JUDGMENT OF THE COURT OF FIRST INSTANCE (Eighth Chamber)

1 July 2009 *

In Joined Cases T-81/07, T-82/07 and T-83/07,

Jan Rudolf Maas, acting in his capacity as administrator in the bankruptcy proceedings relating to KG Holding NV, residing in Rotterdam (Netherlands), represented by G. van der Wal and T. Boesman, lawyers,

applicant in Case T-81/07,

Jan Rudolf Maas and Cornelis van den Bergh, acting in their capacity as administrators in the bankruptcy proceedings relating to Kliq BV, residing in Rotterdam, represented by G. van der Wal and T. Boesman, lawyers,

applicants in Case T-82/07,

and

* Language of the case: Dutch.

Jean Leon Marcel Groenewegen, acting in his capacity as administrator in the bankruptcy proceedings relating to Kliq Reïntegratie, residing in Utrecht (Netherlands), represented by G. van der Wal and T. Boesman, lawyers,

applicant in Case T-83/07,

v

Commission of the European Communities, represented by H. van Vliet, acting as Agent,

defendant,

APPLICATIONS for annulment of Commission Decision 2006/939/EC of 19 July 2006 on the aid measure notified by the Netherlands for KG Holding NV (OJ 2006 L 366, p. 40),

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

composed of S. Papasavvas, Acting President, N. Wahl and A. Dittrich (Rapporteur), Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 10 December 2008,

gives the following

Judgment

Background to the dispute

1. *General background*

1 KG Holding NV, in which the Kingdom of the Netherlands was the sole shareholder, was created on 1 January 2002 through the transformation of the reintegration services of the Netherlands Ministry of Employment and Social Affairs into a private limited liability company.

2 On 18 May 2002, Kliq Reïntegratie BV (1 450 employees) and Kliq Employability BV (200 employees) were formed by splitting up KG Holding. KG Holding was the sole shareholder in those two companies. There were also a small number of other minor subsidiaries. The principal activities of the two main subsidiaries involved the provision of services in connection with finding employment for jobseekers, integrating people living with disabilities into the labour market, helping employers to find the right staff for specific posts and general staff placement services.

3 Following financial problems, Kliq BV was formed on 31 July 2003 as part of a restructuring operation involving Kliq Reïntegratie. Kliq subsequently took over some of Kliq Reïntegratie's contracts from 1 October 2003.

4 On 30 September 2003, KG Holding took the decision, as Kliq's sole shareholder, to issue 150 000 Kliq shares, each with a nominal value of EUR 100, totalling EUR 15 million, on condition that 75% of that sum, that is to say, EUR 11.25 million, would not be paid up until Kliq requested it.

5 On 12 November 2003, the Kingdom of the Netherlands applied to the Commission for authorisation to grant rescue aid in the form of credit for KG Holding amounting to EUR 45 million over six months, of which EUR 9.25 million was intended as a loan to Kliq and EUR 35.75 million was intended for Kliq Reïntegratie in order for it to meet its current contractual commitments and to cover the costs of a social plan.

6 In its decision of 16 December 2003 (OJ 2004 C 33, p. 8), the Commission concluded that the State aid which the Kingdom of the Netherlands proposed to grant KG Holding, in the form of a EUR 45 million loan over a six-month period, could be considered compatible with the common market.

7 On 23 December 2003, a EUR 9.25 million loan agreement was concluded between KG Holding and Kliq. It did not allow Kliq to offset, but it did allow KG Holding to offset sums owing in respect of the loan against any subsequent claim by Kliq.

8 On 24 January 2004, the Netherlands Finance Minister decided to convert the EUR 45 million loan granted to KG Holding into restructuring aid for that company. That conversion was to take the form of conversion of the rescue loan granted by the

Kingdom of the Netherlands to KG Holding into equity capital in KG Holding and allocation of EUR 9.25 million of that loan to Kliq and EUR 35.75 million of that loan to Kliq Reïntegratie. In its notification to the Commission on 26 January 2004, the Kingdom of the Netherlands applied for approval of that restructuring aid. The Commission requested further information in April, August and November 2004.

9 On 8 February 2005, the Rechtbank Rotterdam (Rotterdam District Court) declared KG Holding bankrupt and appointed J.R. Maas to be the administrator. On 9 February 2005, the Rechtbank Utrecht (Utrecht District Court) declared Kliq Reïntegratie bankrupt and appointed J.L.M. Groenewegen to be the administrator.

10 On 23 March 2005, the Commission convened a meeting with representatives of the Finance Ministry and of the companies concerned to discuss the application for authorisation of the restructuring aid.

11 Following the bankruptcy of KG Holding and with Kliq facing financial difficulties, in early 2005 the latter drew up a plan enabling it to carry on its activities. The aim of that plan was to enable KG Holding to sell its shares in Kliq. In order to do that, Kliq proceeded on the basis of a two-stage plan, involving, first, KG Holding meeting its obligation to it to make full payment for the shares by offsetting its obligation to pay against the EUR 9.25 million loan and then the sale of its shares held by KG Holding.

12 On 16 June 2005, Kliq requested KG Holding's administrator to make payment in full in respect of the capital that had not been paid up. KG Holding's administrator refused Kliq's request to pay for the shares by offsetting that obligation against Kliq's debt in the form of the EUR 9.25 million loan. Kliq then, on 21 June 2005, requested the Rechter-commissaris (delegated judge), who is the competent national court, to order KG Holding's administrator to cooperate in implementing the two-stage plan, carry out the

conversion and then sell Kliq's shares through a tendering procedure. On 22 June 2005, the Kingdom of the Netherlands also brought an action requesting the Rechter-commissaris to order the administrator to take all available measures to prevent Kliq from offsetting its claim on KG Holding (obligation to make full payment for shares) against KG Holding's claim on Kliq (EUR 9.25 million loan). On 22 August 2005, the Rechter-commissaris granted Kliq's request. He considered that a set-off and full payment for shares constituted an advantage for all KG Holding's creditors. The Kingdom of the Netherlands' request was dismissed and KG Holding's administrator was given formal notice to cooperate in implementing the two-stage plan drawn up by Kliq. Neither of the two parties appealed against that decision.

13 On 14 December 2005, Kliq was declared bankrupt and J.R. Maas and C. van den Bergh were appointed administrators. The administrators sold Kliq's assets to a market operator on 21 December 2005 for EUR 5.5 million.

2. *Administrative procedure*

14 On 5 August 2005, the Commission decided to initiate the procedure under Article 88(2) EC, following the notification by the Kingdom of the Netherlands of 26 January 2004 (OJ 2005 C 280, p. 2). In that decision, the Commission reached the provisional conclusion that the restructuring aid which the Kingdom of the Netherlands planned to grant KG Holding, by converting the EUR 45 million loan, plus the interest due thereon, into equity in KG Holding, did not meet the requirements set out in its notice concerning the Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 1999 C 288, p. 2) ('the Guidelines') in force at the time the rescue loan was granted. The Commission therefore expressed doubts as to whether the planned restructuring aid could be considered compatible with the common market.

15 The Kingdom of the Netherlands communicated to the Commission its reaction to that decision and the further information requested of it by letters of 29 September 2005 and 13 January and 17 February 2006.

3. *Contested decision*

16 On 19 July 2006, the Commission adopted Decision 2006/939/EC on the aid measure notified by the Netherlands for KG Holding NV (OJ 2006 L 366, p. 40) ('the contested decision').

17 In the contested decision, the Commission established, first of all, the existence of State aid within the meaning of Article 87(1) EC.

18 The Commission then assessed whether the restructuring aid was compatible with the common market. In paragraph 34 of the contested decision the Commission stated that KG Holding qualified as a company in difficulties pursuant to the Guidelines and was consequently eligible for restructuring aid. The Commission also pointed out that the grant of aid was conditional on implementation of a restructuring plan which had to be endorsed by the Commission (contested decision, paragraph 35). In paragraph 36 of the contested decision, the Commission observed that the restructuring plan notified by the Netherlands authorities was incomplete. In the Commission's view, the restructuring plan was not effective and could not bring about the required turnaround because of the insufficient internal rate of return compared with the expected return on capital (contested decision, paragraphs 37 and 38).

19 In paragraph 39 of the contested decision, the Commission states:

'Since the core conditions for the granting of restructuring aid pursuant to the Guidelines are not met, the Commission cannot approve the restructuring plan, and the restructuring aid cannot therefore be authorised. Nor, by the same token, can the notified measure be considered to be compatible with the common market under Article 87(3)(c) [EC].'

20 In Section 6.2.3 of the contested decision, the Commission sets out further considerations with regard to the conversion into equity of the EUR 9.25 million rescue loan transferred to Kliq, the EUR 35.75 million rescue loan transferred to Kliq Reïntegratie and the old loans granted to KG Holding upon incorporation.

21 With regard to the conversion into equity of the EUR 9.25 million rescue loan transferred to Kliq, the Commission states the following, in paragraphs 43 to 45 of the contested decision:

'(43) The Dutch authorities informed the Commission that the competent Dutch court had ordered them to convert the EUR 9.25 million loan into equity on the basis of Articles 53 and 69 of the Dutch Bankruptcy Law. The conversion took place on 22 August 2005. The conversion can therefore be regarded as partial implementation of the notified measure.

(44) The Commission would remind the Dutch authorities that, in accordance with the principle that Community law takes precedence over national law, the implementation of the decision of the national court referred to in paragraph (43) is in breach of the ban on implementing any State aid measure before the Commission has approved it under Article 88(3) [EC]. The conversion of the rescue loan into equity for the purposes of restructuring ranks as unlawful

restructuring aid. Since, moreover, the notified aid does not meet the requirements of the Guidelines, a measure which constitutes partial implementation thereof is also incompatible. The fact that the measure was implemented by order of a national court is irrelevant in this context, since national courts, like other State bodies, are required to comply with the provisions of the Treaty.

(45) Consequently, the conversion of the EUR 9.25 million rescue loan transferred to [Kliq] pursuant to the judgment of the national court is deemed to amount to the granting of unlawful and incompatible restructuring aid to [Kliq]. Since this restructuring aid cannot be approved, it is incompatible with the common market.'

