OPINION OF ADVOCATE GENERAL

BOT

delivered on 23 April 2009 [1]

1. Following the work carried out within the Council of the European Union in 1997 on tax competition between the Member States, the Commission of the European Communities went on to examine and re-examine the tax schemes adopted by the Member States in the light of the rules of the EC Treaty on State aid.

2. The Commission thus re-examined the tax scheme implemented by the Kingdom of Belgium in favour of coordination centres. [2] While it had taken the view in 1984, in 1987 and, subsequently, in 1990 that that scheme did not constitute State aid, the Commission adopted a decision on 17 February 2003 declaring that scheme to be incompatible with the common market. [3] That decision was the subject of an action for annulment brought before the Court of Justice, judgment in which was given on 22 June 2006 in *Belgium and Forum 187* v *Commission*. [4]

3. At the same time, the Commission examined the tax scheme introduced in 1997 by the Kingdom of the Netherlands concerning international financing activities carried on by certain groups of undertakings (the 'GFA scheme').

4. That scheme permits undertakings which have been given an individual authorisation for a period of 10 years to establish reserves to cover the risks associated with the exercise of those activities. That scheme was not notified to the Commission prior to its implementation, and the Commission decided on 11 July 2001 to initiate the formal investigation procedure provided for under Article 88(2) EC.

5. By decision of 17 February 2003, [5] the Commission took the view that that scheme constituted State aid incompatible with the common market. However, it took the view that the beneficiaries of that scheme on the date on which it initiated the formal investigation procedure were entitled to rely on a legitimate expectation that the scheme was

1 — Original language: French.

2 — A coordination centre is an undertaking established by a multinational group of companies with the aim of providing a variety of services to those companies, particularly in the financial sector.

3 — Commission Decision C(2003) 564 final on the aid scheme implemented by Belgium for coordination centres established in Belgium, as rectified by the corrigendum of 23 April 2003.

4 — Joined Cases C-182/03 and C-217/03 [2006] ECR I-5479.

5 — Commission Decision 2003/515/EC on the State aid implemented by the Netherlands for international financing activities (OJ 2003 L 180, p. 52; the 'contested decision').

compatible with the Treaty rules, taking into account the positions it had repeatedly adopted on the Belgian tax scheme in 1984, 1987 and 1990. The Commission therefore authorised those undertakings to benefit from the GFA scheme until the expiry of their current authorisations and until 31 December 2010 at the latest.

6. Koninklijke Friesland Foods NV, [6] which is a Netherlands undertaking, brought an action for annulment of the contested decision before the Court of First Instance of the European Communities.

7. By judgment of 12 September 2007 in *Koninklijke Friesland Foods* v *Commission*, [7] the Court of First Instance annulled that decision in so far as it excludes from the transitional scheme economic operators such as KFF who, as at 11 July 2001, had lodged an application for authorisation on which a decision had not yet been taken by the Netherlands tax authority.

8. The Court is currently seised of the appeal brought by the Commission against that judgment. That appeal essentially raises two points of law connected with KFF's status as a potential beneficiary of the aid scheme and with the fact that that scheme was not notified to the Commission.

9. The first point of law concerns the admissibility of the action for annulment brought by that undertaking against the contested decision. The question is whether KFF may be allowed to contest the legality of that decision before the Community Courts even though it did not enjoy any acquired right on the date on which the decision was notified.

10. The second point of law requires the Court to examine the scope of the principle of the protection of legitimate expectations in the area of State aid. The question is whether KFF may, on the same basis as the other undertakings benefiting from the scheme, rely upon the principle of the protection of legitimate expectations and benefit from transitional measures even though that scheme was not notified to the Commission prior to its implementation. The Court is therefore being asked to examine whether the conditions which it established in *Belgium and Forum 187* v *Commission* as being applicable to recognition of the existence of an infringement of that principle are fulfilled in this instance.

11. In this Opinion, I shall propose that the Court declare the appeal to be well founded.

12. Primarily, I shall submit that, by ruling that KFF is individually concerned by the contested decision, the Court of First Instance erred in law in its assessment of the admissi-

6 — 'KFF'.
7 — Case T-348/03, the 'judgment under appeal'.

bility of the action, which justifies the setting aside of the judgment under appeal.

13. In the alternative, I shall argue that, even assuming that the action brought by KFF is admissible, that judgment must be set aside in so far as that undertaking was not entitled to claim infringement of the principle of the protection of legitimate expectations.

14. I shall propose that the Court itself give final judgment on the objection of inadmissibility raised by the Commission and uphold that objection.

I — The Community legal framework

15. In the Treaty, State aid is the subject of a prohibition in principle, from which there are a number of derogations. 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.'

16. Article 87 EC then lists, in paragraphs (2) and (3), forms of State aid which are automatically compatible with the common market and those which may be considered to be compatible with it.

17. Article 88 EC provides:

'1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market.

2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 87, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

...

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 87, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.'

18. Finally, Article 89 EC authorises the Council to make regulations for the application of Articles 87 EC and 88 EC. Under that authorisation, the Council, on 22 March 1999, adopted Regulation (EC) No 659/1999, [8] which lays down specific rules for the procedures to be followed for the application of Article 88 EC.

8 — Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1).

II — The GFA scheme

19. The GFA scheme was established by the 1969 Law on Corporation Tax. [9] It was amended by the Law of 13 December 1996, [10] which inserted Article 15b with a view to combating the tendency of internationally active Netherlands undertakings to shelter their group financing activities within companies established abroad, and in particular in tax havens. That scheme, as modified, entered into force on 1 January 1997.

20. Article 15b of the 1969 Law permits beneficiary undertakings to establish a reserve to cover risks associated with their international financing activities. The scheme is accessible to any undertaking, whether of Netherlands or foreign origin, which pays corporation tax, provided that it meets the following conditions laid down by that provision:

— the beneficiary undertaking must carry on financial activities for the benefit of members of the group established in at

9 — Wet op de vennootschapsbelasting 1969.

10 — Law amending the 1969 Law on Corporation Tax with a view to combating erosion of the tax base and reinforcing the tax infrastructure (Wet tot wijziging van de wet op de vennootschapsbelasting 1969 met het oog op het tegengaan van uitholling van de belastinggrondslag en het versterken van de fiscale infrastructuur) (Stb. 1996, No 65; the '1969 Law').

least four countries or on at least two continents;

— it must be regularly engaged in the activity of lending and placing funds and must be able to operate independently. That activity must be conducted exclusively from the Kingdom of the Netherlands;

— each of the four countries in which the related members are located must generate at least 5% of the taxable income which the company obtains from its financing activities. Each of the two continents must generate at least 10% of that income.

