JUDGMENT OF THE COURT (First Chamber)

11 December 2008 *

In Case C-295/07 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 20 June 2007,

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

appellant,

the other parties to the proceedings being:

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

applicant at first instance,

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

intervener at first instance,

* Language of the case: French.

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of the Chamber, M. Ilešič, A. Tizzano, A. Borg Barthet and J.-J. Kasel, Judges,

Advocate General: P. Mengozzi,
Registrar: R. Grass,

after hearing the Opinion of the Advocate General at the sitting on 5 June 2008,

gives the following

Judgment

1 By its appeal, the Commission of the European Communities requests the Court to set aside the judgment of the Court of First Instance of the European Communities in Case T-369/00 *Département du Loiret* v *Commission* [2007] ECR II-851 ('the judgment under appeal'), by which it annulled 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 contested decision') in so far as that decision concerns the aid granted in the form of the preferential land price referred to in Article 1 thereof.

Legal context

Regulation (EC) No 659/1999

2 Article 14 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty (OJ 1999 L 83, p. 1), entitled 'Recovery of aid', reads as follows:

'1. Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary (hereinafter referred to as a "recovery decision"). The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law.

2. The aid to be recovered pursuant to a recovery decision shall include interest at an appropriate rate fixed by the Commission. Interest shall be payable from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery.

3. Without prejudice to any order of the Court … pursuant to Article [242] of the Treaty, recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision. To this effect and in the event of a procedure before national courts, the Member States concerned shall take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to Community law.'

The communication on the interest rates to be applied when aid granted unlawfully is being recovered

3 In communication 2003/C 110/08 of 8 May 2003 on the interest rates to be applied when aid granted unlawfully is being recovered (OJ 2003 C 110, p. 21) ('the 2003 communication'), the Commission states the following:

'…

… the question has arisen whether this interest rate should be applied on a simple basis or on a compound basis. … The Commission accordingly considers it necessary to clarify urgently its position on the matter...

…

… despite the variety of situations, it appears that the effects of an unlawful aid are to provide funding to the beneficiary on similar conditions to a medium term non-interest bearing loan. Accordingly, the use of compound interest appears necessary to ensure that the financial advantages resulting from this situation are fully neutralised.

Accordingly, the Commission wishes to inform the Member States and interested parties that in any future decisions it may adopt ordering the recovery of aid unlawfully

granted, it will apply the reference rate used for calculating the net grant equivalent of regional aids on a compound basis. In accordance with normal market practice, compounding should take place on an annual basis. Likewise, the Commission will expect the Member States to apply compound interest in the execution of pending recovery decisions, unless this would be contrary to a general principle of Community law.'

Regulation (EC) No 794/2004

4 Article 11 of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Regulation No 659/1999 (OJ 2004 L 140, p. 1), entitled 'Method for applying interest', provides:

'1. The interest rate to be applied shall be the rate applicable on the date on which unlawful aid was first put at the disposal of the beneficiary.

2. The interest rate shall be applied on a compound basis until the date of the recovery of the aid. The interest accruing in the previous year shall be subject to interest in each subsequent year.

3. The interest rate referred to in paragraph 1 shall be applied throughout the whole period until the date of recovery. However, if more than five years have elapsed between the date on which the unlawful aid was first put at the disposal of the beneficiary and the

date of the recovery of the aid, the interest rate shall be recalculated at five yearly intervals, taking as a basis the rate in force at the time of recalculation.'

5 Under the fifth paragraph of Article 13 of that regulation, Article 11 thereof is to apply in relation to any recovery decision notified after the date of entry into force of that regulation.

Background to the dispute and contested decision

6 The background to the dispute, as set out in paragraphs 1 to 8 of the judgment under appeal, may be summarised as follows.

7 On 31 August 1987, the City of Orléans, the département du Loiret (France) and Scott SA ('Scott') concluded an agreement for the sale to Scott of a plot of land for the purpose of establishing a plant. That agreement provided that the département du Loiret and the City of Orléans would contribute up to FRF 80 million (EUR 12.2 million) towards the preparation of the site for Scott.

8 In January 1996, Scott was acquired by Kimberly-Clark Corp., which announced the closure of the plant in January 1998. The plant's assets, namely the site and the paper mill, were acquired by Procter & Gamble in June 1998.

9 After receiving a complaint about the aid in question, following a report published by the French Court of Auditors in November 1996, the Commission, following an exchange of information with the French authorities between January 1997 and April 1998, informed those authorities, by letter of 10 July 1998, of its decision of 20 May 1998 to initiate the procedure provided for in Article 93(2) of the EC Treaty (now Article 88(2) EC).