22 Concerning the EUR 35.75 million rescue loan transferred to Kliq Reïntegratie, the Commission stated that that loan had not been converted into equity so the measure was still deemed to be rescue aid. In paragraph 50 of the contested decision, the Commission authorised the liquidation plan for KG Holding and Kliq Reïntegratie, which had gone into bankruptcy, provided that the following two conditions were met:

— 'the [Kingdom of the Netherlands] [must register] its EUR 35.75 million claim on [KG Holding] and/or [Kliq Reïntegratie] as a creditor in the bankruptcy proceedings with the [administrator]; and

— the [Kingdom of the Netherlands] [must ensure] that the company is liquidated in a manner that would put an end to the distortion of competition, i.e. the activities of the undertakings concerned should end and their assets should be sold on market terms as soon as possible. It is generally speaking the case that the sale of an undertaking as a whole involves the risk of the aid that has been granted being transferred to whoever acquires the undertaking. That risk is reduced if only the undertaking's assets are sold.'

23 Concerning the old loans granted to KG Holding upon incorporation, the Commission stated that they were outside the scope of the restructuring aid package and of the present procedure (contested decision, paragraph 51). None the less, it wished to make its position clear in order to help prevent any further conflicts arising between the Community rules on State aid and the application of national law by the competent courts, more specifically in relation to the legal proceedings before the Netherlands court outlined in paragraphs 52 to 55 of the contested decision.

24 Paragraphs 52 to 55 of the contested decision read:

'(52) Under the notified restructuring plan, by 2016 [KG Holding] was to repay in full old loans amounting to EUR 41 million, including a conditional EUR 17 million current account credit facility …, which had been granted on market terms by the State in 2002 in the wake of [KG Holding's] incorporation and is outside the scope of the restructuring aid package.

(53) By letter of February 2006, the [Kingdom of the Netherlands] informed the Commission that, in the context of [KG Holding] and [Kliq Reïntegratie's] bankruptcy proceedings, the [administrators] had asked the competent national courts to order the State to pay in full the credit facility, which had been frozen by the State in the wake of the suspension of payments pending the bankruptcy of [KG Holding] and [Kliq Reïntegratie] in February 2005.

(54) The Commission notes that the above matter is under the jurisdiction of the competent national court, which will have to establish whether the State's decision was in line with the terms and conditions set forth in the credit facility termination agreement.

(55) The Commission takes the position that if the State's decision was in line with the agreement, then the competent court must uphold the State's decision and dismiss the [administrators'] claim. If, however, the court should decide that, despite the fact that the State complied with its contractual rights and obligations, the State still must pay the full amount of the credit facility to the [administrators], in the framework of the said bankruptcy proceedings, such a decision could be deemed to be tantamount to granting new State aid to [KG Holding's] creditors, and it would have to be notified to the Commission in accordance with Article 88(3) [EC].'

25 In the light of the foregoing, the Commission adopted, in the contested decision, the following operative part:

'*Article 1*

The [Kingdom of the Netherlands'] aid measure in the form of restructuring aid for [KG Holding] amounting to EUR 45 million does not fulfil the requirements of the [Guidelines] and is therefore incompatible with the common market.

Article 2

1. [The Kingdom of the Netherlands] shall take all necessary measures to recover from [KG Holding] and [Kliq] that part of the aid referred to in Article 1 that was transferred as a EUR 9.25 million rescue loan by [KG Holding] to its subsidiary [Kliq], plus any interest.

2. Recovery shall be effected without delay and in accordance with the procedures of national law, provided that they allow the immediate and effective implementation of [the contested decision].

3. The amount to be recovered shall bear interest from the date on which the individual parts thereof were first put at the disposal of the beneficiaries until the date of their actual recovery.

4. The interest to be recovered pursuant to paragraph 3 shall be calculated in accordance with the methods set out in Articles 9 and 11 of Commission Regulation (EC) No 794/2004.

Article 3

[The Kingdom of the Netherlands] shall register its claim of EUR 35.75 million on [KG Holding] and/or [Kliq Reïntegratie] as a creditor in the bankruptcy proceedings with the [administrator]. [The Kingdom of the Netherlands] shall ensure that the undertakings are liquidated in a manner that will put an end to the distortion of competition, with the activities of the undertakings concerned being terminated and their assets sold on market terms as soon as possible.'

Procedure and forms of order sought by the parties

26 By applications lodged at the Registry of the Court of First Instance on 14 March 2007, Mr Maas, in his capacity as administrator in the bankruptcy proceedings relating to KG Holding ('Applicant 1'), Messrs Maas and van den Bergh, in their capacity as administrators in the bankruptcy proceedings relating to Kliq BV ('Applicant 2'), and

Mr Groenewegen, in his capacity as administrator in the bankruptcy proceedings relating to Kliq Reïntegratie ('Applicant 3'), brought three actions.

27 By order of the President of the Eighth Chamber of the Court of First Instance of 3 November 2008, Cases T-81/07, T-82/07 and T-83/07 were joined for the purposes of the oral procedure and the judgment in accordance with Article 50 of the Rules of Procedure of the Court of First Instance.

28 By a document lodged at the Registry of the Court of First Instance on 14 November 2008, the Commission forwarded its letter of 31 October 2008 concerning Cases T-81/07 and T-82/07 addressed to the Netherlands authorities. Applicants 1 and 2 submitted their observations concerning that letter by a document lodged at the Registry of the Court of First Instance on 25 November 2008.

29 The parties presented oral argument and replied to the questions put by the Court at the hearing on 10 December 2008.

30 The applicants claim that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

31 The Commission contends that the Court should:

— dismiss the applications;

— order the applicants to pay the costs.

Law

32 In support of their actions, the applicants plead, in essence, errors of fact and of law, an inadequate statement of reasons for the contested decision, infringement of the rights of the defence and of the right to be heard and of the general principles of law, and a number of infringements of Articles 87 EC and 88 EC.

33 For the purposes of examining these actions, it is necessary to distinguish between the different parts of the contested decision that are being disputed:

— the EUR 17 million credit facility referred to in paragraphs 51 to 55 of the contested decision, granted to KG Holding by the Kingdom of the Netherlands;

— the notified EUR 45 million restructuring aid, declared incompatible with the common market in Article 1 of the contested decision;

— recovery from KG Holding and Kliq of the EUR 9.25 million rescue loan converted into equity, plus related interest, until the date of its recovery, provided for in Article 2 of the contested decision;

— registration, as provided for in Article 3 of the contested decision, of the Kingdom of the Netherlands' EUR 35.75 million claim on KG Holding and/or Kliq Reïntegratie, as a creditor in the bankruptcy proceedings, with the administrator in order to recover that part of the rescue aid transferred to Kliq Reïntegratie.

1. *Preliminary observations*

34 In preparation for the hearing, the Court sent the Report for the Hearing to the parties before the hearing and requested them to submit any observations on that report either orally at the hearing or in writing in good time before the hearing. By a document lodged at the Registry of the Court of First Instance on 8 December 2008, Applicants 1 and 2 submitted some written observations on the Report for the Hearing. At the hearing on 10 December 2008, the Commission requested the Court, in essence, not to take those observations into account.

35 It should be noted that, under Article 47(1) of the Rules of Procedure, the application and the defence may be supplemented by a reply from the applicant and by a rejoinder from the defendant. Since Applicants 1 and 2 lodged their applications and replies and the Commission lodged its defences and rejoinders in Cases T-81/07 and T-82/07, the written procedure has been closed since 14 January 2008. The Court considers that the statement lodged by Applicants 1 and 2 on 8 December 2008 falls partly outside the scope of observations on the Report for the Hearing. As the parties were not authorised to add documents to the file after the end of the written procedure, the Court has not taken into account the observations made by Applicants 1 and 2 in their statement of 8 December 2008 in so far as they were outside the scope of observations on the Report for the Hearing.

2. *Admissibility of the actions in Cases T-81/07 and T-83/07 as regards the EUR 17 million credit facility granted to KG Holding by the Kingdom of the Netherlands*

Arguments of the parties

36 The Commission argues that the complaints concerning the credit facility are inadmissible. Its assessments contained in the grounds of the contested decision cannot be the subject of an action for annulment.

37 Applicants 1 and 3 claim that the Commission made a statement in paragraphs 51 to 55 of the contested decision that was incorrect in law concerning a EUR 17 million current account credit facility, which according to them was granted to KG Holding by the Kingdom of the Netherlands upon its incorporation and was not covered by the initiating decision. The Commission therefore exceeded its powers and infringed their rights of defence and their right to be heard, and the general principles of law, including the right to good administration provided for in Article 41 of the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1), the principle of transparency and its duty of diligence.

38 The Commission examined in paragraphs 51 to 55 of the contested decision public credit granted by the State to KG Holding in 2002. This was a EUR 17 million current account credit facility at a bank, together with a public guarantee, granted by the Kingdom of the Netherlands in 2002, on market terms, which Applicant 1 and Applicant 3 requested in civil proceedings before the Rechtbank Den Haag (The Hague District Court). Without giving reasons for its position in that regard, the Commission stated in the contested decision that a decision by the national court finding that the State was required to comply with that obligation, entered into in 2002, is equivalent to a decision granting new State aid to KG Holding's creditors.

39 Applicants 1 and 3 claim that the Commission exceeded its powers in giving a decision on a measure which is the subject of proceedings pending before the national court.

40 In addition, the Commission's position contains an inadequate statement of reasons within the meaning of Article 253 EC. The Commission established in paragraph 52 of the contested decision that a EUR 17 million credit facility had been granted by the Kingdom of the Netherlands on market terms and that it could not be considered to be State aid. Since the grant of a loan to an undertaking by the State does not constitute State aid, the decision taken by the competent court under national law ordering that State to comply with its obligations under an agreement which, at the time it was concluded, did not constitute State aid and to honour the credit facility could hardly be considered to be a decision granting new State aid. A commercial undertaking would also be bound, if it were in the Kingdom of the Netherlands' position, to honour the agreed credit facility.

41 The EUR 17 million credit facility is not, moreover, part of the transformation of the rescue loan into aid for restructuring KG Holding, notified by the Kingdom of the Netherlands under Article 88(3) EC.

42 Even if the Kingdom of the Netherlands had at some point supplemented its notification by adding that credit facility to it, of which Applicants 1 and 3 had not been informed, that issue would not fall within the scope of the investigation and procedure under Article 88(2) EC. In any event, no mention of this was made in the decision of 5 August 2005.

43 The principle of good administration, the principle of transparency and the duty of diligence require that persons potentially concerned should be fully aware, on the basis of the initiating decision, of the nature and scope of the measure subject to more detailed investigation. It is not compatible with those principles that the Commission should take a decision, even a non-binding decision, on a measure, irrespective of

whether or not it is linked to the subject-matter of the decision initiating the procedure, if that measure is not cited therein.