21. Under Article 15b(10) of the 1969 Law, the tax inspector is to examine applications from undertakings wishing to benefit from the provisions of the GFA scheme. The inspector is to grant the right to benefit from the scheme, specifying the conditions for its use in the light of the particular situation of the undertaking, by adopting a decision which is open to appeal ('GFA authorisation'). [11]

11 — See Decree DB 97/3951 of 2 October 1997 setting out the model decision referred to in Article 15b of the 1969 Law (Besluit nr DB 97/3951 van 2 oktober 1997 tot vaststelling van de modelbeschikking inzake artikel 15 b van de Wet op de venootschapsbelasting 1969).

III — The factual and procedural background

A — *The facts prior to the contested decision*

22. The GFA scheme was not notified to the Commission prior to its implementation on 1 January 1997.

23. Following a period of reflection on tax competition between the Member States, the Economic and Financial Affairs Council adopted a code of conduct for business taxation. [12] An *ad hoc* group was set up to assess national tax measures with harmful consequences for the common market.

24. Following that step, the Commission undertook to develop guidelines on the application of Articles 87 EC and 88 EC to measures falling within the scope of direct business taxation. Thus, on 11 November 1998, the Commission adopted a Notice on the application of the State aid rules to measures relating to direct business taxation. [13] It was on the basis of that notice that the Commission went on to examine or re-

12 — Resolution of the Council and the representatives of the Governments of the Member States, meeting within the Council, of 1 December 1997 on a code of conduct for business taxation (OJ 1998 C 2, p. 2).

13 — OJ 1998 C 384, p. 3.

examine the tax schemes in force in the various Member States.

25. On 12 February 1999, the Commission thus asked the Netherlands authorities for information on the GFA scheme. The Netherlands authorities replied on 8 March 1999.

26. On 27 December 2000, KFF applied to the Netherlands tax authority for authorisation to establish a reserve under the GFA scheme from 1 January 2000 (the 'GFA application'). That application was discussed with the tax authority on 24 April 2001.

27. By letter of 11 July 2001, published in the *Official Journal of the European Communities* of 31 October 2001, the Commission notified the Kingdom of the Netherlands of its decision to initiate the formal investigation procedure pursuant to Article 88(2) EC. [14] Within the framework of its preliminary evaluation of the aid, the Commission expressed its doubts as to the compatibility of the GFA scheme with the common market. It stated that the scheme could constitute State aid and did not seem to qualify for any of the derogations provided for in Article 87(2) and (3) EC. In accordance with Article 88(2) EC, the Commission invited the Kingdom of the Netherlands and the other interested parties to submit their comments within one month.

28. On 26 July 2001, the Netherlands tax authority informed KFF that the Commission had initiated the formal investigation procedure.

29. Following the initiation of that procedure, the GFA application by KFF was suspended.

30. By letter of 3 October 2002, the Kingdom of the Netherlands made to the Commission the representation that, taking into account legitimate expectations and the safeguarding of acquired rights, that institution ought to allow undertakings using the GFA scheme at that time to continue to benefit from it until the expiry of the authorisations which had been granted.

31. Finally, on 5 December 2002, the Netherlands State Secretary for Finance adopted a decision to the effect that, from that date, the administrative authorities would no longer process any new applications for the GFA scheme.

14 — OJ 2001 C 306, p. 6.

B — *The contested decision*

32. On 17 February 2003, the Commission adopted the contested decision.

33. By that decision, the Commission confirms its doubts regarding the existence of the GFA scheme and the compatibility of that scheme with Community law. It states, first, that the scheme constitutes State aid within the terms of Article 87(1) EC and sets out the reasons why it takes the view that that scheme does not qualify for any of the derogations provided for in paragraphs (2) and (3) of that article.

34. Next, the Commission examines the legitimate expectation of the beneficiaries of the GFA scheme. It recognises that such an expectation exists and states that that expectation justifies it in refraining from ordering recovery of the aid granted.

35. Recitals 111 and 112 of the contested decision are worded as follows:

‘…

In the present case the Commission notes that, although the Belgian and Dutch schemes are not completely identical, the GFA scheme nevertheless has similarities with the scheme introduced in Belgium by Royal Decree No 187 of 30 December 1982 dealing with the tax treatment of coordination centres. Both of the measures concern intra-group activities and a significant number of beneficiaries of the GFA scheme had previously made use of the Belgian [coordination centres] scheme. In its decision of 2 May 1984, the Commission ruled that the Belgian scheme was not aid within the meaning of Article [87(1) EC]. Even if this decision was not published, it should be noted, as the Dutch authorities and interested parties have stressed, that it was stated in the 14th Competition Report and in an answer to a parliamentary question [15] that the Commission had not lodged any objections to the scheme in question.

In this context, the Commission points out that its decision on the Belgian scheme was adopted before the GFA scheme entered into force. It also notes that all beneficiaries of the GFA scheme were recognised as such before the Commission decided to institute the formal investigation procedure. The Commission therefore accepts the arguments put forward by the Dutch authorities and interested parties to the effect that the beneficiaries had a legitimate expectation and will refrain from ordering recovery of the aid.’

15 — The Commission refers to its footnote 16, which relates to Written Question No 1735/90 (OJ 1991 C 63, p. 37). It also refers to the questions submitted previously by Belgian MEPs Radoux No 2381/82 (OJ 1983 C 170, p. 9) and Van Rompuy No 1817/83 (OJ 1984 C 148, p. 14).

36. Finally, the Commission examines the reasons why it finds it necessary to provide for a transitional period until the effects of the GFA scheme have been extinguished. It draws a distinction between two situations.