10 The judgment under appeal makes the following reference to the contested decision:

‘10 The amended text of the contested decision reads:

“*Article 1*

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

Article 2

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

2. Recovery shall be effected without delay and in accordance with the procedures of national law, provided that they allow the immediate and effective execution of this Decision. The aid to be recovered shall include interest from the date on which it was made available to the beneficiary until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid."

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

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

…"

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

Procedure at first instance and the judgment under appeal

11 By application lodged at the Registry of the Court of First Instance on 4 December 2000, the département du Loiret brought an action for annulment of the contested decision in so far as it declares unlawful the State aid granted in the form of the preferential land price and orders repayment of the sum of FRF 39.58 million (EUR 6.03 million) or, at present value, FRF 80.77 million (EUR 12.3 million).

12 Scott, which also brought an action before the Court of First Instance for partial annulment of the contested decision (Case T-366/00 *Scott* v *Commission* [2007] ECR II-797), intervened in those proceedings in support of the form of order sought by the département du Loiret.

13 The Commission requested the Court of First Instance to dismiss the action of the département du Loiret as unfounded.

14 By the judgment under appeal, the Court of First Instance held, in respect of the capitalisation of the interest, that the contested decision did not contain a sufficient statement of reasons. It thus upheld the fifth part of the second plea and annulled that decision in so far as it concerns the aid granted in the form of the preferential land price referred to in Article 1 thereof, without examining the other pleas and arguments put forward in support of the action.

15 Regarding the use of a compound rate, the Court of First Instance found, first, in paragraph 36 of the judgment under appeal, that the contested decision does not specify that it is applying a compound rate and that it is only by carrying out a calculation by reference to the initial value and the 'present-day value' of the aid as indicated in that decision that the reader is able to conclude that a compound rate was used. No reasons whatsoever are given for using a compound rate rather than a simple rate.

16 Next, in paragraph 43 of the judgment under appeal, the Court of First Instance found that the imposition of compound interest in the present case was the first manifestation of a new and important policy of the Commission, which the Commission had wholly failed to explain. In the contested decision, the Commission ought, first, to have indicated that it had decided to capitalise the interest and, second, to have justified its approach.

17 In paragraph 44 of the judgment under appeal, the Court of First Instance stated that that obligation to state reasons was all the greater since, in the light of the time which had elapsed between the date of the sale of the site and the contested decision, namely 13 years, the imposition of compound interest had had significant financial consequences on the amount of the aid to be recovered.

18 In paragraph 45 of the judgment under appeal, the Court of First Instance found that the statement of reasons in the contested decision was also insufficient as regards the rate of interest applied.

19 Then, in response to the Commission's argument that the use of a compound rate for the purpose of expressing the present value of the initial value of the subsidy is justified by the need to restore effective competition by eliminating the advantage received by the beneficiary, the Court of First Instance held, in paragraph 49 of the judgment under appeal, that such justification presupposes, first, that the beneficiary still retains such an advantage at that date and, second, that the form of the aid in issue can be assimilated to an interest-free loan of a sum corresponding to the value of the initial subsidy. The contested decision wholly fails to address those points.

20 In that regard, the Court of First Instance observed, in paragraph 50 of the judgment under appeal, that, in the light of the form of the aid granted to Scott in 1987, namely the conveyance of developed land at a preferential price, it is by no means obvious that expressing the present-day value of the estimated value of the initial subsidy by applying a rate of compound interest of 5.7% during the period in question will achieve a figure corresponding to the advantage which the beneficiary enjoyed as owner of the asset in 2000.

21 According to paragraph 51 of the judgment under appeal, it was furthermore common ground that the land and the factory were sold to Procter & Gamble in 1998. In fact, the price reported by the French authorities — the Commission did not deny that that sale took place in normal market conditions and it analysed that sale in the contested decision, accepting the possibility that the property was sold for that price — was below not only the value which the Commission had determined in 1987 but also the price paid by Scott.

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

23 Lastly, in paragraph 53 of the judgment under appeal, the Court of First Instance held that the contested decision is marred by an inconsistency in that it applies, without providing any justification, interest on a compound basis until the date of the decision and then interest on a simple basis up to the time of the recovery of the aid. Indeed Article 2 of that decision, in providing that recovery is to take place in accordance with the national rules, has the consequence that the interest attaching to the period between the date of the contested decision and the date of recovery of the aid is to be calculated at a simple rate.

Procedure before the Court and forms of order sought

24 By application lodged at the Registry of the Court of Justice on 20 June 2007, the Commission brought an appeal against the judgment under appeal.

