

JUDGMENT OF THE COURT (Fourth Chamber)

2 December 2010 *

In Case C-464/09 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 25 November 2009,

Holland Malt BV, established in Lieshout (Netherlands), represented by O. Brouwer, A. Stoffer and P. Schepens, advocaten,

appellant,

the other parties to the proceedings being:

European Commission, represented by L. Flynn and A. Stobiecka-Kuik, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: English.

Kingdom of the Netherlands, represented by C. Wissels and Y. de Vries, acting as Agents,

intervener at first instance,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, K. Schiemann, L. Bay Larsen, C. Toader (Rapporteur) and A. Prechal, Judges,

Advocate General: J. Mazák,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 September 2010,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- ¹ By its appeal, Holland Malt BV ('Holland Malt') seeks to have set aside the judgment of the Court of First Instance of the European Communities (now 'the General Court') of 9 September 2009 in Case T-369/06 *Holland Malt v Commission* [2009] ECR II-3313 ('the judgment under appeal') dismissing its application for annulment of Commission Decision 2007/59/EC of 26 September 2006 concerning the State aid granted by the Netherlands to Holland Malt BV (OJ 2007 L 32, p. 76; 'the contested decision').

Legal context

- 2 Point 3.2 of the Community Guidelines for State aid in the agriculture sector (OJ 2000 C 28, p. 2, 'the Guidelines'), included in the part setting out the 'General principles', provides:

'Although Articles 87 [EC], 88 [EC] and 89 [EC] are fully applicable to the sectors covered by the common organisations of the market, their application nevertheless remains subordinate to the provisions established by the regulations concerned. In other words recourse by a Member State to the provisions of Articles 87, 88 and 89 cannot receive priority over the provisions of the regulation on the organisation of that sector of the market... It follows that under no circumstances can the Commission approve an aid which is incompatible with the provisions governing a common organisation of the market or which would interfere with the proper functioning of the common organisation.'

- 3 Point 4.2.5 of the Guidelines, included in the part relating to 'Aids for investments', provides:

'No aid may be granted [for investments in connection with the processing and marketing of agricultural products] unless sufficient evidence can be produced that normal market outlets for the products concerned can be found. This must be assessed at the appropriate level in relation to the products concerned, the types of investments, and existing and expected capacities. To this end, any restrictions on production or limitations of Community support under the common market organisations must

be taken into account. In particular no aid may be granted in contravention of any prohibitions or restrictions laid down in the common organisations of the market ...

...'

- 4 Finally, Point 4.2.6 of that part of the Guidelines provides:

'Aids for investments with eligible expenses in excess of EUR 25 million, or where the actual amount of aid will exceed EUR 12 million must be specifically notified to the Commission in accordance with Article 88(3) of the Treaty.'

Background to the dispute and the contested decision

- 5 Holland Malt is a joint venture between Bavaria NV, a brewery which produces beer and soft drinks, and Agrifirm, a cooperative of cereal producers in Germany and the northern Netherlands. It is the holder of a patent for the production and sale of HTST ('High Temperature, Short Time') malt.
- 6 The Kingdom of the Netherlands adopted a regional investment scheme called 'Regionale investeringsprojecten 2000'. The Commission, by decision of 17 August 2000, approved that scheme and, by decision of 18 February 2002, also approved an

amendment to that scheme which extended its scope to include the sectors of processing and selling the agricultural products listed in Annex I to the EC Treaty.