37. As regards the fate of the reserves already constituted by the beneficiary undertakings under the GFA scheme, the Commission finds that those reserves form part of a long-term strategy and that the advantages associated with them are safeguarded on the basis of legitimate expectation. Consequently, it takes the view that those beneficiary undertakings may continue to use their reserves under existing Netherlands law. [16]

38. With regard to the establishment of new reserves, the Commission points out that, in principle, the principles of the protection of legitimate expectation and legal certainty may no longer be relied on after a decision declaring aid to be incompatible with the common market. In this regard, it states that the effects of legitimate expectation cannot last beyond a reasonable period required for the Member State and the undertakings concerned to adapt to the new situation. In the case at issue, the Commission takes note of the context in which the procedure was initiated and in particular of the progress already made at Community level to combat harmful tax competition. It also takes account of the announcement of the abolition of the GFA scheme with effect from December 2002 and hence of the fact that the number of beneficiaries of that scheme will diminish gradually in the run-up to 2010. [17]

39. In recital 118 of the contested decision, the Commission therefore states as follows:

'In view of these exceptional circumstances, the Commission considers that the companies benefiting from the GFA scheme when this procedure was initiated can continue to constitute new reserves or to continue to use existing reserves in accordance with the GFA scheme's implementing provisions while the current provisions remain in force and until 31 December 2010 at the latest.'

40. The Commission draws the following conclusion from the foregoing:

'(119) The Commission finds that the Kingdom of the Netherlands has unlawfully implemented the aid in breach of Article 88(3) [EC]. It regards the GFA scheme as incompatible with the common market.

16 — See recital 114 of the contested decision.

17 — See recitals 115 to 117 of the decision.

However, in view of the beneficiaries' legitimate expectation and the exceptional circumstances described above, there are no grounds for proceeding with recovery of the aid and the scheme can be maintained until 31 December 2010'.

41. The operative part of the contested decision is worded as follows:

'*Article 1*

The aid scheme implemented by the [Kingdom of the] Netherlands pursuant to Article 15b of the 1969 Corporate Tax Act and put into effect by the Law of 13 December 1996 is incompatible with the common market.

Article 2

The [Kingdom of the] Netherlands shall terminate the scheme referred to in Article 1. The companies covered by this scheme as at 11 July 2001 may continue to benefit from it until the end of the 10-year period granted to them by the Dutch tax authorities. In any event, implementation of the scheme shall be terminated by 31 December 2010 at the latest.

…'.

C — The facts subsequent to the contested decision

42. By letter of 11 April 2003, the Kingdom of the Netherlands, inter alia, asked the Commission to confirm in writing that the transitional scheme provided for in Article 2 of the contested decision also applied to undertakings which, although not the subject of a decision of the Netherlands tax authority permitting them to join the GFA scheme, had made an application to that effect prior to 5 December 2002, the date from which any new application for GFA authorisation would be refused, in so far as those undertakings satisfied the conditions of the scheme on 11 July 2001.

43. In a letter of 7 July 2003, the Commission stated that it was clear from recital 118 of the contested decision and from Article 2 of that

decision that the transitional scheme did not apply to those undertakings. It also stated that, if the Netherlands authorities decided to grant GFA authorisation to those undertakings, this would be tantamount to the grant of new aid contrary to the contested decision.

44. On 21 August 2003, the Netherlands tax authority rejected KFF's GFA application on the basis of the contested decision.

45. Article 15b of the 1969 Law was repealed by Article 1, Section D, of the Law of 15 September 2005. [18]

46. Article 2 of the latter Law provides essentially that that article and the provisions flowing from it are to remain applicable to taxpayers liable to corporation tax who, on 11 July 2001, met the conditions attached to the scheme provided for in Article 15b of the 1969 Law. It also provides that that transitional provision is to apply for a period of 10 years from the date on which the taxpayer was able to establish a reserve, which period may not extend beyond 31 December 2010.

18 — Law amending the 1969 Law — abolition of the GFA scheme (Wet van 15 september 2005, houdende wijziging van de wet op de vennootschapsbelasting 1969 — vervallen van concernfinancieringsregeling) (Stb. 2005, No 468).

IV — The action before the Court of First Instance and the judgment under appeal

47. By application of 10 October 2003, KFF brought an action for annulment of the contested decision before the Court of First Instance.

48. By a document lodged with the Registry of the Court of First Instance on 14 January 2004, the Commission raised a plea of inadmissibility under Article 114(1) of the Rules of Procedure of the Court of First Instance. KFF lodged observations on that plea on 29 March 2004. By order of the Court of First Instance of 28 February 2005, the decision on that plea and the decision on costs were reserved for the final judgment.

49. By the judgment under appeal, the Court of First Instance held that the action brought by KFF was admissible. It also found that the action was well founded and annulled Article 2 of the contested decision in so far as it excludes from the transitional scheme which it lays down those traders who, as at 11 July 2001, had lodged a request with the Netherlands tax authority for application of the aid scheme in question but on whose request a decision had not yet been taken by that date.

V — The procedure before the Court of Justice and the forms of order sought by the parties

50. Pursuant to Article 56 of the Statute of the Court of Justice, the Commission brought an appeal against the judgment under appeal by application lodged with the Court Registry on 22 November 2007.

51. The Commission claims, primarily, that the Court should declare the present appeal to be well founded and, consequently, set aside the judgment under appeal, dismiss the action for annulment brought by KFF and order the latter to pay the costs of the proceedings before both Courts.

52. In the alternative, the Commission asks the Court to set aside the judgment under appeal in so far as it grants rights to traders other than KFF who, as at 11 July 2001, had lodged a request with the Netherlands tax authority for application of the GFA scheme, and to dismiss the action for annulment of the contested decision in so far as it is intended to grant rights to undertakings other than KFF.

53. KFF contends that the appeal should be dismissed and the Commission ordered to pay the costs.

VI — Examination of the appeal

A — *The first plea, alleging misconstruction of the condition relating to individual interest on the part of KFF*

1. Arguments of the parties

54. The Commission submits that the Court of First Instance erred in holding that KFF was individually concerned by the contested decision within the meaning of the fourth paragraph of Article 230 EC and the Court's case-law.

55. It claims in this regard that the Court of First Instance committed an error of law in basing its analysis on *Belgium and Forum 187* v *Commission* and in treating the situation of KFF in the same way as that of economic operators who, in that case, were applying to have their authorisations renewed. In the Commission's view, those two situations are not comparable in so far as KFF has never benefited from the GFA scheme. Contrary to the findings of the Court of First Instance in paragraph 100 of the judgment under appeal, KFF is not therefore 'specifically' affected by the contested decision but is affected in exactly the same way as the other Netherlands undertakings which have never benefited from that scheme.

56. KFF submits that that plea is inadmissible. It takes the view that the question whether the difference between an initial application for recognition and an application for renewal is relevant in determining whether it forms part of a restricted group is a question of fact which the Court may not examine in the context of an appeal.