25 The Commission requests the Court to declare the present appeal well founded and, as a result, to set aside the judgment under appeal in its entirety. Moreover, given the state of the proceedings, the Commission asks the Court to give final judgment in the matter and to hold that the contested decision contains a sufficient statement of reasons as regards the use of a compound interest rate. The Commission requests, in the alternative, in respect of any question on which the Court finds that the state of the proceedings does not permit final judgment to be given, that it refer the case back to the Court of First Instance for judgment.

26 Consequently, the Commission also requests that the département du Loiret be ordered to bear its own costs and to pay those incurred by the Commission in the proceedings before the Court of Justice and the Court of First Instance, and that Scott be ordered to bear its own costs in the proceedings before the Court of Justice and the Court of First Instance.

27 The département du Loiret contends that the appeal should be dismissed in its entirety and that the Commission should be ordered to pay the costs of the proceedings.

28 Scott contends that the Commission's appeal should be dismissed and that the Commission should be ordered to pay the costs incurred by Scott in defending its interests in the present proceedings.

The appeal

29 In support of its appeal, the Commission puts forward eight pleas based respectively on the following assertions:

— a decision is sufficiently reasoned if a simple mathematical calculation shows which method of calculation was used;

— the use of a compound interest rate is necessarily implicit in the reasoning of the contested decision, given the objective of restoring the pre-existing situation;

— unlawful reversal of the burden of proof: it was for the applicant to prove the alleged change in practice; it was not for the Commission to prove the absence of such a change;

— the Commission is not legally required to establish that a recipient retains an advantage at the date of the order for recovery;

— the judgment is based on speculation and not on evidence and reverses the burden of proof as regards the alleged price at which the plant's assets were sold to Procter & Gamble;

— an alleged sale price, 11 years after the grant of aid, is not relevant for the purpose of calculating the amount of aid to be recovered;

— in accordance with the Commission's obligation to ensure the execution of final decisions on State aid, where the final decision is silent on the point, the question whether simple or compound interest is to be applied to the recovery is a matter of Community law, not national law; and

— the question of the interest rate may be separated from the amount of the principal sum: there is, in any event, no legal basis for annulling the contested decision, apart from in so far as it applied an interest rate higher than a simple interest rate.

The first plea

Arguments of the parties

30 The Commission submits that a decision contains a sufficient statement of reasons if a simple calculation shows which method of calculation was used (in this case, compound interest). All the necessary data are contained in the contested decision and the formula is well known. The Court of First Instance was thus not entitled to base the annulment of the contested decision inter alia on the fact, noted in paragraph 36 of the judgment under appeal, that it was only by carrying out a certain mathematical calculation that the reader was able to conclude that a compound rate had been used.

31 According to the département du Loiret, this plea is nugatory, as the finding of the Court of First Instance criticised by it is not part of that Court's reasoning, but rather a descriptive element which makes up for the lack of announcement and explanation, in the text of the contested decision, of the method used to convert the amounts to present-day values. In fact the Court of First Instance annulled that decision because it gave no reasons for using that method, which at that time was unprecedented in the Commission's practice.

32 Scott also submits that it is merely a factual observation on which the Court of First Instance did not base the annulment of the contested decision.

Findings of the Court

33 It is true that the finding of the Court of First Instance, in paragraph 36 of the judgment under appeal, to the effect that the contested decision does not specify that it uses a compound rate and that it is only by effecting a calculation that the reader is able to deduce that a compound rate was used, is part of the Court's analysis aimed at determining whether the Commission provided sufficient reasons for its decision to calculate the present-day value of the aid by charging compound interest.

34 However, a reading of that passage in its context, and in particular in conjunction with paragraphs 37 to 43 of the judgment under appeal, shows that that finding is merely preliminary in nature and is not the basis of the Court's conclusion, in paragraph 54 of the judgment under appeal, that the contested decision does not contain a sufficient statement of reasons. Rather, that conclusion is based on the finding, also in paragraph 36 of the judgment under appeal, that the Commission should have given the reasons for applying a compound rate instead of a simple rate.

35 The first plea must therefore be rejected as nugatory.

The second plea

Arguments of the parties

36 Referring again to paragraph 36 of the judgment under appeal, the Commission considers that the use of a compound interest rate is, in any event, necessarily implicit in the reasoning of the contested decision, in the light of the declared objectives of eliminating the advantage and restoring the pre-existing situation. Inflation is a modern

economic fact and it is expressed in annual compound terms. Consequently, unless a compound interest rate is used, the present-day value of money is not measured correctly and the advantage is not eliminated. This analysis is confirmed by Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraphs 96 to 98.

37 The département du Loiret submits, first, that the use of a compound rate could not have been implicit at the time, in the light of the legislation then in force and the Commission's statements of position and practice.