44 Contrary to what the Commission asserts, the credit facility is not mentioned in point 5 of the annex to the initiating decision.

Findings of the Court

45 Applicants 1 and 3 claim in essence that the Commission expressed a view that was incorrect in law, in paragraphs 51 to 55 of the contested decision, on the EUR 17 million credit facility, and that it wrongly described that credit facility as new State aid that had to be notified if the State still had to pay the full amount to the administrators. That view taken by the Commission infringes their rights of defence, their right to be heard, its duty of diligence, and the principles of good administration and transparency.

46 The Court would point out that it is not appropriate for the Commission to express a view in the statement of reasons of a decision on measures that are outside the scope of the operative part of that decision. However, in this case, suffice it to say that, regardless of the grounds on which the contested decision is based, only the operative part thereof is capable of producing legal effects and, as a consequence, of adversely affecting the interests of those concerned. By contrast, the assessments made in the grounds of a decision are not in themselves capable of forming the subject-matter of an application for annulment. They can be subject to judicial review by the Community judicature only to the extent that, as grounds of a measure adversely affecting the interests of those concerned, they constitute the essential basis for the operative part of that measure (order of the Court of Justice of 28 January 2004 in Case C-164/02 *Netherlands* v *Commission* [2004] ECR I-1177, paragraph 21) or if, at the very least, those grounds are likely to alter the substance of what was decided in the operative part of the measure in question (see, to that effect, Case T-251/00 *Lagardère and Canal+* v *Commission* [2002] ECR II-4825, paragraph 68, and the order of the Court of First Instance of 30 April 2007 in Case T-387/04 *EnBW* v *Commission* [2007] ECR II-1195, paragraph 127).

47 In this case, the disputed assessments of the Commission regarding the credit facility do not constitute the essential basis for the operative part of the contested decision. Nor were they likely to alter the substance of the operative part. Since the Commission merely stated in that operative part that the aid granted by the Kingdom of the Netherlands in the form of restructuring aid for KG Holding amounting to EUR 45 million was incompatible with the common market and that the Kingdom of the Netherlands was to take all necessary measures to recover from KG Holding and Kliq the part of the aid amounting to EUR 9.25 million and register its EUR 35.75 million claim on KG Holding and/or Kliq Reïntegratie, the operative part concerned does not contain any view taken by the Commission relating to the EUR 17 million credit facility.

48 Consequently, the actions in Cases T-81/07 and T-83/07 are inadmissible in so far as they are directed against the considerations set out in the contested decision concerning the EUR 17 million credit facility.

3. *Substance*

49 It is necessary to examine the complaints concerning the incompatibility with the common market of the restructuring aid notified amounting to EUR 45 million (Article 1 of the contested decision), the recovery from KG Holding and Kliq of the EUR 9.25 million rescue loan converted into equity, plus related interest up until the date of its recovery (Article 2 of the contested decision), registration of the Kingdom of the Netherlands' EUR 35.75 million claim on KG Holding and/or Kliq Reïntegratie as a creditor in the bankruptcy proceedings with the administrator (Article 3 of the contested decision) and the consequences of the bankruptcy for the recovery of State aid (Articles 2 and 3 of the contested decision).

Incompatibility with the common market of the restructuring aid notified amounting to EUR 45 million (Article 1 of the contested decision)

Arguments of the parties

50 The applicants claim that the Commission, in breach of Articles 87 EC and 88 EC, did not establish that the planned aid affected competition and trade between Member States. At the very least, the considerations expressed by the Commission in that regard in paragraph 23 of the contested decision are insufficiently reasoned and therefore fail to comply with Article 253 EC.

51 As regards the considerations contained in paragraph 23 of the contested decision, according to the applicants the first sentence of that paragraph, which states that the fact that KG Holding is operating only on the Netherlands market does not exclude the possibility that granting it an advantage might distort or threaten to distort competition and might have an effect on trade between Member States, is merely an assertion.

52 In the second sentence of paragraph 23 of the contested decision, the Commission does not name the smaller international players on the Netherlands market. Nor does it explain to what extent the presence on the Netherlands market of subsidiaries of those undertakings is relevant in determining whether competition is distorted to a significant extent, or the possible consequences for trade between Member States. At the hearing, the applicants disputed the international nature of those undertakings as regards the common market.

53 In the third sentence of paragraph 23 of the contested decision, the Commission indicates that the conditions for applying Article 87(1) EC appear to be met. The

Commission should have established that those conditions were in fact met and should not merely have confined itself to stating that they appeared to be met.

54 As regards the consequences of converting the rescue loan to KG Holding into restructuring aid, the Commission should have taken into consideration the nature of the rescue loan and restructuring aid in question.

55 According to Applicants 1 and 3, the EUR 45 million rescue loan approved was intended primarily for the liquidation of Kliq Reïntegratie: the sum of EUR 35.75 million was made available to Kliq Reïntegratie by KG Holding to finance the redundancy plan for some 1 000 employees and other expenses incurred in connection with the liquidation of Kliq Reïntegratie. That sum could not be refunded and could not therefore have an effect on national competition or have significant consequences for trade between Member States.

56 According to Applicant 2, as regards Kliq, the Commission does not state how a set-off between the two debts could have significant consequences for competition and for trade between Member States. That set-off would in fact, as compared with a situation in which it had not been made, be an advantage only for the general body of KG Holding's creditors and not for Kliq.

57 In their replies, the applicants point out that the statement of reasons in the contested decision is also incompatible with what the Commission stated in its decision of 16 December 2003. In Section 3.2.2 of that decision, the Commission considered that the consequences for competition and trade between Member States would be non-existent or barely perceptible. Moreover, when referring to the initiating decision, the Commission did not take into account the fact that its obligation to state reasons in the context of the initiating decision is very different from that in the context of the contested decision.

58 The applicants claim that the Commission cannot supplement the statement of reasons in the contested decision a posteriori. Referring to the Commission decision of 23 November 2005 concerning aid measure N 465/2005 (OJ 2006 C 9, p. 5), the applicants consider that the factors relied on by the Commission in its statements in defence are not relevant as regards whether the aid measure might have distorted or threatened to distort competition or affected trade between Member States.

59 The Commission disputes the arguments put forward by the applicants.

Findings of the Court

60 As regards Article 1 of the contested decision, the applicants call into question, on the one hand, the allegedly inadequate statement of reasons as regards distortion of competition and the effects on trade between Member States and, on the other hand, the Commission's analysis of those two conditions.

61 First, as regards the Commission's obligation to state reasons, the Court observes that 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 Court to exercise its power of review (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63, and Case C-17/99 *France* v *Commission* [2001] ECR I-2481, paragraph 35).

62 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 or

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 (Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraph 16, and *France* v *Commission*, paragraph 61 above, paragraph 36).

63 As regards more particularly a decision concerning State aid, the Court of Justice has held that although, in certain cases, the very circumstances in which the aid has been granted may show that it is liable to affect trade between Member States and to distort or threaten to distort competition, the Commission must at least set out those circumstances in the statement of reasons for its decision (Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, paragraph 24; Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2000] ECR I-8855, paragraph 66; and Case C-334/99 *Germany* v *Commission* [2003] ECR I-1139, paragraph 59).

64 The Commission does not have to establish that such aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition (Case C-372/97 *Italy* v *Commission* [2004] ECR I-3679, paragraph 44). In that context, an 'effect' on trade between Member States also includes the possibility of such an effect (Case C-66/02 *Italy* v *Commission* [2005] ECR I-10901, paragraph 112).

65 In this case, it is to be noted that in the contested decision the Commission referred in particular to the fact that the aid was granted by means of transformation into equity capital of the EUR 45 million rescue loan granted by the Kingdom of the Netherlands to KG Holding (paragraphs 8 and 22). It also stated that the rescue aid granted to KG Holding and its transformation into equity capital conferred on it an advantage that an undertaking in such difficulties, close to bankruptcy, would not have obtained on the financial market (paragraph 22). In addition, the Commission stated that there were smaller international players such as TMP and Creyff's (subsidiary of Solvus, Belgium) on the Netherlands market on which KG Holding was also operating (paragraph 23). It then concluded that the advantage at issue appeared to favour one company over its

competitors, thus distorting or threatening to distort competition and affect trade between Member States (paragraph 23). So far as the size of KG Holding and Kliq Reïntegratie is concerned, the Commission stated that those companies had around 2 000 employees (paragraphs 9 and 10) and that the registered capital of KG Holding amounted to approximately EUR 73 million on 1 January 2002 (paragraph 32).

66 In so doing, the Commission set out sufficiently clearly the facts and legal considerations which are of substantive importance in the structure of the contested decision in that regard. In setting out that information, the Commission has adduced sufficient evidence to establish that the aid at issue was liable to affect trade and competition.

67 That statement of reasons enables the applicants and the Court to ascertain the reasons why the Commission considered that it could not be excluded that the contested operation might lead to distortion of competition and affect trade between Member States.

68 As regards the applicants' argument that the statement of reasons in the contested decision in that respect is incompatible with Section 3.2.2 of the Commission decision of 16 December 2003, it should be noted that that decision did not concern restructuring aid but rescue aid. As regards the Commission decision of 23 November 2005 concerning aid measure N 465/2005 in respect of school support services, the applicants do not state how that decision is relevant in this case. In any event, that decision does not call into question the adequacy of the statement of reasons of the contested decision.

69 Consequently, the arguments relating to an allegedly defective statement of reasons must be rejected.

70 Secondly, as regards the merits of the Commission's assessment in the contested decision regarding distortion of competition and effects on trade, it is appropriate to examine whether the aid in question is liable to affect trade between Member States and whether it distorts or threatens to distort competition.

71 It should be noted, in that regard, that it is apparent from the case-law that any grant of aid to an undertaking exercising its activities in the Community market is liable to cause distortion of competition and affect trade between Member States (see Joined Cases T-92/00 and T-103/00 *Diputación Foral de Álava and Others* v *Commission* [2002] ECR II-1385, paragraph 72, and case-law cited).

72 As regards first of all the condition concerning distortion of competition, it is common ground that the rescue aid amounting to EUR 45 million was granted in the form of a loan by the Kingdom of the Netherlands to KG Holding, of which EUR 9.25 million was given as a loan to Kliq and EUR 35.75 million was intended for Kliq Reïntegratie in order for it to meet its current contractual commitments and cover the costs of a social plan.

