of the Commission's intentions.

152 The Commission challenges those arguments.

Findings of the Court

153 Since that plea essentially raises the same questions as those put forward in paragraph 38 above, it must be rejected on the grounds set out in paragraphs 40 to 48 above.

Costs

154 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. Since the applicant has been unsuccessful, it must, having regard to the form of order sought by the defendant, be ordered to pay the costs.

On those grounds,

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

hereby:

1. Dismisses the action;

2. Orders the applicant to pay the costs.

Forwood Pirrung Mengozzi

Meij Vilaras

Delivered in open court in Luxembourg on 14 January 2004.

H. Jung
Registrar

N.J. Forwood
President