38 It states in particular that, for the method of calculating interest, the Commission's letter to the Member States SG(91) D/4577 of 4 March 1991 (Communication to Member States concerning the procedures for the notification of aid plans and procedures applicable when aid is provided in breach of the rules of Article [88](3) of the EC Treaty) explicitly designated the calculation method provided for by the national law of the State to which the negative decision was addressed. At the end of the fourth paragraph of point 2 of that letter, the Commission stated that recovery was to be 'effected in accordance with national law, including the provisions concerning interest due for late payment of amounts owing to the government'.

39 That letter, the reference role of which was recognised by the Court in Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraphs 164 and 165, was the expression by the Commission of the applicable law as regards interest until the adoption of Regulation No 794/2004. The 2003 communication amended that letter only as regards the method for calculating present-day values.

40 During the period in question, the position in the national legislation of many Member States was — and still is — that the cost of time is covered by charging simple interest.

41 Secondly, as is apparent from the Court's judgment in Case 73/74 *Groupement des fabricants de papiers peints de Belgique and Others* v *Commission* [1975] ECR 1491, it was not possible in any event for the reasoning of the contested decision to be implicit, since the decision went appreciably further than previous decisions.

42 Scott contends that this plea does not address the arguments adopted by the Court of First Instance as a basis for annulling the contested decision and that it also runs counter to both the legislative history and the Commission's practice at the relevant time.

Findings of the Court

43 First of all, the Court finds that the Court of First Instance, in paragraph 35 of the judgment under appeal, correctly set out the settled case-law according to which the statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and

the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see, inter alia, Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63, and Case C-413/06 P *Bertelsmann and Sony Corporation of America* v *Impala* [2008] ECR I-4951, paragraph 166).

44 It is also apparent from the case-law that, although a decision of the Commission which fits into a well-established line of decisions may be reasoned in a summary manner, for example by a reference to those decisions, if it goes appreciably further than the previous decisions, the Commission must give an account of its reasoning (see, to that effect, *Groupement des fabricants de papiers peints de Belgique and Others* v *Commission*, paragraph 31, and Case C-301/96 *Germany* v *Commission* [2003] ECR I-9919, paragraphs 88 and 92).

45 As the Advocate General observed in point 38 of his Opinion, that requirement applies all the more where reasoning is claimed to be implicit.

46 It is, moreover, common ground that, when the contested decision was adopted, there was no provision of Community law or case-law of the Court of Justice or the Court of First Instance which specified that the necessary interest on aid to be recovered is to be calculated on a compound basis. On the contrary, as noted by the Court of First Instance in paragraph 40 of the judgment under appeal, in its 2003 communication, the Commission expressly acknowledged that the question had arisen as to whether such interest ought to be simple or compound and considered it necessary to clarify urgently its position on the matter. It accordingly informed the Member States and interested parties that, in any decision ordering the recovery of unlawful aid that it might adopt in the future, it would apply a compound interest rate.

47 The Court further notes that, in its reply of 11 September 2006 to a letter from the Court of First Instance of 27 July 2006, the Commission acknowledged that its negative final decisions prior to the contested decision did not state that the compound interest method was to be applied.

48 Moreover, according to the findings of the Court of First Instance in paragraph 42 of the judgment under appeal, the Commission was unable to refer to a single decision prior to the contested decision in which it actually applied compound interest. Before the Court of Justice, the Commission merely observed, without further explanation, that it had already provided the Court of First Instance with examples of cases of State aid where the Commission had applied compound interest.

49 The Court of First Instance was thus fully entitled to find, in paragraph 43 of the judgment under appeal, that the imposition of compound interest in the present case was the first manifestation of a new and important policy of the Commission which it ought to have justified.

50 It follows that, contrary to the Commission's submissions, although the contested decision stated that the advantages deriving from the aid were to be eliminated in order to restore the pre-existing situation, the use of a compound interest rate cannot be regarded as necessarily implicit in the reasoning of the contested decision.

51 The second plea must therefore be rejected as unfounded.

The third plea

Arguments of the parties

52 Referring to paragraph 42 of the judgment under appeal, the Commission submits that that judgment unlawfully reverses the burden of proof in State aid proceedings and proceedings before the Court of First Instance. The département du Loiret did not adduce any evidence in support of its assertion that the Commission changed its practice and, in any event, that assertion was refuted by the Commission, in particular in its reply of 11 September 2006 to a question from the Court of First Instance.

53 The département du Loiret contends that this plea is incorrect in fact and in law. Since the département du Loiret sufficiently elaborated, before the Court of First Instance, on its plea for annulment on the ground of lack of reasoning in the light of previous practice, it was for the Commission, by definition the party most familiar with its own practice, to correct any statements which were, in its view, inaccurate.