73 Under the restructuring plan, the EUR 45 million loan granted to KG Holding was to be converted into restructuring aid for that company. That conversion was to take the form of conversion of the rescue loan granted by the Kingdom of the Netherlands to KG Holding into equity in KG Holding and allocation of EUR 9.25 million of that loan to Kliq and EUR 35.75 million of that loan to Kliq Reïntegratie.

74 The effect envisaged of the restructuring aid was the payment in full by KG Holding of the considerable debt — in view of its share capital of approximately EUR 73 million as at 1 January 2002 — of EUR 45 million. As regards Kliq, that payment would have the effect of converting the EUR 9.25 million loan into equity. The aid in question was intended to improve the scope for action of KG Holding and Kliq and, thus, the competitive position of those companies.

75 As regards Kliq Reïntegratie, it must be borne in mind that, according to settled case-law, aid which is intended to relieve an undertaking of the expenses which it would normally have had to bear in its day-to-day management or its usual activities in principle distorts competition (see, to that effect, Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraphs 48 and 77; Case T-214/95 *Vlaamse Gewest* v *Commission* [1998] ECR II-717, paragraph 43; and Case T-217/02 *Ter Lembeek* v *Commission* [2006] ECR II-4483, paragraph 177). The planned restructuring aid was to relieve that undertaking of a debt of EUR 35.75 million. As regards the applicants' argument that the sum of EUR 35.75 million was intended for the liquidation of Kliq Reïntegratie, it should be observed that it is clear from the Commission decision of 16 December 2003 that that sum was intended to meet contractual commitments and cover the costs of a social plan. Kliq Reïntegratie was thus to be relieved of costs which it would normally have had to bear.

76 As regards the condition relating to the effect on trade between Member States, it is settled case-law that, when State aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, that trade must be regarded as affected by the aid (Case 730/79 *Philip Morris Holland* v *Commission* [1980] ECR 2671, paragraph 11; Case C-75/97 *Belgium* v *Commission* [1999] ECR I-3671, paragraph 47; and *Ter Lembeek* v *Commission*, paragraph 75 above, paragraph 181).

77 In this case, it is clear that the EUR 45 million restructuring aid envisaged strengthens the position of KG Holding and its two subsidiaries, Kliq and Kliq Reïntegratie, in relation to that of their competitors on the Netherlands market, which include, as stated in paragraph 23 of the contested decision, international undertakings like TMP and Creyff's.

78 At the hearing, the applicants disputed the international nature of those undertakings as regards the common market, claiming that the effects of their activities were internal to the Kingdom of the Netherlands. It should be noted that the applicants did not

submit any evidence in that regard. They were thus unable to show that the Commission's finding in the contested decision, that the undertakings concerned were international, was incorrect.

79 Since the contested aid strengthens the applicants' position in relation to other competing undertakings, in particular, international undertakings offering comparable services in other Member States as well, it is necessary to consider that intra-Community trade is affected by the aid.

80 As a consequence, the conclusion must be drawn, in the light of the case-law cited, that the Commission was right to consider that the contested aid was liable to distort competition and affect trade between Member States.

81 It is clear from the foregoing that the applicants' arguments concerning the incompatibility of the contested aid with the common market must be rejected. The application for annulment of Article 1 of the contested decision is therefore unfounded.

Recovery from KG Holding and Kliq of the EUR 9.25 million rescue loan, plus related interest up until the date of its recovery (Article 2 of the contested decision)

Arguments of the parties

82 Applicants 1 and 2 claim that the Commission was wrong in the view it took, in paragraphs 43 to 46 of the contested decision, with regard to the payment in full for the shares held by KG Holding in Kliq by means of a set-off between KG Holding's obligation to pay and that company's claim on Kliq under the loan agreement. That

issue is not covered by the initiating decision of 5 August 2005. The Commission therefore exceeded it powers and infringed the applicants' rights of defence and their right to be heard, and the general principles of law, including the right to good administration provided for in Article 41 of the Charter of Fundamental Rights of the European Union, the principle of transparency and its duty of diligence.

83 The set-off at issue is not part of the conversion of the rescue loan into restructuring aid for KG Holding, notified by the Kingdom of the Netherlands under Article 88(3) EC on 26 January 2004.

84 Even if the Kingdom of the Netherlands had supplemented its notification by adding to it that proposed set-off between obligations, of which Applicants 1 and 2 had not been informed, that issue would not come within the scope of the investigation and procedure under Article 88(2) EC. No mention of this was made in the initiating decision. Contrary to what the Commission states, the conversion into equity is not mentioned in the annex to the initiating decision.

85 The principle of good administration, the principle of transparency and the duty of diligence require that persons who are potentially concerned should be able to ascertain clearly, on the basis of the initiating decision, the nature and scope of the measure that is subject to more detailed investigation. The fact that the Commission expresses a view, even a non-binding view, on a measure that may or may not be linked to the subject of the initiating decision is not compatible with those principles if that measure is not cited in that decision.

86 In their replies, Applicants 1 and 2 state that, contrary to what the Commission alleges, there was no question of the aid measure notified being altered after initiation of the procedure under Article 88(2) EC. Since, following the notification of 26 January 2004, KG Holding was declared bankrupt on 8 February 2005, the Kingdom of the Netherlands lost all control over KG Holding and its subsidiaries, including Kliq Reïntegratie and Kliq. The Kingdom of the Netherlands became an unsecured creditor

without any right of control. There can be no question of considering the set-off, carried out unilaterally by Kliq, as an act of the Member State or an aspect of the procedure initiated under Article 88(2) EC.

87 Applicant 2 also claims that, in paragraphs 43 to 46 of the contested decision, the Commission was wrong to decide that Kliq should be considered to be the recipient of EUR 9.25 million in State aid. The Commission should, in its view, have taken into account the fact that the conversion of the rescue loan into equity could not be imputed to the Kingdom of the Netherlands and could not therefore be described as State aid within the meaning of Article 87(1) EC. The contested decision is wrong in law and/or in fact, and contains an inadequate statement of reasons, in breach of Article 87 EC and/or Article 253 EC.

88 According to Applicant 2, the Commission examined whether there was State aid under the heading 'Compatibility of the aid with the common market', and not under the heading 'Existence of aid'.

89 In assessing the measure, the Commission relied on incorrect factual data, which is apparent in particular from paragraph 43 of the contested decision. Contrary to what it alleges, the order of the Rechter-commissaris is not addressed to the Kingdom of the Netherlands, but solely to KG Holding's administrator, who cannot be compared with or deemed to be the State. Also, the Commission is wrong to claim that the court ordered the Netherlands authorities to convert the loan into equity, when it merely instructed KG Holding's administrator to allow the set-off in respect of Kliq.

90 The bankruptcy of KG Holding on 8 February 2005 altered the situation. The acts of KG Holding's administrator, whether under instructions from the Rechter-commissaris or with his approval, cannot be attributed to the State. KG Holding's administrator is not an organ of the State and does not act on behalf of the shareholder (the State), and that State cannot give directions to KG Holding's administrator or to the Rechter-

commissaris or exercise any control. The role of administrator in bankruptcy proceedings is governed by Netherlands bankruptcy law. Article 87(1) EC is therefore not applicable to the acts and decisions of the administrator.

91 In the matter of bankruptcy, the Rechter-commissaris is a court or tribunal within the meaning of Article 234 EC.

92 The mere fact that a public undertaking is under State control is not sufficient to attribute financial support measures to the State. It is also necessary to examine whether the public authorities should be considered to have been involved in some way in the adoption of those measures. As a result of the bankruptcy and the appointment of the administrator, the financial resources of KG Holding and Kliq are no longer, since 8 February 2005, under constant public control and are therefore no longer at the disposal of the competent national authorities. It is clear from paragraph 36 of the contested decision that the Netherlands authorities could at no time have supplied the information required.

93 The primacy of Community law, mentioned by the Commission in paragraph 44 of the contested decision, and Article 88(3) EC do not in this case give rise to any obligations for KG Holding's administrator. According to Applicant 2, the set-off was in the interests of the general body of KG Holding's creditors. That is why the Rechter-commissaris, without infringing Community law, was able to grant that request, and his order was, as such, compatible with the common market.

94 In the reply, Applicant 2 states that the Commission did not take into account the fact that the unilateral set-off carried out by Kliq was a different measure from that notified by the Kingdom of the Netherlands. The measure notified is the proposed decision of the Netherlands authorities to grant restructuring aid to KG Holding by means of transforming the EUR 45 million rescue loan and interest due on the loan, into equity capital. The measure examined by the Commission in the contested decision is the

order of the Rechter-commissaris in which the latter instructs KG Holding's administrator to cooperate in carrying out the two-stage plan proposed by Kliq. The two measures should have been examined separately with regard to Article 87(1) EC.

95 In addition, the Commission's assertion that the Rechter-commissaris had control over the funds concerned was incorrect. Any interested person is entitled, under national bankruptcy law, to bring an action before the Rechter-commissaris against an act of an administrator. That does not mean, however, that the claim is at the disposal of the Rechter-commissaris or that he has control over it. To adopt a different interpretation would have the unacceptable consequence that any measure taken by an undertaking following a judicial decision would be regarded as having been financed through State resources and therefore as attributable to the State.

96 As regards the recovery of interest, Applicants 1 and 2 claim that the Commission was wrong to decide in Article 2(3) of the contested decision that the Kingdom of the Netherlands should take all necessary measures to recover from KG Holding and Kliq the EUR 9.25 million in aid, and that the amount to be recovered should bear interest from the date on which the individual parts thereof were first put at the disposal of the recipients until the date of their recovery.

97 In their view, Netherlands bankruptcy law provides that interest due after the date on which bankruptcy is declared is no longer accounted for. They add that the recovery of aid unlawfully paid must take place in accordance with the relevant procedural rules of national law, in so far as those rules do not render recovery of the aid impossible in practice.

98 National legislation which provides that the debts of undertakings that have been declared bankrupt cease to produce interest from the date of the relevant declaration cannot be regarded as rendering the recovery of the aid required by Community law impossible in practice.

99 According to the applicants, the interest referred to in Article 2(3) of the contested decision therefore runs until the date on which KG Holding and Kliq, respectively, were declared bankrupt and not until the date of recovery.

100 In their replies, Applicants 1 and 2 state that it was impossible for them, before the contested decision was adopted, to know that the Commission would impose on the Kingdom of the Netherlands an obligation that was contrary to the rules of national law. They did not therefore fail to comply with their duty of diligence by not informing the Commission of the existence of a national provision. Discussion between the Commission and the Member State, pursuant to Article 10 EC, concerning the details of recovery is not sufficient. They state that so long as the contested decision has not been annulled or amended in that respect the Kingdom of the Netherlands is obliged to recover interest as well until the date of actual recovery.