2. Assessment

57. The contested decision, in accordance with Article 4 thereof, is addressed solely to the Kingdom of the Netherlands. Natural or legal persons, such as KFF, who wish to bring an action for annulment of that decision must therefore fulfil the conditions laid down in the fourth paragraph of Article 230 EC. They must accordingly demonstrate that that decision is of direct and individual concern to them.

58. If they are unable to demonstrate that they fulfil those conditions, the action brought against the contested decision will be inadmissible.

59. In the case at issue, the Court is asked to examine whether KFF, whose application for authorisation was pending on the date on which the contested decision was notified, is individually concerned by that decision within the meaning of the fourth paragraph of Article 230 EC and Community case-law.

60. The issue is therefore whether, according to the criteria set out by the Court in *Plaumann* v *Commission* [19] and since confirmed by settled case-law, KFF is affected by the contested decision by reason of certain attributes which are peculiar to it or by reason of circumstances in which it is differentiated from all other persons and by virtue of those factors is individually distinguished just as in the case of the persons to whom that decision is addressed. [20]

61. That case-law has been applied and refined by the Court in the particular area of State aid. Thus, the Court has repeatedly held that, in that field, an undertaking cannot contest a Commission decision prohibiting a sectoral aid scheme if that undertaking is concerned by that decision solely by virtue of belonging to the sector in question and being a potential beneficiary of the scheme. [21]

19 — Case 25/62 [1963] ECR 95, at p. 107.

20 — See, inter alia, Case C-263/02 P *Commission* v *Jégo-Quéré* [2004] ECR I-3425, paragraph 45; Case C-78/03 P *Commission* v *Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737, paragraph 33; and Case C-125/06 P *Commission* v *Infront WM* [2008] ECR I-1451, paragraph 70.

21 — See, inter alia, Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2000] ECR I-8855, paragraph 33 and the case-law cited there.

62. In such a situation, the undertaking cannot be affected by the Commission decision in the same way as an undertaking which does in fact benefit from the scheme in question and which could be required to reimburse the aid illegally paid by the Member State.

63. That line of reasoning forms part of the settled case-law to the effect that an undertaking is allowed to contest the legality of a Community measure when that measure alters rights acquired by that undertaking prior to its adoption. [22]

64. Thus, even though an undertaking belongs to a restricted group of economic operators, as is the case of KFF and the thirteen other undertakings which applied to the Netherlands tax authority for authorisation, that is not sufficient for it to be recognised as being individually concerned by the contested measure. That undertaking must also have a legally protected right permitting it to be distinguished in the same way as the addressee of that decision would be, in accordance with the case-law deriving from *Plaumann* v *Commission*.

65. KFF clearly does not have any right acquired prior to the adoption of the contested decision. It was not a beneficiary of the GFA scheme on the date on which that decision was adopted and it was given no guarantee to that effect by the Netherlands tax authority. In those circumstances, although it belongs to a closed group of taxpayers, KFF cannot be affected by the contested decision in the same way as the other undertakings which are beneficiaries of the GFA scheme, some of which will have the duration of their authorisation extended until 31 December 2010.

66. KFF's situation is therefore very different from that of the Belgian coordination centres at issue in *Belgium and Forum 187* v *Commission*, as the latter were already beneficiaries of the scheme in question and were applying for renewal of the authorisations which had been granted to them. The decision at issue in that case did therefore relate to a situation which existed at the time at which it was adopted and called into question the enjoyment of the rights acquired by the coordination centres in respect of future operations.

22 — See, inter alia, Joined Cases 106/63 and 107/63 *Toepfer and Getreide-Import* v *Commission* [1965] ECR 405, at p. 411; Case 62/70 *Bock* v *Commission* [1971] ECR 897; Case 100/74 *CAM* v *Commission* [1975] ECR 1393; Case 232/81 *Agricola commerciale olio and Others* v *Commission* [1984] ECR 3881; Case 264/81 *Savma* v *Commission* [1984] ECR 3915; Case C-309/89 *Codorniu* v *Council* [1994] ECR I-1853; and *Commission* v *Infront WM*, paragraph 72.

67. That is why I take the view that, in ruling that KFF was individually concerned by the contested decision, the Court of First Instance committed an error of law in its assessment of the admissibility of the action which justifies the setting aside of the judgment under appeal.

68. Consequently, I propose that the Court declare the first plea raised by the Commission to be well founded and set aside the judgment under appeal in so far as the Court of First Instance declared the action for annulment of the contested decision brought by KFF to be admissible.

69. Should the Court not follow my proposal and instead take the view that KFF is individually concerned by the contested decision and, moreover, that it has an interest in bringing proceedings, I shall set out the reasons why I consider that, in any event, the appeal remains well founded.

70. I shall examine two pleas which I consider capable of rendering the judgment under appeal invalid in this regard, namely that alleging infringement of the principle of the protection of legitimate expectations and that alleging infringement of the principle of equal treatment.

B — *In the alternative, the second plea, alleging infringement of the principle of the protection of legitimate expectations*

71. Article 2 of the contested decision grants a transitional period to the undertakings which were beneficiaries of the GFA scheme when the Commission initiated the formal aid investigation procedure on 11 July 2001. The Commission took as its basis the legitimate expectation of those undertakings that that scheme was compatible with the rules of the Treaty and the particular circumstances of the case. [23]

72. In the judgment under appeal, the Court of First Instance held that, in so doing, the Commission had infringed the principle of the protection of legitimate expectations by failing to provide a transitional measure for taxpayers, such as KFF, whose application for authorisation was still pending at the time at which the contested decision was notified.

73. Before embarking on an examination of this plea, and in order better to evaluate the manner in which the Court of First Instance considered it in the judgment under appeal, I feel it is important, first of all, to recall the substance of that principle in the light of the Community case-law.

23 — See recitals 111 to 118 of the contested decision.

1. The Court's case-law on the principle of the protection of legitimate expectations

74. The principle of the protection of legitimate expectations is a general principle of Community law which may be used to verify the legality of acts of the institutions. [24]

75. As Advocate General Léger stated in his Opinion in *Belgium and Forum 187* v *Commission*, [25] that principle can be seen as the corollary of the principle of legal certainty, which requires that Community legislation must be certain and its application foreseeable by individuals, in the sense that it seeks, where a rule is altered, to ensure the protection of situations legitimately entered into by one or more natural or legal persons in particular. [26]

76. In the light of the application of the principle of the protection of legitimate expectations in the Court's case-law, Advocate General Léger noted that that principle is considered to have been infringed when the following conditions are satisfied.