54 Scott also observes that it and the département du Loiret explained in detail to the Court of First Instance that their investigations showed that the Commission had never calculated interest on a compound basis prior to the contested decision. There is no basis whatsoever for seeking to invoke a reversal of the burden of proof on this point.

Findings of the Court

55 The Court observes, as a preliminary point, that the question of what the Commission's decision-making practice was prior to the contested decision is, as a rule, a question of fact on which the Court of Justice cannot rule on appeal, as the Court of First Instance has exclusive jurisdiction to find and appraise the relevant facts and also to assess the evidence (see, to that effect, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P *Dansk Rørindustri and Others* v *Commission* [2005] ECR I-5425, paragraphs 177 and 180).

56 By contrast, the Court of Justice does have jurisdiction to ascertain whether the rules of procedure in relation to the burden of proof and the taking of evidence have been observed (see, to that effect, Case C-185/95 P *Baustahlgewebe* v *Commission* [1998] ECR I-8417, paragraph 24, and *Bertelsmann and Sony Corporation of America* v *Impala*, paragraph 29).

57 However, it should be noted at the outset that an inadequate statement of reasons in breach of Article 253 EC constitutes an infringement of essential procedural requirements for the purposes of Article 230 EC and is a plea which may, and even must, be raised by the Community judicature of its own motion (Case C-166/95 P *Commission* v *Daffix* [1997] ECR I-983, paragraph 24, and *Bertelsmann and Sony Corporation of America* v *Impala*, paragraph 174).

58 The Court of First Instance was thus entitled, as part of its analysis to determine whether or not the contested decision contained a sufficient statement of reasons with respect to the calculation of interest, to examine what was the Commission's decision-

making practice prior to the contested decision, to put questions on the point to the Commission and to draw the necessary inferences from the reply.

59 The third plea cannot therefore be upheld.

The fourth plea

Arguments of the parties

60 Referring to paragraphs 50 and 52 of the judgment under appeal, the Commission considers that that judgment concludes wrongly that the Commission is under a legal obligation to establish that the recipient retains an advantage from the aid at the date of the recovery order. It submits that that interpretation is based on an error as to the fundamental purpose and objective of the rules on State aid, which, in actual fact, relate to competition between Member States and not between undertakings. The Commission establishes only at the time aid is granted that the conditions referred to in Article 87(1) EC are fulfilled. It is neither required nor empowered to check once again that those conditions are met at the time a recovery order is issued.

61 According to the département du Loiret, this plea is unfounded, since it gives the judgment under appeal a meaning that it does not have. The Court of First Instance did not in any way seek to introduce a new condition for reimbursement, namely verification that Scott still held an advantage at the time of the negative decision. It

meant simply that such a decision enabled it to ascertain whether the quantification of that advantage, at that date, using the reasoning and economic parameters chosen, was well founded.

62 Scott contends that, on that point, the judgment under appeal merely elaborates on its criticism of the lack of any reasoning for the use of compound interest in the contested decision.

Findings of the Court

63 As evidenced by paragraphs 48 to 52 of the judgment under appeal, the Court of First Instance did not intend to introduce a general principle that, in order to be able to order recovery of State aid, the Commission is required to establish that the recipient still retains an advantage from that aid at the date of the recovery order. The reasoning of the Court of First Instance on whether the recipient still retains, at that date, an advantage from the aid is clearly part of the analysis to determine whether the use of a compound interest rate is justified by the need to eliminate the advantage obtained by the recipient.

64 This plea is thus entirely unfounded, since it is based on a misinterpretation of the judgment under appeal. It is, moreover, nugatory since the finding of the Court of First Instance, in paragraph 43 of the judgment under appeal, that the Commission wholly failed to explain why it applied a compound interest rate for the first time is sufficient by itself to support the conclusion, in paragraph 54 of the judgment under appeal, that the contested decision does not contain a sufficient statement of reasons.

The fifth plea

Arguments of the parties

65 Referring to paragraph 51 of the judgment under appeal, the Commission submits that that judgment is unlawfully based on speculation rather than evidence regarding the alleged price at which the plant's assets were sold to Procter & Gamble in 1998. Referring to the rules on burden of proof before both it and the Court of First Instance, the Commission observes that the contested decision noted that, in any event, no evidence had been provided in respect of that sale price.

66 The département du Loiret contends that this plea relates to a superfluous point which is one of a number of factors, and is intended to call into question the factual assessment made by the Court of First Instance. It is accordingly inadmissible.

67 Scott submits that the challenged paragraph of the judgment under appeal merely describes the factual situation as it was before the Court of First Instance, with the result that it is not open to the Commission to discuss its content. The paragraph could, moreover, be withdrawn without the judgment's being censured as a result.