101 The Commission states that it did not act outside the scope of the initiating decision. The undertakings referred to, namely those in the Kliq group, and the types of aid it examined, in this case rescue aid and restructuring aid, remained the same throughout the procedure. In addition, in the case of Kliq, the proposed conversion of the EUR 9.25 million debt into equity was referred to in point 3 of the annex to the initiating decision.

102 The initiating decision could not have mentioned the specific fact that that measure was ordered by the Rechter-commissaris because that transpired subsequently.

103 The Commission contends that the aid was unlawful. It adds that where aid is unlawful and the Commission has initiated the procedure provided for in Article 88(2) EC against an aid measure already introduced it is not required to extend that procedure if the Member State concerned alters the system. If that were not the case, that State would in effect be able to prolong that procedure at will and thus delay the adoption of a final decision.

104 In addition, neither Applicants 1 and 2 nor the companies of which they are the administrators submitted any observations in connection with the procedure under Article 88(2) EC, although they or representatives of those companies attended the meeting with the Commission on 23 March 2005.

105 In its rejoinders, the Commission explains that the 'debt-for-equity-swap' was covered by the agreement concerning KG Holding's EUR 9.25 million loan to Kliq. It was not a unilateral act on the part of Kliq. The Kingdom of the Netherlands opposed Kliq's application and pointed out to the Rechter-commissaris that conversion of the rescue loan into equity required the Commission's authorisation. The Rechter-commissaris ignored that argument. In his view, in this case in the event of a set-off and payment in full for shares, it was merely a matter of how the implementation of authorised rescue aid was settled under national law.

106 The conversion of EUR 9.25 million of the rescue loan into equity ordered by the administrator is contrary to Section 3.1 of the Guidelines, pursuant to which rescue aid should take the form of loan guarantees or loans, and rescue loans are to be reimbursed within a period of 12 months after disbursement of the last instalment to the firm. The Rechter-commissaris did not interpret the provisions of national law in accordance with Community law, although he had wide discretion in respect of Kliq's request.

107 According to the Commission, acceptance of the arguments put forward by Applicants 1 and 2 would mean that where a Member State notifies a restructuring aid project and the Commission initiates the formal investigation procedure the mere fact that a court subsequently orders that restructuring aid to be granted without its authorisation would require it to initiate a second formal investigation procedure.

108 Disputing the arguments of Applicant 2, the Commission states that in Section 6.2.3.1 of the contested decision it did not analyse the acts adopted by the Netherlands

executive but the order of the Rechter-commissaris of 22 August 2005. The acts of the administrator under that order are attributable to the Kingdom of the Netherlands because they were ordered by a member of the Netherlands judiciary.

109 The Commission points out that the resources at issue here are State resources, emanating in particular from the executive of the Kingdom of the Netherlands, in the form of a rescue loan that should in principle have been repaid to the State. The Kingdom of the Netherlands, in particular its judiciary, had control over those funds. It ordered the conversion of the loan into equity.

110 According to the Commission, the order of the Rechter-commissaris is not compatible with the common market. A creditor would not convert his loan into the equity capital of an undertaking in difficulty. His chances of recovering a part of what was owing to him in the event of bankruptcy would be greatly reduced. The Commission also contends that the loan agreement between KG Holding and Kliq prohibits any offsetting. If the Rechter-commissaris had not made his order, it would not have been open to Kliq to require KG Holding to convert the loan into equity.

111 Case-law has also confirmed on a number of occasions that the acts of courts could open the way to State aid.

112 Even if the order of the Rechter-commissaris of 22 August 2005 is not an act attributable to the State and therefore not State aid, that would not have altered its conclusion that the EUR 9.25 million loan had to be recovered. In this case, there was misuse of aid within the meaning of Articles 14 and 16 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1). The Commission gave its agreement only to rescue aid in the form of a short-term repayable loan. However, that loan was converted, without its consent, into equity from the end of August 2005. If that conversion was not attributable to the State, it must therefore be attributable to some other person. If that was the case, that person used the aid in a manner different from that to which the Commission agreed, constituting misuse of State aid.

113 In its rejoinder, the Commission contends that the content of the two-stage plan was equivalent to a 'debt-for-equity-swap' which it described in point 3 of the annex to the initiating decision. The order of the Rechter-commissaris concerning the conversion of the rescue aid into restructuring aid is contrary to Community law and attributable to the State. In this case, what are involved are not resources available as a result of profits made by Kliq but resources deriving from a rescue loan granted by the Kingdom of the Netherlands.

114 As regards the recovery of interest, the Commission contends that no one, in particular Applicants 1 and 2, had informed it of the Netherlands legislation before it adopted the contested decision. In the absence of such specific information before the adoption of the contested decision, it was impossible for it to take into account, when drawing up its decisions ordering recovery, all possible national legislation.

Findings of the Court

115 Applicants 1 and 2 claim, in essence, that the set-off between the obligation to make full payment for shares and the EUR 9.25 million loan was not the subject of the initiating decision. According to the Commission, that set-off must be regarded as partial implementation of the restructuring aid notified by the Kingdom of the Netherlands. As regards the interest to be recovered, according to Applicants 1 and 2, the Commission wrongly decided that it ran until the date of recovery.

116 It is necessary to examine first of all whether the set-off between the obligation to make full payment for the shares and the EUR 9.25 million claim effected following the order of the Rechter-commissaris is the subject of the initiating decision.

117 In that regard, it should be pointed out that under Article 6 of Regulation No 659/1999 the decision to initiate the procedure must give the interested parties the opportunity effectively to participate in the formal investigation procedure, during which they will have the opportunity to put forward their arguments (Joined Cases T-195/01 and T-207/01 *Government of Gibraltar* v *Commission* [2002] ECR II-2309, paragraph 138). The sole purpose of the procedure provided for in Article 88(2) EC is to oblige the Commission to take steps to ensure that all persons who may be concerned are notified and given an opportunity of putting forward their arguments (Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 17).

118 According to paragraph 1 of the initiating decision, the subject of that decision is the notification of 26 January 2004, by which the Kingdom of the Netherlands announced its intention to grant restructuring aid to KG Holding. Paragraph 15 of that decision states that the measure concerned is designed to convert the rescue aid granted by the State to KG Holding, together with related interest, into equity capital. That conversion forms part of the restructuring plan described in paragraph 10 of that decision. Under that plan, the restructuring aid consists of KG Holding allocating the EUR 9.25 million State rescue loan to Kliq and then converting that loan into equity. That restructuring measure is also mentioned in point 3 of the annex to the initiating decision.

119 No mention is made of the set-off between the obligation to make full payment for the shares and the EUR 9.25 million claim in the initiating decision. The order of the Rechter-commissaris in question is dated 22 August 2005 and was therefore made after the adoption of the initiating decision on 5 August 2005. The Commission was not therefore in a position to mention the set-off in the initiating decision.

120 That set-off, which was effected after the order of the Rechter-commissaris was made, must be distinguished from the conversion of the rescue loan into equity under the restructuring plan notified by the Kingdom of the Netherlands to the Commission.

121 As regards the set-off, it is clear from the documents in the case, and in particular from the order of the Rechter-commissaris of 22 August 2005, that provision was made for it in the two-stage plan drawn up by Kliq. Under that two-stage plan, KG Holding was to meet its obligation to Kliq to make full payment for the shares it held in Kliq by effecting that set-off and those shares were then to be sold.

122 In the event, Kliq requested the Rechter-commissaris, under Article 69 of the Faillissementswet (Netherlands Bankruptcy Law), to direct KG Holding's administrator to cooperate in carrying out the two-stage plan.

123 In his order of 22 August 2005, the Rechter-commissaris granted Kliq's request. He therefore by implication directed KG Holding's administrator to make full payment for the shares which KG Holding held in Kliq and to offset that amount against that part of the rescue aid amounting to EUR 9.25 million lent to Kliq by KG Holding.

124 It is true that that set-off resulted in the conversion of the part of the rescue loan amounting to EUR 9.25 million into equity in Kliq and that it therefore had the effect which was envisaged in particular in the restructuring plan described in the initiating decision.

125 However, the fact remains that the Rechter-commissaris did not order the implementation of the restructuring plan in the form in which it was notified by the Kingdom of the Netherlands to the Commission.

126 First of all, it should be noted that the subject of that order, as stated in paragraph 1.1 thereof, was Kliq's request, under Article 69 of the Faillissementswet, seeking the cooperation of KG Holding's administrator in carrying out the two-stage plan, that is to say, first, KG Holding's meeting of its obligation to Kliq to make full payment for the

shares by offsetting the obligation to make full payment against the EUR 9.25 million loan, and then the sale of the shares which KG Holding held in Kliq.

127 That order therefore concerned not only the part of the rescue loan amounting to EUR 9.25 million, but also the obligation to make full payment for the shares. The set-off in question was dependent on full payment for the shares. However, conversion of the rescue loan into equity, as provided for in the restructuring plan, concerned only the rescue aid. Hence the subject of the order clearly differs from that of the restructuring plan.

128 Next, it should be noted that the order of the Rechter-commissaris is based only on Netherlands bankruptcy law, in this case Article 69 of the Faillissementswet.

129 It is clear from the order of the Rechter-commissaris that he considered whether implementation of the two-stage plan was an advantage for all KG Holding's creditors. He concluded that payment in full for the shares KG Holding held in Kliq and offsetting that amount against the part of the rescue aid amounting to EUR 9.25 million lent to Kliq by KG Holding did constitute such an advantage.

130 Therefore, the Rechter-commissaris did not implement the restructuring plan but ordered the implementation of the two-stage plan as requested by Kliq.

131 Moreover, the Rechter-commissaris was not involved either in drawing up the restructuring plan or in applying for restructuring aid. It was the executive that was responsible in that respect. The latter would therefore have had competence to implement the restructuring aid if it had been approved by the Commission. The Rechter-commissaris was adjudicating in his order, as an independent judicial body, on

the assets and liabilities of the companies, including the part of the rescue aid amounting to EUR 9.25 million, without taking into account the restructuring aid planned by the Netherlands authorities and notified to the Commission.

132 It is also necessary to take account of the fact that, as the Commission accepted at the hearing, when the Rechter-commissaris made his order, the Netherlands authorities no longer wished to implement the restructuring plan as notified to the Commission.