77. First of all, there must be an act or conduct on the part of the Community administration capable of having given rise to a well-founded expectation. According to the case-law, the principle of the protection of legitimate expectations may be invoked against a Community act only to the extent to which the Community itself has previously created a situation which could give rise to such an expectation. [27] Moreover, the Community administration must provide specific assurances. [28]

78. Second, that expectation must be legitimate, that is to say, the person concerned must not have been able to foresee the change to the line of conduct previously adopted by the administration. According to the case-law, if a prudent and circumspect trader could have foreseen the adoption of a Community measure likely to affect his interests, he cannot plead the principle of the protection

24 — See, inter alia, Case 74/74 *CNTA* v *Commission* [1975] ECR 533, paragraph 44; Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477, paragraph 26; Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061, paragraph 15; Case C-104/97 P *Atlanta* v *European Community* [1999] ECR I-6983, paragraph 52; Case C-403/99 *Italy* v *Commission* [2001] ECR I-6883, paragraph 35; and Case C-17/03 *VEMW and Others* [2005] ECR I-4983, paragraph 73.

25 — I refer to points 365 to 433 of his Opinion.

26 — See, to this effect, Case C-63/93 *Duff and Others* [1996] ECR I-569, paragraph 20, and Case C-107/97 *Rombi and Arkopharma* [2000] ECR I-3367, paragraph 66.

27 — Case 289/81 *Mavridis* v *Parliament* [1983] ECR 1731, paragraph 21; Case C-177/90 *Kühn* [1992] ECR I-35, paragraph 14; *Rombi and Arkopharma*, paragraph 67; Case C-459/02 *Gerekens and Procola* [2004] ECR I-7315, paragraph 29; and *Belgium and Forum 187* v *Commission*, paragraph 147 and the case-law cited there.

28 — Case C-82/98 P *Kögler* v *Court of Justice* [2000] ECR I-3855, paragraph 33; Case C-274/99 P *Connolly* v *Commission* [2001] ECR I-1611, paragraph 113; and *Belgium and Forum 187* v *Commission*, paragraph 147 and the case-law cited there; see also the order in Case C-44/00 P *Sodima* v *Commission* [2000] ECR I-11231, paragraphs 50 to 52.

of legitimate expectations if the measure is adopted. [29] The expectation to which the measure or the conduct of the Community administration gives rise is therefore 'legitimate', and must accordingly be protected, in the case where the person concerned could reasonably count on the continuation or the stability of the situation thus created, in the same way as any 'prudent and circumspect' trader.

79. Third, the Community interest pursued by the contested measure must not preclude the adoption of transitional measures necessary to protect the legitimate expectation of the party concerned. That condition is satisfied where the balancing of the interests in issue shows that, in the circumstances of the case, the Community interest does not prevail over that of the person concerned in the continuation of the situation that it was legitimately entitled to regard as stable. [30]

80. It should also be stated that those three conditions are cumulative.

81. It was by reference to those three conditions that the Court of First Instance examined whether, and confirmed that, KFF was justified in seeking application of the principle of the protection of legitimate expectations.

29 — See, to this effect, Case C-22/94 *Irish Farmers Association and Others* [1997] ECR I-1809, paragraph 25; Joined Cases C-37/02 and C-38/02 *Di Lenardo and Dilexport* [2004] ECR I-6911, paragraph 70; and *Belgium and Forum 187* v *Commission*, paragraph 147 and the case-law cited therein.

30 — For examples of this balancing of the interests involved, see Case C-90/95 P *de Compte* v *Parliament* [1997] ECR I-1999, paragraph 39, and Case C-183/95 *Affish* [1997] ECR I-4315, paragraph 57.

2. Arguments of the parties

82. The Commission submits a number of arguments in support of this plea.

83. First, the Commission criticises the fact that, in paragraphs 125 and 126 of the judgment under appeal, the Court of First Instance held that it is not relevant whether or not KFF was a beneficiary of the GFA scheme or whether it satisfied the conditions of eligibility for the scheme for the purpose of assessing whether it had a legitimate expectation.

84. Second, the Commission calls into question the assessment by the Court of First Instance in regard to the examination of the three conditions required for recognition of the existence of a legitimate expectation on the part of KFF.

85. As regards the first condition, relating to the existence of an expectation, the Commission points out that it never gave specific

assurances to KFF as to the compatibility of the GFA scheme with the common market.

86. It recognises that the positions which it repeatedly adopted in respect of the Belgian tax regime may indeed have given rise to a 'degree of expectation'. However, this does not constitute a specific commitment to KFF but only a decision on a separate, slightly similar aid scheme. The Commission also states that it was unaware that KFF even existed, as that undertaking had not made itself known to the Commission in the context of the procedure laid down in Article 88(2) EC.

87. As regards the second condition, concerning the legitimacy of that expectation, the Commission submits that KFF did not act as a prudent and circumspect trader.

88. In the first place, unlike some of the coordination centres involved in *Belgium and Forum 187* v *Commission*, KFF was never granted authorisation.

89. Second, even assuming that KFF did in fact undertake substantial investments in order to satisfy the conditions of eligibility for the GFA scheme, it did not submit its application for authorisation until 27 December 2000. In the Commission's view, a prudent and circumspect trader ought to have been aware, well before 1 January 2000, that the Commission was liable to classify the GFA scheme as State aid incompatible with the common market. In that regard, the Commission refers to the Resolution of 1 December 1997 of the Council and the representatives of the Governments of the Member States, meeting within the Council, on a code of conduct for business taxation. It also refers to its Notice of 11 November 1998 on the application of the State aid rules to measures relating to direct business taxation. In addition, it points to a press release of 23 February 2000 containing a statement by the European Competition Commissioner, Mr Monti. [31]

90. Finally, the Commission takes issue with paragraph 134 of the judgment under appeal, according to which the Commission invited the interested parties to submit comments on any legitimate expectation which would preclude recovery of the sums paid. The Commission points out that that argument does not relate to an undertaking such as KFF, which has never received aid under the GFA scheme.

91. As regards the third condition, concerning the balancing of interests, the Commission criticises the reasoning of the Court of First Instance only for the sake of

31 — Statement by Commissioner Monti concerning the control of fiscal State aids (IP/00/182).

completeness. In its view, paragraph 139 of the judgment under appeal is vitiated by failure to state grounds and by an error of fact.