Findings of the Court

68 The fifth plea concerns a passage of the judgment under appeal by which the Court of First Instance, as part of its analysis to determine whether the use of a compound interest rate is justified by the need to eliminate the advantage obtained by the recipient, wished to express its doubts as to the value of the advantage retained by Scott at the date of the contested decision.

69 Thus, like the fourth plea, it is nugatory since the finding of the Court of First Instance, in paragraph 43 of the judgment under appeal, to the effect that the Commission wholly failed to explain why it applied a compound interest rate for the first time, is sufficient in itself to support the conclusion, in paragraph 54 of that judgment, that the contested decision does not contain a sufficient statement of reasons.

The sixth plea

Arguments of the parties

70 Referring to paragraphs 51 and 52 of the judgment under appeal, the Commission submits that that judgment found incorrectly that the alleged price at which the plant's assets were sold to Procter & Gamble in 1998, 11 years after the granting of the aid, was relevant for the purposes of calculating the amount of State aid to be recovered.

71 It asserts that there is no doubt that Scott received a considerable amount of State aid and that there are a number of reasons which could explain the decline in the value of the assets. Moreover, the value of aid which is unlawful and incompatible with the common market falls to be calculated at the date when it is granted; the objective of restoring the previous situation necessarily implies compound interest, irrespective of what the recipient may have done with the aid in the meantime.

72 According to the département du Loiret, this plea is inadmissible because it is directed against an assessment of fact made by the Court of First Instance. Moreover, since the grounds given in paragraphs 50 and 51 of the judgment under appeal are superfluous, the criticisms relating to those grounds are accordingly nugatory. Scott puts forward the same arguments as under the fifth plea.

Findings of the Court

73 Like the fifth plea, the sixth plea relates to a passage of the judgment under appeal by which the Court of First Instance, as part of its analysis to determine whether the use of a compound interest rate is justified by the need to eliminate the advantage obtained by the recipient, wished to express its doubts as to the value of the advantage retained by Scott at the date of the contested decision.

74 It is therefore also nugatory since the finding of the Court of First Instance, in paragraph 43 of the judgment under appeal, that the Commission wholly failed to explain why it applied a compound interest rate for the first time is sufficient by itself to support the conclusion, in paragraph 54 of the judgment under appeal, that the contested decision does not contain a sufficient statement of reasons.

The seventh plea

Arguments of the parties

75 Referring to paragraph 53 of the judgment under appeal, the Commission submits that that judgment held incorrectly that, where a final decision on State aid is silent on the point, the question whether the interest rate on recovery is simple or compound is governed by 'national procedures'.

76 The need to apply compound interest is a substantive, not a procedural, matter, as is the rate of interest itself. It is a fundamental question of Community law, the objective being to eliminate the advantage entirely and to restore the pre-existing situation, which requires an accurate assessment of the value of money over time.

77 Moreover, if the use of a compound interest rate were a procedural matter, Regulation No 794/2004 would, by definition, be unlawful because it would encroach on areas within the competence of the Member States under Article 14(3) of Regulation No 659/1999.

78 The département du Loiret submits that this plea cannot be upheld. Although the method for calculating the present-day value of State aid found to be unlawful is a substantive matter governed by Community law, the fact remains that, at the material time, Community law referred to national law where the final decision was silent on the point.

79 Scott submits that, given the current state of the law, as evidenced by, in particular, paragraph 88 of *Siemens* v *Commission*, and the practice at the relevant time, the contested decision cannot reasonably be interpreted as having ordered the French authorities to circumvent the rules laid down in national law and to use a compound interest rate in order to calculate the present-day value of the amount to be recovered for the period between the date of that decision and the date of actual recovery.

Findings of the Court

80 The first and second sentences of Article 2(2) of the contested decision state:

'Recovery [of the aid in question] 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.'

81 This wording must be read bearing in mind the state of Community law and the Commission's practice relating to the calculation of the present-day value of an amount of aid to be recovered, as they stood at the date the contested decision was adopted.

82 As found in paragraph 46 of the present judgment, when the contested decision was adopted, there was no provision of Community law or case-law of the Court of Justice or the Court of First Instance which specified whether the necessary interest on aid to be recovered is to be calculated on a simple or compound basis.

83 Although it is true that the method for calculating the present-day value of unlawful aid is a substantive and not a procedural matter, the Court nevertheless finds, as rightly pointed out by the département du Loiret, that the Commission stated in its letter to the Member States SG(91) D/4577 of 4 March 1991 that the final decision by which it declares aid to be incompatible with the common market will 'entail recovery of the amount of aid already paid unlawfully, to be effected in accordance with national law, including the provisions concerning interest due for late payment of amounts owing to the government, interest which should normally run from the date of the award of the unlawful aid in question'.