133 Furthermore, the Netherlands authorities were not involved in converting part of the rescue loan into equity. According to the order of the Rechter-commissaris, and contrary to what is stated in paragraphs 19 and 43 of the contested decision, it was not the Kingdom of the Netherlands which had to convert the loan into equity but KG Holding's administrator, who was required to cooperate in effecting that conversion. As is clear from its defence, the Commission was aware of this at the time the contested decision was adopted. It explains in that statement that it considered that the part of the aid in question was attributable to the State because, although the measure had not been ordered by the Netherlands executive, it had none the less been ordered by the Rechter-commissaris.

134 The conclusion must therefore be drawn that in this case the conversion of the EUR 9.25 million rescue loan, through a set-off between the obligation on KG Holding to make full payment for the shares and that company's claim on Kliq under the loan agreement, ordered by the Rechter-commissaris, is a measure different from that notified by the Kingdom of the Netherlands. The order of the Rechter-commissaris concerned the assets and liabilities of KG Holding and Kliq, including the part of the rescue aid amounting to EUR 9.25 million, approved by the Commission, irrespective of the restructuring aid notified by the Kingdom of the Netherlands. That conversion by means of a set-off does not therefore come within the scope of the initiating decision.

135 It is true, as the Commission stated, that it follows from Case C-119/05 *Lucchini* [2007] ECR I-6199, paragraphs 60 and 61, that a national court must interpret, as far as it is possible, the provisions of national law in such a way that they can be applied in a manner which contributes to the implementation of Community law and it is under a duty to give full effect to the provisions of Community law, if necessary refusing of its own motion to apply any conflicting provision of national legislation. It is also true, as the Commission contended, that the national court must take care not to adopt a decision which would have the sole effect of extending the circle of recipients of unlawful aid (Case C-368/04 *Transalpine Ölleitung in Österreich* [2006] ECR I-9957, paragraph 57).

136 However, the obligation for the Rechter-commissaris to take into account Community law as regards the rescue aid does nothing to alter the fact that he did not take a decision implementing the restructuring aid and that his order does not therefore come within the scope of the initiating decision.

137 As regards the Commission's argument that the order of the Rechter-commissaris is attributable to the State, it is clear that in this case the question that arises is not whether acts of the judiciary are attributable to the State (see, on that question, Case C-224/01 *Köbler* [2003] ECR I-10239, paragraphs 31 to 33), but whether, as stated in paragraph 43 of the contested decision, the national court ordered the implementation of the restructuring aid as notified by the Kingdom of the Netherlands.

138 Concerning the Commission's argument that it is not required to extend the procedure under Article 88(2) EC where the Member State concerned alters the aid in question, it is appropriate to note that, in this case, the order of the Rechter-commissaris did not concern the restructuring aid notified by the Kingdom of the Netherlands. There was therefore no alteration of that aid in this case.

139 Furthermore, it is necessary to reject the Commission's argument, relied on in the alternative, should the Court consider that the order of the Rechter-commissaris does not constitute State aid, that there was misuse of the rescue aid authorised. On the one hand, the Commission initiated a formal procedure in order to investigate the restructuring aid notified by the Kingdom of the Netherlands and not misuse of the rescue aid it approved. On the other hand, it is not apparent from the grounds of the contested decision that that decision concerned misuse of State aid.

140 In consequence, the Commission's argument cannot be accepted.

141 It follows from the foregoing that Article 2 of the contested decision must be annulled without it being necessary to consider the other arguments relied on by Applicants 1 and 2 concerning the part of the rescue aid amounting to EUR 9.25 million.

Registration of the Kingdom of the Netherlands' EUR 35.75 million claim on KG Holding and/or Kliq Reïntegratie as a creditor in the bankruptcy proceedings with the administrator (Article 3 of the contested decision)

142 This plea concerns the recovery of the rescue aid received, lastly, by Kliq Reïntegratie. Applicants 1 and 3 dispute the statement of reasons in the contested decision and whether the obligation to register the EUR 35.75 million claim on KG Holding and/or Kliq Reïntegratie in the bankruptcy proceedings is well founded.

The statement of reasons of the contested decision

— Arguments of the parties

143 As regards registration with the administrator of the Kingdom of the Netherlands' EUR 35.75 million claim on KG Holding and/or Kliq Reïntegratie as a creditor in the bankruptcy proceedings, Applicants 1 and 3 claim that the Commission committed errors of assessment and that the reasoning in the contested decision is therefore unclear or at least inadequate, in breach of Article 87(1) EC and Article 253 EC. The contested decision does not make clear whether the Commission considers that the EUR 35.75 million which the Kingdom of the Netherlands must recover is lawful or unlawful aid, or whether it considers it to be rescue aid which it can approve under paragraph 23(d) of the Guidelines. The first interpretation could result from Articles 1, 2 and 3 of the contested decision, whilst paragraphs 47 to 50 and Article 3 of the contested decision support the second interpretation, which is undermined, however, by Article 1 and paragraphs 39 and 56 of the contested decision, according to which the measure notified cannot be considered to be compatible with the common market.

144 According to Applicants 1 and 3, it is possible that the Commission merely intended to indicate in Article 3 of the contested decision that the Kingdom of the Netherlands was to recover the amount of the approved rescue loan from the party which had contracted that loan only under conditions in accordance with national law, without giving its view as to the identity of that contracting party.

145 The Commission disputes the arguments put forward by Applicants 1 and 3.

— Findings of the Court

146 Applicants 1 and 3 contend that the contested decision is inadequately reasoned as concerns the sum of EUR 35.75 million.

147 In that regard, it should be noted that the obligation to state reasons is an essential procedural requirement that must be distinguished from the question of the merits of the contested decision, which concerns the substantive legality of the contested measure and which must satisfy the requirements laid down by case-law (see paragraphs 61 and 62 above).

148 In this case, in paragraphs 7 and 8 of the contested decision, the Commission describes the background to the restructuring aid notified by the Kingdom of the Netherlands by letter of 26 January 2004. It states in particular in those paragraphs that in December 2003 it authorised EUR 45 million in rescue aid for KG Holding pending a restructuring plan. In paragraph 14 of the contested decision, the Commission notes that under the restructuring plan the rescue aid granted to KG Holding, EUR 35.75 million of which was then allocated to Kliq Reïntegratie, was transformed into restructuring aid by means of conversion into equity capital.

149 In paragraph 22 of the contested decision, the Commission states that the restructuring aid in question consists in the conversion of the rescue loan granted by the Kingdom of the Netherlands to KG Holding, plus interest due on the loan, into equity capital. After considering the conditions to be met in order to obtain authorisation for restructuring aid in paragraphs 30 to 38 of the contested decision, the Commission concludes in paragraph 39 that, since the conditions for the granting of restructuring aid pursuant to the Guidelines are not met, the Commission cannot approve the restructuring plan, and the restructuring aid cannot therefore be authorised. Article 1 of the contested decision thus states that the restructuring aid is incompatible with the common market.

150 Paragraphs 47 to 50 of the contested decision concern the part of the rescue aid amounting to EUR 35.75 million. The Commission sets out in those paragraphs the conditions for authorising a liquidation plan, including the obligation on the Kingdom of the Netherlands to register its EUR 35.75 million claim on KG Holding and/or Kliq Reïntegratie as a creditor in the bankruptcy proceedings with the administrator. Article 3 of the contested decision sets out that obligation and the obligation that the Kingdom of the Netherlands must ensure that the undertakings concerned are liquidated in a manner that will put an end to the distortion of competition, and in particular that their activities should be terminated and their assets sold on market terms as soon as possible.

151 In the statement of reasons for the contested decision, the Commission therefore draws a clear distinction between rescue aid and restructuring aid. It takes into consideration the context of the restructuring aid, which concerns the same amount as the rescue aid. By requiring the Kingdom of the Netherlands to register its EUR 35.75 million claim on the companies '[KG Holding] and/or Kliq Reïntegratie' in the bankruptcy proceedings with the administrator, the Commission takes into account the complexity of the case as regards in particular the ownership of the assets of those companies as shown in paragraph 15 of the contested decision.

152 Moreover, as part of the administrative procedure, the Commission organised a meeting on 23 March 2005 concerning the application for authorisation of the restructuring aid, which was attended by representatives of KG Holding and of Kliq Reïntegratie. Those companies were therefore well aware of the background to the contested decision.

153 Comprising, first, considerations to the effect that the conditions for authorisation of the restructuring aid were not met and then a summary of the consequences of those considerations as regards the part of the rescue aid amounting to EUR 35.75 million, the statement of reasons for the contested decision discloses in a clear and unequivocal fashion the reasoning followed by the Commission and thus meets the requirements of Article 253 EC.

The requirement to register the State's EUR 35.75 million claim on KG Holding and/or Kliq Reïntegratie in the bankruptcy proceedings

— Arguments of the parties

154 Applicants 1 and 3 argue that the Commission was wrong in deciding that the Kingdom of the Netherlands had to register with the administrator its EUR 35.75 million claim on KG Holding and/or Kliq Reïntegratie as a creditor in the bankruptcy proceedings.

155 The Commission accepted in its decision of 16 December 2003 that the sum of EUR 35.75 million should be used to finance the redundancies of staff members and the rescission of the redundant contracts of Kliq Reïntegratie, and that Kliq Reïntegratie was thereafter to be placed in liquidation, which would be incompatible with recovery of that sum from KG Holding and/or Kliq Reïntegratie.

156 The Commission was aware that Kliq Reïntegratie would function, under the planned restructuring operation, only as an entity in which the non-profitable parts of KG Holding would be liquidated and Kliq Reïntegratie would in turn be placed in liquidation after its various debts and staff redundancy plans had been settled. As the Commission stated in Sections 2.1 and 2.4 of its decision of 16 December 2003, the EUR 35.75 million was intended to provide the means to meet commitments under current contracts and cover the costs of the social plan.

157 In their replies, Applicants 1 and 3 claim that the reformulation of the obligations imposed on the Kingdom of the Netherlands under the decision of 16 December 2003 was unnecessary, since that decision already laid down obligations to apply if the rescue aid was not converted into restructuring aid or if the Commission did not authorise restructuring aid. Furthermore, given the way in which the investigation was limited in the initiating decision, the Commission should have confined its examination to the request for approval of the restructuring aid and, in accordance with the decision of

16 December 2003, merely stated that, if the Commission did not give the approval sought, it would be for the Kingdom of the Netherlands to demonstrate that the rescue loan had been or was being reimbursed, or that it had been offset in accordance with national bankruptcy law. The question of the extent to which the Kingdom of the Netherlands had met that obligation should not be covered in the contested decision. Investigation of the restructuring aid notified and the procedure initiated to that end under Article 88(2) EC cannot be used to check compliance with an earlier decision and the obligations it imposed on the Kingdom of the Netherlands or obligations that stem from it for the latter.