92. First, it contends, the Court of First Instance does not explain why there is no public interest preventing KFF from relying on the principle of the protection of legitimate expectations. According to the Commission, the fact that it granted a transitional arrangement to the actual beneficiaries of the GFA scheme does not lend validity to the reasoning of the Court of First Instance as that arrangement was based on a progressive reduction in the number of applicants.

93. Next, the Commission submits that the analysis carried out by the Court of First Instance tends to call into question the effectiveness of the formal investigation procedure laid down in Article 88(2) EC. According to the Court of First Instance, potential beneficiaries of the GFA scheme could seek to benefit from transitional measures solely on the ground that they had applied for authorisation, even though they had not made themselves known during the formal aid investigation procedure.

94. The Commission then criticises the reference to *Belgium and Forum 187* v *Commission*, in particular to paragraph 165 thereof, as that case concerned the renewal of an authorisation.

95. Third, the Commission submits that the Court of First Instance committed an error of fact by maintaining, in paragraph 139 of the judgment under appeal, that the actual beneficiaries of the GFA scheme may continue to benefit from it 'until 2010'. In that connection, the Commission refers to the precise wording of Article 2 of the contested decision.

96. Fourth, the Commission criticises the fact that, in paragraphs 141 to 143 of the judgment under appeal, the Court of First Instance took the view that the issue of whether or not the Commission was actually aware of the specific situation of KFF on 11 July 2001 was not relevant for the purpose of assessing whether the principle of the protection of legitimate expectations had been infringed.

97. In its view, such reasoning is contrary to Community case-law to the effect that the legality of a decision on State aid may be assessed only on the basis of the information available to the Commission at the time when it adopted that decision. In the present case, the Commission submits that it was never aware of the specific situation of KFF, since the latter had never submitted comments to the Commission. According to that institution, the Court of First Instance ought for that reason to have verified whether it did in fact possess that item of information and, if not, should have declared any plea or argument based on that item of information to be inadmissible.

98. The Commission adds that, under the system for the supervision of State aid, a potential beneficiary may not raise arguments based on a factual situation of which the Commission was unaware if it did not make itself known to the Commission within the framework of Article 88(2) EC.

99. KFF submits, first, that there is nothing in the case-law to support the view that the protection of legitimate expectations must be founded solely on actual commitments given by a Community institution. KFF also points to contradictions in the Commission's defence. While the Commission states in the contested decision that the decision on compatibility which it adopted in respect of the Belgian tax regime gave rise to a legitimate expectation on the part of the beneficiaries of the GFA scheme, it submits in its application that that decision relates to a 'slightly similar' scheme and that it does not constitute a specific commitment to KFF.

100. KFF then goes on to criticise the Commission's arguments to the effect that it was not a prudent and circumspect trader. It compares its situation to that of the beneficiaries of the Belgian tax scheme in *Belgium and Forum 187* v *Commission*. KFF fails to see why those beneficiaries, pending a reply to their application to have their authorisation renewed, were prudent and circumspect traders whereas it, pending a reply to its application for GFA authorisation, is not. KFF further submits that the initiation of the formal investigation procedure on 11 July 2001 could not cause its legitimate expectation to disappear on that date. Furthermore, as regards the balancing of interests, the fact that the legitimate expectation is 'very general in nature' is irrelevant. Where the legitimate expectation has been established, irrespective of the means by which the Commission has created it, the interest of the undertakings in question should be balanced against the Community interest. In any event, KFF submits that the Commission has failed to put forward any argument capable of precluding the granting of a transitional scheme to fourteen other undertakings.

101. KFF adds, finally, that the Commission does not need to have individual information on undertakings which, like KFF, were 'beneficiaries of the GFA scheme'. According to KFF, the Commission should have realised that applications for authorisation might still be pending, given the way in which the scheme actually operates. In those circumstances, the question whether KFF lodged comments with the Commission pursuant to the procedure laid down in Article 88(2) EC is irrelevant to the examination of this plea.

3. Assessment

102. I take the view that the second plea raised by the Commission is well founded. To my mind, the Court of First Instance erred in

law in accepting that KFF had a legitimate expectation that the GFA scheme was compatible with the Treaty rules.

(a) The existence of an expectation

103. In the judgment under appeal, the Court of First Instance accepted that the Commission's conduct in relation to the Belgian tax scheme created an expectation that the GFA scheme was compatible with the common market.

104. The Court of First Instance took as its basis the reasons set out by the Commission in recitals 111 and 112 of the contested decision, in which the latter accepts the existence of a legitimate expectation on the part of the beneficiaries of the GFA scheme, regard being had to the positions which it had taken with regard to the Belgian tax scheme.

105. It seems to me that the assessment of that first condition by the Court of First Instance is incorrect. In my view, there can be no act or conduct on the part of the Commission capable of creating that expectation in a situation such as that here in issue, where the GFA scheme was not the subject of prior notification, contrary to the procedural rules laid down in Article 88(3) EC.

106. It follows from settled case-law that an economic operator may entertain and rely upon a legitimate expectation that aid is lawful only if that aid has been granted in compliance with the procedure laid down for that purpose and, in particular, with the powers attributed to the Commission. [32] In this regard, the Court takes the view that a diligent trader should normally be able to determine whether that procedure has been followed. [33]

107. That case-law is based on the mandatory nature of State aid supervision and on the need to guarantee the efficacy of the preventive supervision exercised by the Commission. That supervision is based on the obligation to notify such aid, which the Court classifies as a 'central element'. [34] That obligation enables the Commission to monitor the common market in accordance with the objectives pursued by the Treaty. That obligation has in particular the objective of eliminating any doubt as to whether a national measure does or does not amount to State aid within the meaning of Article 87(1) EC. It is therefore common ground that the purpose of the obligation to notify State aid is legal certainty and it must therefore be rigorously observed. [35]

32 — Case C-408/04 P *Commission* v *Salzgitter* [2008] ECR I-2767, paragraph 104 and the case-law cited there.

33 — See, inter alia, Case C-24/95 *Alcan Deutschland* [1997] ECR I-1591, paragraph 25 and the case-law cited there.

34 — *Commission* v *Salzgitter*, paragraph 104 and the case-law cited there. I would also point out that, in its order in Case C-399/95 R *Germany* v *Commission* [1996] ECR I-2441, the President of the Court also held that failure to comply with the obligation to notify is 'a particularly serious breach, since [it] contravenes a system which is essential to protect the common market' (paragraph 54 and the case-law cited there).