84 That letter thus linked the matter of charging interest to the procedural rules for recovery and referred in that regard to national law. It is only by the Commission communication concerning the obsolescence of certain State aid policy documents (OJ 2004 C 115, p. 1) that the Commission informed the Member States and interested third parties that it no longer intended to apply that letter, which, moreover, like the other documents covered by that communication, it referred to as 'texts concerning procedural issues in the field of State aid'.

85 Since the contested decision does not state explicitly that the aid to be recovered must be expressed as a present-day value on the basis of a compound interest rate and it is, furthermore, not disputed that French law provides for the application of a simple interest rate, the Court of First Instance thus rightly interpreted Article 2(2) of the contested decision as meaning that the effect of that provision is that the interest relating to the period between the date of the contested decision and the date of recovery of the aid will be calculated at a simple rate, and found that, accordingly, the contested decision is vitiated by a manifest inconsistency.

86 Consequently, the seventh plea must also be rejected.

The eighth plea

Arguments of the parties

87 The Commission argues that the judgment under appeal is disproportionate in that it annuls the contested decision in its entirety (in so far as it relates to the plot of land and the plant) on the basis of conclusions limited to the reasons given for using a compound interest rate. The question of interest could and should have been separated from the question of the principal amount, and the question of compound interest could and should have been separated from the question of simple interest. The initial amount of the aid as found in the contested decision and the use of a simple interest rate were not disputed in the judgment under appeal.

88 The eighth plea does not change the subject-matter of the proceedings. The grounds of appeal listed in the second sentence of the first paragraph of Article 58 of the Statute of the Court of Justice refer, by definition, to points which may arise or be identified in a judgment of the Court of First Instance. In the present case, the judgment under appeal itself infringes Community law.

89 It would be profoundly unjust and incompatible with the requirement of effective judicial protection if a judgment (finding against the Commission in the present case) were upheld in spite of an error of law, without there being any possibility of review on appeal. This claim is based on Article 113(1) of the Rules of Procedure of the Court of Justice, which restates the fundamental rule that a request to set aside in whole or in

part a decision of the Court of First Instance is, by definition, one of the points which may give rise to an appeal.

90 Moreover, the eighth plea relates not to the grounds of annulment themselves as adopted by the Court of First Instance, but rather to their consequences. The Commission does not believe that it is for the defendant before the Court of First Instance to examine of its own volition, for the benefit of an applicant or the Court of First Instance, what might be the different consequences if the opposing party were to be successful. That would oblige the defendant to develop an entire alternative line of argument based on assumptions about what the Court of First Instance might or might not do.

91 The département du Loiret and Scott contend that this plea is inadmissible because it broadens the subject-matter of the proceedings and seeks a different form of order, since the Commission did not, at any time, ask the Court of First Instance to confine itself to annulling the decision in part, even though the criticism of the calculation method was raised as a specific point.

92 Moreover, the separation between simple and compound interest which the Court is requested to take into consideration by this plea in order to vary the judgment under appeal would lead to a substantial modification of the contested decision itself, even though the Court of First Instance does not have unlimited jurisdiction in the field of State aid. The interest calculation method is a component which forms an integral part of the calculation leading to the final amount of the aid and the reasons for choosing it are just as important as the reasons for finding aid to be unlawful and calculating the amount thereof before updating. The ultimate impossibility of separating them means that partial annulment is impossible.

Findings of the Court

— Admissibility of the eighth plea

93 Under the first paragraph of Article 58 of the Statute of the Court of Justice, an appeal to the Court of Justice is to be limited to points of law and is to lie on grounds including infringement of Community law by the Court of First Instance.

94 Furthermore, Article 113(2) of the Rules of Procedure of the Court of Justice provides that the subject-matter of the proceedings before the Court of First Instance may not be changed in the appeal.

95 In that regard, it must be borne in mind that, according to settled case-law, the jurisdiction of the Court of Justice is, in principle, confined to review of the findings of law on the pleas argued before the Court of First Instance (Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 59, and Case C-266/05 P *Sison* v *Council* [2007] ECR I-1233, paragraph 95).

96 By this plea, the Commission is not seeking to challenge the findings of law as such adopted by the Court of First Instance on a plea argued before it. Rather, it criticises the inferences drawn by the Court of First Instance from its conclusion that the fifth part of the second plea relied on by the département du Loiret, to the effect that the

Commission did not give sufficient reasons for its decision to calculate the present-day value of the aid by charging compound interest, should be upheld. According to the Commission, the Court of First Instance erred, because it failed to observe the principle of proportionality, in annulling on the basis of that conclusion alone the contested decision in its entirety, in so far as it concerns the aid granted in the form of a preferential price for the plot of land in question.