158 Applicant 3 adds that on 23 December 2003 the Kingdom of the Netherlands concluded a EUR 45 million loan agreement with KG Holding. That company in turn concluded a EUR 35.75 million loan agreement with Kliq Reïntegratie and a EUR 9.25 million loan agreement with Kliq. The Kingdom of the Netherlands has no claim on Kliq Reïntegratie either under the loan agreement or under national law.

159 Applicant 3 claims that Kliq Reïntegratie cannot be described as a recipient undertaking. The Commission does not state, either in the contested decision or in the decision of 16 December 2003 approving the rescue loan, that State aid had been granted to Kliq Reïntegratie. In the decision of 16 December 2003 and in paragraph 24 and Article 1 of the contested decision, the Commission refers to State aid only with regard to KG Holding.

160 Applicant 3 adds that Kliq Reïntegratie can in no way be described as a recipient of State aid since, at the time the EUR 35.75 million loan was granted to it, it was no longer engaged in economic activity and therefore could no longer be considered to be an undertaking for the purposes of Article 87(1) EC. The loan agreement between KG Holding and Kliq Reïntegratie, approved by the Commission in its decision of 16 December 2003, is dated 24 December 2003. The activities of Kliq Reïntegratie were transferred to Kliq with effect from 1 October 2003.

161 The Commission stated in Table 2 of its decision of 16 December 2003 that, although the purpose of the loan did not appear to be strictly limited to maintaining KG Holding's normal activity, it could none the less be regarded as a rescue loan in this case. The EUR 35.75 million loan was in fact needed in order to cover the redundancy costs of 1 200 staff members and the rescission of leasing and rental contracts that had become redundant. The Commission added that that loan should also enable the undertaking to have sufficient liquid assets to meet its current contractual commitments.

162 According to Applicant 3, it is possible that, in Article 3 of the contested decision, the Commission intended merely to indicate that the Kingdom of the Netherlands should register the EUR 35.75 million claim arising under the State loan with the administrator in the bankruptcy proceedings of the contracting party to which the State had lent that sum, namely KG Holding. However, the State registered a claim with KG Holding's administrator and with Kliq Reïntegratie's administrator.

163 In his reply, Applicant 3 refers to paragraph 9 of the initiating decision, according to which KG Holding was to liquidate Kliq Reïntegratie, which was losing money, and set up a new subsidiary, Kliq. Under the restructuring plan, it was Kliq which was to restore the viability of KG Holding in the long term. In paragraph 10 of the initiating decision, the Commission also stated that Kliq Reïntegratie was to be liquidated before the end of 2004. In the diagram in paragraph 11 of the initiating decision, the Commission put the words 'To be closed' next to the name of Kliq Reïntegratie.

164 The Commission disputes the arguments put forward by Applicants 1 and 3.

— Findings of the Court

165 Applicants 1 and 3 claim first of all that allocation of the EUR 35.75 million rescue loan to financing the liquidation of Kliq Reïntegratie, as provided for in the Commission decision of 16 December 2003, is incompatible with the obligation to register the Kingdom of the Netherlands' claim on KG Holding and/or Kliq Reïntegratie.

166 As a preliminary point, it should be noted, as is clear from paragraph 10 of the Guidelines, that rescue aid is by nature temporary assistance. According to paragraph 23(d) of the Guidelines, it must be accompanied by an undertaking on the part of the Member State concerned to communicate to the Commission, not later than six months after the rescue aid measure has been authorised, a restructuring plan or a liquidation plan or proof that the loan has been reimbursed in full. Paragraph 25 of the Guidelines states that rescue aid is a one-off operation designed to keep a company in business for a limited period, during which its future can be assessed.

167 It follows that, in principle, unless a restructuring plan or a liquidation plan is communicated to the Commission, rescue aid must be reimbursed. In this case, according to the Commission, reimbursement is to be made by registration of the EUR 35.75 million claim on KG Holding and/or Kliq Reïntegratie.

168 The Commission decision of 16 December 2003 does not exclude reimbursement of the aid by means of such registration. It is clear from paragraphs 1 and 2.1 of that decision that the aid was allocated for the rescue of the Kliq group, namely KG Holding and its subsidiaries Kliq and Kliq Reïntegratie. In Sections 2.1 and 2.4 of that decision, the Commission stated that the EUR 35.75 million was intended to provide the means to meet commitments under current contracts and cover the costs of Kliq Reïntegratie's social plan.

169 The Commission approved the rescue aid in accordance with the Guidelines. Moreover, in the decision of 16 December 2003, it is stated that the Kingdom of the Netherlands had undertaken, in accordance with paragraph 23(d) of the Guidelines, to communicate a restructuring plan or a liquidation plan or proof that the loan had been reimbursed in full.

170 In the light of the foregoing, it is clear that the argument put forward by Applicants 1 and 3, that the allocation of the rescue aid referred to in the Commission decision of 16 December 2003 is incompatible with reimbursement, must be rejected.

171 As regards the argument of Applicants 1 and 3 that the contested decision is redundant since the decision of 16 December 2003 already sets out the obligations imposed on the Kingdom of the Netherlands if rescue aid is not converted into restructuring aid or if the Commission does not authorise restructuring aid, it should be noted that the mere fact that a decision is redundant does not mean that it is unlawful.

172 In their replies, Applicants 1 and 3 claim that, according to the initiating decision, the contested decision should have been confined to examining the request for approval of the restructuring aid and should not relate to obligations concerning the rescue aid, which already ensued from the decision of 16 December 2003.

173 It must be pointed out that, in their applications, Applicants 1 and 3 did not put forward any plea alleging that, in the contested decision, the Commission, in ruling on the rescue aid, did not keep within the limits of the initiating decision. It must therefore be noted that, in challenging the contested decision on the ground that in it the Commission did not keep within the limits of its investigation established in the initiating decision, Applicants 1 and 3 are putting forward a new plea in their replies. Consequently, since it is formulated without any explanation to justify the delay in raising it, that plea must be rejected as being out of time under Article 48(2) of the Rules of Procedure.

174 Applicant 3 also submits that Kliq Reïntegratie was not a recipient of the aid and that the Kingdom of the Netherlands had no claim on it. Moreover, when the EUR 35.75 million loan was granted, that company was no longer an undertaking for the purposes of Article 87(1) EC.

175 As regards first of all the argument that Kliq Reïntegratie was not a recipient of the aid and that the State had no claim on that company, it should be pointed out that, under Community law, if the Commission finds that aid is incompatible with the common market, it may require the Member State to recover that aid from the recipient (Joined Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia* v *Commission* [2003] ECR I-4035, paragraph 65, and Case C-277/00 *Germany* v *Commission* [2004] ECR I-3925, paragraph 73), or, in other words, from the undertakings which actually benefited from it (see, to that effect, Case C-457/00 *Belgium* v *Commission* [2003] ECR I-6931, paragraph 55, and Case C-277/00 *Germany* v *Commission*, paragraph 75).

176 The EUR 45 million rescue aid was intended to rescue the Kliq group. The EUR 35.75 million was intended to provide the means to meet commitments under current contracts and cover the costs of Kliq Reïntegratie's social plan. It was the latter company which actually received the EUR 35.75 million from the rescue loan granted to KG Holding. Kliq Reïntegratie was a wholly-owned subsidiary of KG Holding. The latter was therefore only an intermediary as regards the grant of the aid and Kliq Reïntegratie was the actual recipient.

177 The Commission was therefore entitled to regard Kliq Reïntegratie as the recipient of aid in the amount of EUR 35.75 million, and there is no need for the Court to examine whether the Kingdom of the Netherlands had a claim on that company.

178 As regards Applicant 3's argument that at the time the EUR 35.75 million loan was granted Kliq Reïntegratie could no longer be considered to be an undertaking for the purposes of Article 87(1) EC, it should be noted that, according to settled case-law, the

concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed (see Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, paragraph 21, and Case C-309/99 *Wouters and Others* [2002] ECR I-1577, paragraph 46, and case-law cited). It is also settled case-law that any activity consisting in offering goods and services on a given market is an economic activity (see *Wouters and Others*, paragraph 47, and case-law cited).

179 Kliq Reïntegratie's principal activity consisted in the provision of services in connection with finding employment for jobseekers, integrating people living with disabilities into the labour market, helping employers to find the right staff for specific posts and general staff placement services. In the light of the case-law cited in paragraph 178 above, Kliq Reïntegratie must be regarded as being engaged in an economic activity.

180 When the EUR 35.75 million rescue loan was granted to Kliq Reïntegratie under the loan agreement which that company concluded with KG Holding on 24 December 2003 and which was approved by the Commission in its decision of 16 December 2003, Kliq Reïntegratie had not yet gone bankrupt. According to Applicant 3, from 1 October 2003 Kliq took over some of Kliq Reïntegratie's contracts at the market price, new management was appointed, costs were reduced and some of Kliq Reïntegratie's employees (500 of the 1 450 employees) were taken on by Kliq. Applicant 3 adds that a social plan and, in particular, a redundancy plan were implemented for those staff members who were not taken on by Kliq.

181 On 1 October 2003, Kliq Reïntegratie was still responsible for those contracts that had not been taken over by Kliq, and had 950 employees. The financial means were not available for the social plan until after the loan agreement was concluded on 24 December 2003. Lastly, Kliq Reïntegratie did not go bankrupt until 9 February 2005, 16 months after some of the contracts were taken over by Kliq. Those facts show that, when the EUR 35.75 million rescue loan was granted to it under the loan agreement it had concluded with KG Holding on 24 December 2003, Kliq Reïntegratie was still engaged in an economic activity and could be described as an undertaking receiving rescue aid.

182 The arguments put forward by Applicants 1 and 3 cannot therefore be accepted.

The consequences of the bankruptcy for the recovery of State aid (Articles 2 and 3 of the contested decision)

Arguments of the parties

183 The applicants claim that the Commission decided, in paragraphs 43 to 46 and Article 2 of the contested decision, in breach of Articles 87 EC and 88 EC, that the Kingdom of the Netherlands should recover the EUR 9.25 million in aid from KG Holding and Kliq. The Commission was also wrong in deciding, in paragraphs 47 to 50 and Article 3 of the contested decision, that the Kingdom of the Netherlands had, in order to recover the EUR 35.75 million aid from KG Holding and/or Kliq Reïntegratie, to register its claim on those companies in the bankruptcy proceedings. As a result of the bankruptcy of KG Holding, Kliq Reïntegratie and Kliq, recovery of the aid had become impossible and pointless, inasmuch as recovery of those sums by means of registering the claim in the bankruptcy proceedings was no longer necessary and was redundant as regards putting an end to the distortion of competition.