35 — Case C-99/98 *Austria* v *Commission* [2001] ECR I-1101, paragraph 73.

108. Thus, in so far as a Member State has not taken the precaution of notifying the Commission of aid which it plans to implement, it, like the undertakings benefiting from that aid, cannot count on the aid being compatible with Community law. Any expectation on which an economic operator such as KFF might rely cannot therefore be founded on a specific assurance.

109. Consequently, and in so far as implementation of the GFA scheme was not notified, in any form whatsoever, to the Commission, notwithstanding the clear and unconditional character of that obligation, I consider that KFF is unjustified in claiming that the principle of the protection of legitimate expectations has been infringed.

110. To take the opposite view would, in my opinion, be tantamount to calling into question the very principle of the obligation to notify laid down in Article 88(3) EC.

111. In this regard, I consider it important to point out that the principle of the protection of legitimate expectations, important though it may be, cannot be applied in an absolute manner and its application must be combined with that of the principle of legality. While observance of the principle of the protection of legitimate expectations imposes a number of obligations on the Community institutions, it also requires compliance by the Member States with the obligations laid down in the Treaty and a degree of diligence on the part of the traders concerned. That was not the situation in the present case.

112. Nor can that expectation be founded on a decision on compatibility which the Commission adopted in respect of a separate tax scheme implemented by another Member State.

113. Although the Commission took the view in 1984 that the Belgian tax scheme did not constitute State aid, that decision can relate only to the scheme applicable to the Belgian coordination centres as it was addressed to the Kingdom of Belgium alone. Moreover, although that scheme has features in common with the scheme at issue in the present case, the fact remains that a reading of the contested decision indicates that their similarity remains open to debate. While the Commission states in recital 111 of the contested decision that 'the GFA scheme... has similarities with the scheme introduced in Belgium', it states in recital 101 of the same decision that 'the fact that they are not identical cannot be denied in view of the techniques used and the form in which the benefits were granted'.

114. In those circumstances, I find it difficult to accept that the Commission may have given KFF specific assurances capable of supporting an expectation that the GFA scheme was compatible with Community law. Basing that expectation on a decision which the Commission adopted in respect of a separate national

tax scheme is a further breach of the obligation to notify laid by down by the Treaty and of the entire system of preventive supervision established by the Commission within the framework of State aid supervision.

115. In the light of all of the foregoing, I take the view, contrary to the finding of the Court of First Instance, that there is no basis for the expectation on which KFF relies in the present case.

116. I would add that such an expectation, if it did exist, would not in any event be legitimate.

(b) The legitimacy of the expectation

117. Contrary to the findings made by the Court of First Instance in paragraphs 132 to 138 of the judgment under appeal, I take the view that the second condition required by the case-law for recognition of an infringement of the principle of the protection of legitimate expectations is likewise not satisfied, for two reasons.

118. First, I would point out that KFF has no acquired right as it is not an undertaking benefiting from the GFA scheme. It has not demonstrated that it satisfied the conditions of eligibility for that scheme and the Kingdom of the Netherlands did not give it any guarantee that it would obtain GFA authorisation.

119. Second, I consider that, had it been a prudent and circumspect trader, KFF would have been able to foresee the adoption of a Community measure liable to affect its interests.

120. After all, on 11 July 2001, the Commission adopted a decision by which it initiated the formal aid investigation procedure. As the Court of First Instance points out in paragraph 133 of the judgment under appeal, the initiation of that procedure indicated that the Commission had serious doubts as to the compatibility of the GFA scheme with the Treaty rules. It is true, as the Court of First Instance states, that those serious doubts do not imply any definitive classification of that scheme. None the less, in a case such as the present, in which the GFA scheme was not notified to the Commission, I consider the existence of serious doubts as to the compatibility of that scheme to be sufficient to support the conclusion that the expectation on which KFF relies is not legitimate.

121. I also take the view that the grounds set out in the decision of 11 July 2001 were capable of enabling KFF to consider it sufficiently likely that the Commission

would declare that the GFA scheme constituted aid incompatible with the Treaty. [36] Following an initial examination of the elements of that scheme, the Commission stated that it could constitute State aid and that it did not appear to qualify for any of the derogations provided for in Article 87(2) and (3) EC.

122. Furthermore, I would add that this case is not readily comparable to *Belgium and Forum 187* v *Commission*. There are two major differences between those two cases, one relating to KFF's status as a potential beneficiary and the other to the failure to notify the GFA scheme to the Commission.

123. On the one hand, as I have indicated, KFF never received GFA authorisation, unlike the Belgian coordination centres at issue in *Belgium and Forum 187* v *Commission*, which were applying to have their authorisations renewed. In the present case, the Netherlands tax authority never confirmed that KFF satisfied the conditions of eligibility for authorisation and could therefore be regarded as a beneficiary of the GFA scheme.

124. On the other hand, the Kingdom of the Netherlands did not take the precaution of informing the Commission of the tax scheme which it planned to implement. The Commission has therefore never adopted a position on the compatibility of that scheme with the Treaty rules, unlike in the case of the tax scheme implemented by the Belgian authorities. The latter scheme had been duly notified by the Kingdom of Belgium, in accordance with Article 88(3) EC. The Commission had at that time stated in its 1984 and 1987 decisions and in the reply given by Mr Brittan, Competition Commissioner, on behalf of the Commission on 24 September 1990 to Written Question No 1735/90 from Mr Gijs de Vries, a Member of the European Parliament, [37] that that scheme did not come within the scope of Article 87(1) EC.

125. Finally, it is important to state that in *Belgium and Forum 187* v *Commission* the legitimate expectation of the coordination centres was accepted only under very restrictive conditions and in the light of the particular features of that case. It is therefore very difficult, in my view, to recognise KFF as having a legitimate expectation that the GFA scheme is compatible with the Treaty rules when it is not an undertaking benefiting from that scheme and that scheme was not notified beforehand to the Commission.

36 — See the Commission's findings in that decision.

37 — OJ 1991 C 63, p. 37.

126. In my opinion, the foregoing factors are sufficient to support the finding that the expectation on which KFF relies, if it exists, is not in any event legitimate.

127. Consequently, and in so far as the three conditions referred to by the case-law as being applicable to recognition of an infringement of the principle of the protection of legitimate expectations are cumulative, I take the view that KFF is not entitled to rely on that principle.