97 Although the Court of Justice has jurisdiction to review the findings of law on the pleas argued before the Court of First Instance, it must, if the appeals procedure is not to be rendered largely meaningless, also have jurisdiction to review the legal conclusions drawn by the Court of First Instance from those findings, which also constitute a point of law.

98 In that context, moreover, the specific conclusions which the Court of First Instance may, where appropriate, draw in its judgment from its finding that a plea is well founded cannot necessarily be anticipated by the parties during the proceedings before the Court of First Instance.

99 It follows from the foregoing that a plea put forward in the context of an appeal, against a legal conclusion drawn by the Court of First Instance from the finding of law made on a plea argued before it cannot be regarded as 'chang[ing]' 'the subject-matter of the proceedings before the Court of First Instance' within the meaning of Article 113(2) of the Rules of Procedure of the Court of Justice.

100 Moreover, contrary to the contentions of the département du Loiret and Scott, nor does the eighth plea seek a different form of order, which is inadmissible under the second indent of Article 113(1) of those Rules of Procedure.

101 As noted by the Advocate General in point 93 of his Opinion, the Commission's request before the Court of First Instance for the action of the département du Loiret to be dismissed can be considered also to include the narrower request for the action to be dismissed only in part.

102 Consequently, the objection of inadmissibility raised against the eighth plea by the département du Loiret and Scott must be rejected.

— Whether the eighth plea is well founded

103 Under the first paragraph of Article 231 EC and the sixth paragraph of Article 224 EC, if the action is well founded, the Court of First Instance is to declare the act concerned to be void.

104 In that regard, the Court finds, first, that the Court of First Instance may not, merely because it considers a plea relied on by the appellant in support of its action for annulment to be well founded, automatically annul the challenged act in its entirety. Annulment of the act in its entirety is not acceptable where it is obvious that that plea, directed only at a specific part of the challenged act, is such as to provide a basis only for partial annulment.

105 Second, it must be borne in mind that, in accordance with settled case-law, partial annulment of a Community act is possible only if the elements the annulment of which is sought may be severed from the remainder of the act (Case C-244/03 *France* v *Parliament and Council* [2005] ECR I-4021, paragraph 12 and case-law cited).

106 That requirement of severability is not satisfied in the case where the partial annulment of an act would have the effect of altering its substance (*France* v *Parliament and Council*, paragraph 13).

107 In the present case, it is indisputable that the issue of whether the present-day value of the initial amount of the aid must be calculated by applying a simple interest rate or a compound interest rate does not affect the finding, in the contested decision, that the aid is incompatible with the common market and that it must be recovered.

108 In that regard the Court notes in particular that the operative part of the contested decision itself draws a distinction, in Article 1, between the initial amount of the aid in question and the present-day value. There is no argument in either the contested

decision or the judgment under appeal which precludes the issue of interest from being regarded as separable from the initial amount of the aid.

109 However, and contrary to the Commission's contentions, the Court of First Instance cannot be criticised for having failed to separate the question of compound interest from that of simple interest. First, the Court of First Instance could not have replaced the calculation of the present-day value of the initial amount of aid using a compound interest rate with one using a simple interest rate without altering the substance of the contested decision. Second, in paragraphs 45 to 47 of the judgment under appeal, the Court of First Instance found that the reasons in the contested decision were also insufficient as regards the use of the 5.7% interest rate for a period of 13 years.

110 It follows from the foregoing that the eighth plea must be upheld in that it criticises the Court of First Instance for having failed to separate the question of interest from that of the amount of the principal sum and for having annulled the contested decision in its entirety, in so far as it relates to the land and the plant, on the basis of conclusions restricted to the reasons for the calculation of the present-day value of the initial amount of the aid.

Referral of the case back to the Court of First Instance

111 Under the first paragraph of Article 61 of the Statute of the Court of Justice, if the appeal is well founded, the Court of Justice is to set aside the decision of the Court of First Instance. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.

112 Since the Court of First Instance examined only the fifth part of the second plea relied on by the département du Loiret in support of its action, the Court considers that the state of the present proceedings does not permit final judgment to be given. The case must therefore be referred back to the Court of First Instance.

113 Since the case is to be referred back to the Court of First Instance, the costs relating to the present appeal proceedings should be reserved.

On those grounds, the Court (First Chamber) hereby:

1. **Sets aside the judgment of the Court of First Instance of the European Communities of 29 March 2007 in Case T-369/00 *Département du Loiret* v *Commission* [2007] ECR II-851;**

2. **Refers the case back to the Court of First Instance of the European Communities;**

3. **Reserves the costs.**

[Signatures]