184 According to settled case-law, the purpose of a decision requiring recovery of aid is to restore effective competition, that is to say, to restore the situation to what it was before the grant of the incompatible aid. That purpose is achieved where the amount of the unlawfully granted aid, plus default interest, is reimbursed by the recipient, since the latter will thus lose the market advantage which it enjoys in relation to its competitors and, hence, the situation on the market before the aid was paid will be restored. If the recipient undertakings are no longer active on that market, recovery of the amount of aid from the assets of the bankrupt company is not necessary.

185 The applicants accept that, according to Case C-277/00 *Germany* v *Commission*, paragraph 175 above, paragraph 85, aid must be recovered by means of registering the claim against the bankrupt's assets. However, that judgment makes reference to Case 52/84 *Commission* v *Belgium* [1986] ECR 89 and Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, cases in which the recipient undertaking was not bankrupt at the date of the contested decision and was therefore still potentially active on the market. Those cases should therefore be distinguished from the present case, in which the recipient undertakings were no longer active on the market as a result of their bankruptcy.

186 In their replies, the applicants observe that, where an undertaking has ceased its activities completely and definitively, has been declared bankrupt and is in liquidation, as is the case of KG Holding, it is self-evident that its competitors can no longer be disadvantaged. The recipient undertaking has in fact disappeared from the market and from the economic point of view no longer exists.

187 The applicants refer to the Commission decisions of 30 October 2002 on the State aid granted by Italy to Industrie Navali Meccaniche Affini SpA (INMA) (OJ 2003 L 22, p. 36) and of 7 May 2004 on the State aid granted by Germany to Fairchild Dornier GmbH (Dornier) (OJ 2004 L 357, p. 36). The Commission decided in those decisions not to recover the aid since the recipient undertaking had ceased to engage in economic activity.

188 The applicants stress that they are not challenging the settled case-law recalled in Case T-324/00 *CDA Datenträger Albrechts* v *Commission* [2005] ECR II-4309. In that case, the recipient undertaking had not yet been declared bankrupt when the Commission adopted its decision. In Case C-277/00 *Germany* v *Commission*, paragraph 175 above, the economic activities of the undertaking concerned had, following the bankruptcy, been transferred to its wholly-owned subsidiary, over which it exercised control.

189 The Commission disputes the arguments put forward by the applicants.

Findings of the Court

190 The applicants dispute, in essence, the lawfulness of the recovery order contained in Article 2(1) and Article 3 of the contested decision on account of the bankruptcy proceedings and the cessation of their economic activities.

191 With regard, first of all, to the bankruptcy proceedings, it should be noted that the bankruptcies of KG Holding, Kliq Reïntegratie and Kliq were declared on 8 and 9 February and 14 December 2005, respectively, thus prior to the adoption of the contested decision on 19 July 2006.

192 In that regard, according to the case-law concerning undertakings in receipt of aid which have become insolvent, restoration of the previous situation and removal of the distortion of competition resulting from aid unlawfully paid may, in principle, be achieved by registration as one of the liabilities of the undertaking in liquidation of an obligation relating to repayment of the aid concerned, except in so far as that aid has benefited another undertaking (see *CDA Datenträger Albrechts* v *Commission*, paragraph 188 above, paragraph 101, and case-law cited).

193 According to that case-law, the mere fact that the undertaking has gone bankrupt does not therefore call into question the principle that unlawful aid must be recovered (see also, to that effect, *Italy and SIM 2 Multimedia* v *Commission*, paragraph 175 above, paragraphs 53 to 55).

194 Secondly, as regards cessation of the economic activities of the undertakings concerned, the legality of a decision concerning State aid is to be assessed in the light of the information available to the Commission when the decision was adopted (Case C-277/00 *Germany* v *Commission*, paragraph 175 above, paragraph 39), that is to say, on 19 July 2006 in this case.

195 It should be noted that the applicants did not submit any observations to the Commission during the administrative procedure. However, the applicants' arguments are not inadmissible merely because they were not raised during the administrative procedure. The right of a person to bring proceedings cannot be restricted simply because, although that person could, in the course of the administrative procedure, have submitted observations on an assessment communicated when the Article 88(2) EC procedure was opened and then repeated in the contested decision, he did not do so (Case T-380/94 *AIUFFASS and AKT* v *Commission* [1996] ECR II-2169, paragraph 64, and Case T-16/96 *Cityflyer Express* v *Commission* [1998] ECR II-757, paragraph 39).

196 As regards the economic activities of KG Holding, it is clear from paragraphs 19 and 20 of the contested decision that the Netherlands authorities sent two letters to the Commission in September 2005 and in February 2006 to inform it of the progress of KG Holding's bankruptcy proceedings. As regards Kliq, it is clear from paragraph 20 of the contested decision that the Netherlands authorities sent a letter to the Commission in January 2006 informing it of Kliq's bankruptcy as of 14 December 2005 and the ensuing proceedings. It is not apparent from the documents in the case that the Commission received other information concerning the economic activities of KG Holding and Kliq after they were declared bankrupt. The Commission cannot therefore be criticised for concluding, when the contested decision was adopted, that the bankruptcy proceedings had not yet terminated and that the undertakings concerned had not yet ceased to exist.

197 As regards the economic activities of Kliq Reïntegratie, it is clear from paragraphs 19 and 20 of the contested decision that the Netherlands authorities sent two letters to the Commission in September 2005 and February 2006 to inform it of the progress of the bankruptcy proceedings in respect of Kliq Reïntegratie. It is not clear from the documents in the case that the Commission received other information concerning the

economic activities of Kliq Reïntegratie after it was declared bankrupt. It follows from paragraphs 178 to 181 above that, despite the fact that Kliq took over some of the contracts of Kliq Reïntegratie from 1 October 2003, the latter was still engaged in economic activity at the time the EUR 35.75 million loan agreement was concluded in December 2003. That undertaking did not go bankrupt until 9 February 2005, 16 months after some of its contracts were taken over by Kliq. The Commission was aware that, under the restructuring plan, Kliq Reïntegratie was to cease its activities. That fact does not mean, however, that the undertaking had already ceased its activities on 19 July 2006.

198 It does not appear from the documents in the case that the information supplied by the Netherlands authorities in that regard was so fragmentary that the Commission should have requested the Kingdom of the Netherlands to provide it with additional information concerning the economic situation of the undertakings concerned (see, to that effect, Joined Cases C-324/90 and C-342/90 *Germany and Pleuger Worthington* v *Commission* [1994] ECR I-1173, paragraph 29). The Commission was therefore entitled to consider that the mere fact that the undertakings concerned had gone bankrupt did not mean that they no longer existed.

199 Moreover, contrary to what the applicants assert, it is not apparent from the documents in the case that, when the contested decision was adopted, the undertakings concerned had ceased their economic activities completely and definitively.

200 With regard to the applicants' argument that recovery of the aid in question is impossible, it should be observed, on the one hand, that the mere fact that the undertakings in receipt of aid have gone bankrupt does not mean that recovery of the aid has become impossible and, on the other hand, that the Member State concerned may register its claim as one of those undertakings' liabilities. Furthermore, it should be added that any procedural or other difficulties in regard to the implementation of the contested measure cannot affect its lawfulness (see, to that effect, Case C-142/87 *Belgium* v *Commission*, paragraph 185 above, paragraphs 62 and 63, and Case C-214/07 *Commission* v *France* [2008] ECR I-8357, paragraph 46). In the event of difficulties, the Commission and the Member State concerned must respect the principle underlying Article 10 EC, which imposes a duty of genuine cooperation on the Member States and the Community institutions, and must work together in good faith with a view to

overcoming difficulties whilst fully observing the Treaty provisions, and in particular the provisions on State aid (see Case C-415/03 *Commission* v *Greece* [2005] ECR I-3875, paragraph 42, and case-law cited).

201 The applicants referred to the earlier Commission decisions of 30 October 2002 and 7 May 2004 to demonstrate the unlawfulness of the contested decision. In that regard, suffice it to say that each case of State aid must be assessed separately by the Court of First Instance. The decisions cited by the applicants, which concern specific cases and have no connection with the present decision, are therefore not relevant in this case.

202 The applicants' arguments must therefore be rejected.

203 In the light of all the above considerations, Article 2 of the contested decision must be annulled and the remainder of the applications dismissed.

Costs

204 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. However, where there are several unsuccessful parties, the Court of First Instance is to decide how the costs are to be shared. Under Article 87(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the Court of First Instance may order that the costs be shared or that each party bear its own costs.

205 It follows from the foregoing that a fair application of those provisions would be to order that, since Applicant 1 and Applicant 2 have each been partially unsuccessful in their pleadings, Applicant 1 will bear his own costs in Case T-81/07 and Applicant 2 will bear their own costs in Case T-82/07. Since Applicant 3 has been unsuccessful in all his pleadings, he must be ordered to pay, in addition to his own costs in Case T-83/07, those incurred by the Commission in Case T-83/07. The Commission must bear its own costs in Cases T-81/07 and T-82/07.

On those grounds,

THE COURT OF FIRST INSTANCE (Eighth Chamber)

hereby:

1. Annuls Article 2 of Commission Decision 2006/939/EC of 19 July 2006 on the aid measure notified by the Kingdom of the Netherlands for KG Holding NV;

2. Dismisses the remainder of the applications;

3. Orders Jan Rudolf Maas, in his capacity as administrator in the bankruptcy proceedings relating to KG Holding NV, to bear his own costs in Case T-81/07;

4. Orders Jan Rudolf Maas and Cornelis van den Bergh, in their capacity as administrators in the bankruptcy proceedings relating to Kliq BV, to bear their own costs in Case T-82/07;

5. Orders Jean Leon Marcel Groenewegen, in his capacity as administrator in the bankruptcy proceedings relating to Kliq Reïntegratie, to bear, in addition to his own costs in Case T-83/07, those incurred by the Commission in Case T-83/07;

6. Orders the Commission to bear its own costs in Cases T-81/07 and T-82/07.

Papasavvas Wahl Dittrich

Delivered in open court in Luxembourg on 1 July 2009.

[Signatures]

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