128. In the light of all of the foregoing, I consider that the Court of First Instance also erred in law in finding that KFF was entitled to invoke the principle of the protection of legitimate expectations. If the Court were to hold the action brought by KFF to be admissible, the second plea raised by the Commission should then, in my view, be declared well founded and the judgment under appeal accordingly set aside.

C — *In the alternative, the third plea, alleging infringement of the principle of equal treatment*

129. Article 2 of the contested decision grants a transitional period to the undertakings which were beneficiaries of the GFA scheme on 11 July 2001, taking into account the legitimate expectation on the part of those undertakings that that scheme was compatible with the Treaty rules and the particular circumstances of the case. [38]

130. In the judgment under appeal, the Court of First Instance held that, in so doing, the Commission infringed the general principle of equal treatment by failing to provide any transitional measure for taxpayers, such as KFF, whose application for authorisation was still pending when the contested decision was notified. The Court of First Instance started from the principle that those taxpayers, in the same way as all undertakings which had GFA authorisation on 11 July 2001, were entitled to entertain a legitimate expectation that they would be granted a reasonable transitional period.

1. Arguments of the parties

131. In support of the third plea, the Commission submits that the assessment carried out by the Court of First Instance in relation to the infringement of the principle of equal treatment is incorrect. [39] It claims essentially that KFF cannot be treated in the same way as undertakings which not only actually benefited from the GFA scheme but also submitted comments within the framework of the procedure under Article 88(2) EC and for which the Netherlands authorities requested a transitional arrangement.

38 — See recitals 111 to 118 of the contested decision.
39 — Paragraphs 149 and 150 of the judgment under appeal.

132. KFF submits that this plea is inadmissible in so far as it relates to issues of fact which are not amenable to review by the Court of Justice on appeal.

133. It argues that that plea is not, in any event, well founded. The only relevant question in this case, it submits, is whether there are any significant objective differences justifying a difference in treatment between KFF and the undertakings which, on 11 July 2001, already had GFA authorisation. It finds that none of the alleged differences put forward by the Commission is capable of justifying such a difference in treatment.

2. Assessment

134. Contrary to KFF's submissions, I propose that the Court find the third plea to be admissible. While it is true that the Court of First Instance has exclusive jurisdiction to find and assess the facts, it follows from settled case-law that the Court of Justice has jurisdiction to review the legal characterisation of those facts by the Court of First Instance and the legal conclusions which it has drawn from them. [40]

135. In raising that plea, the Commission asks the Court to review the legal inferences which the Court of First Instance was able to draw with respect to the comparability of the situations in which the various undertakings find themselves and with respect to observance of the principle of equal treatment.

136. In the light of the foregoing submissions, I consider that plea to be likewise well founded.

137. It is settled case-law that the general principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such difference in treatment is objectively justified. [41]

138. It seems clear to me that KFF cannot be treated in the same way as those undertakings which, on 11 July 2001, were already benefiting from the GFA scheme. As I have indicated, KFF, as a potential beneficiary of that scheme, has no acquired right and cannot

40 — See, inter alia, Case C-167/04 P *JCB Service* v *Commission* [2006] ECR I-8935, paragraph 106 and the case-law cited, and Case C-328/05 P *SGL Carbon* v *Commission* [2007] ECR I-3921, paragraph 41 and the case-law cited.

41 — See, inter alia, Case C-127/07 *Arcelor Atlantique et Lorraine and Others* [2008] ECR I-9895, paragraph 23 and the case-law cited.

rely on any legitimate expectation, in contrast to the aforementioned group of undertakings. As the Commission stresses, that fact therefore places KFF in a very specific position.

139. The assessment made by the Court of First Instance, which is based on the converse premiss that KFF could legitimately rely on the principle of legitimate expectations, therefore appears to me to be incorrect.

140. Consequently, if the Court were to find the action brought by KFF to be admissible, then the third plea, alleging infringement of the principle of equal treatment, should in my opinion be declared well founded and the judgment under appeal accordingly set aside.

141. In the light of all of the foregoing, I ask the Court, in the alternative, to declare the appeal brought by the Commission to be well founded and to set aside the judgment under appeal in so far as the Court of First Instance held that that institution infringed the principles of the protection of legitimate expectations and of equal treatment by failing to provide transitional measures for taxpayers whose application was still pending when the contested decision was notified. [42]

42 — There is in my view no need to analyse the fifth plea raised by the Commission in the alternative. In so far as I consider that the judgment under appeal should be set aside, there is no further need to examine whether the Court of First Instance did in fact err in law, in the operative part of that judgment, by conferring rights on all operators who were in the same situation as KFF.

VII — The consequences of setting aside the judgment under appeal

142. As I have indicated, I propose, primarily, that the Court should set aside the judgment under appeal in so far as the Court of First Instance declared the action for annulment brought by KFF to be admissible.

143. In so far as the state of proceedings permits, which, in my view, it does, I also propose that the Court should, in accordance with the first paragraph of Article 61 of its Statute, itself give final judgment on the objection of inadmissibility raised by the Commission.

144. For the reasons which I have already set out in points 57 to 68 of this Opinion, I take the view that the action brought by KFF must be declared inadmissible, in the absence of any individual interest on its part.

VIII — Costs

145. Under Article 69(2) of the Rules of Procedure, applicable to proceedings on appeal by virtue of Article 118 of those

Rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. In the present case, as the Commission has claimed that KFF should be ordered to pay the costs and as KFF has been unsuccessful in most of its pleas, it is appropriate, in my view, to order KFF to pay the costs incurred in the present appeal proceedings.

146. Moreover, Article 122 of the Rules of Procedure provides that, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs. In this case, examination of the objection of inadmissibility raised by the Commission before the Court of First Instance has shown that the action for annulment brought by KFF is inadmissible.

147. In those circumstances, it is appropriate to order KFF to pay the costs relating both to the present proceedings and to those brought before the Court of First Instance.

IX — Conclusion

148. In the light of all of the foregoing, I propose that the Court rule as follows:

(1) The judgment of the Court of First Instance of the European Communities of 12 September 2007 in Case T-348/03 *Koninklijke Friesland Foods* v *Commission* is set aside in so far as the Court of First Instance held the action to be admissible.

(2) The action brought before the Court of First Instance of the European Communities for the annulment of Commission Decision 2003/515/EC of 17 February 2003 on the State aid implemented by the Netherlands for international financing activities is dismissed as being inadmissible.

(3) Koninklijke Friesland Foods NV is ordered to pay the costs relating both to the present proceedings and to those brought before the Court of First Instance of the European Communities.