- 7 The Kingdom of the Netherlands granted Holland Malt investment aid of EUR 7 425 000 under that regional investment scheme. That subsidy was intended for the construction of a malting plant in Eemshaven (Netherlands). Payment was conditional on the investment being effected before 1 July 2005. However, the actual payment of the aid was suspended pending its approval by the Commission.
- 8 By letter of 31 March 2004, the Kingdom of the Netherlands notified that aid measure to the Commission in accordance with Article 88(3) EC and point 4.2.6 of the Guidelines. On 5 May 2005, the Commission initiated a procedure under Article 88(2) EC. Since that procedure delayed payment of the subsidy beyond the deadline for implementation of the investment originally set by the Kingdom of the Netherlands, Holland Malt requested an extension of time until the adoption by the Commission of the decision on that subsidy.
- 9 On 26 September 2006, the Commission adopted the contested decision, in which it found that the measure at issue, which concerned an investment to improve the quality of Holland Malt's products and increase its production capacity, constituted State aid within the meaning of Article 87(1) EC. It went on to consider whether that measure could nevertheless be declared compatible with the common market pursuant to Article 87(3)(c) EC.
- 10 In that context, the Commission found that there was no separate market for HTST or for premium malt as opposed to ordinary malt. Furthermore, given the overcapacity in the world and Community malt markets, it found that there was no evidence

to show the existence of normal market outlets for that product, within the meaning of point 4.2.5 of the Guidelines. Thus, although it acknowledged, in paragraph 93 of the grounds of the contested decision, the importance of the aid for regional development, the Commission found, in paragraph 94 of the grounds of that decision, that it did not satisfy an important condition established by the Guidelines.

- 11 On the basis of those grounds, the Commission found, in Article 1 of the contested decision, that the State aid at issue was incompatible with the common market. Under Article 2 of that decision, the Kingdom of the Netherlands was required to withdraw the aid, and, under Article 3 of that decision, it had to recover from the recipient the aid unlawfully made available to it. According to Article 4 of that decision, the Kingdom of the Netherlands was to inform the Commission of the measures taken to comply with that decision.

The procedure before the General Court and the judgment under appeal

- 12 By application lodged at the Registry of the General Court on 7 December 2006, Holland Malt brought an action for annulment of the contested decision.
- 13 By a document lodged at the Court Registry on 6 April 2007, the Kingdom of the Netherlands applied for leave to intervene in the proceedings in support of Holland Malt. By order of 12 June 2007, the President of the Third Chamber of the General Court granted leave to intervene.

- 14 In support of its action, Holland Malt put forward four pleas alleging infringement of Article 87(1)(1) and (3)(c) EC, breach of the principle of sound administration, and breach of the duty to state reasons laid down in Article 253 EC.
- 15 The second part of the second plea concerning infringement of Article 87(3)(c) EC alleged a failure adequately to balance the beneficial effects of the aid against its impact on intra-Community trading conditions.
- 16 By that second part, the appellant, in essence, alleged that the Commission had relied, in the contested decision, only on point 4.2.5 of the Guidelines without weighing the beneficial effects of the subsidy at issue against its possible adverse impact on trading conditions within the European Community, and had thereby infringed Article 87(3)(c) EC.
- 17 It observed that the fact that the Guidelines are based on Article 87(3) EC necessarily implies that the Commission cannot limit the scope of its discretion to cover solely the criteria set out in those guidelines. In particular, it should interpret point 4.2.5 of the Guidelines in the light of the general criterion laid down in the Treaty, so as to find incompatible with the common market only that aid which adversely affects trading conditions to an extent contrary to the common interest.
- 18 According to Holland Malt, in the contested decision, the Commission did not assess whether, in view of the advantages that the subsidy in question would have involved, the effect of that subsidy was really contrary to the common interest within the meaning of Article 87(3) EC, but restricted itself to ruling out the compatibility of that subsidy on the basis of the alleged lack of normal market outlets for the product

concerned. On the contrary, the Commission should have found, first, that the investment in question had an important beneficial effect on the achievement of the aims of the common agricultural policy and in particular on the policy of rural development of the region concerned by that subsidy and, secondly, that it was following the grant of that subsidy that the appellant had decided to bear the costs of opening its maltings at Eemshaven, in an area in need of being economically developed, rather than in a more economically suitable area in another region of the Netherlands.

- 19 By the judgment under appeal, the General Court dismissed the action and ordered the appellant to bear its own costs and to pay those incurred by the Commission.
- 20 With regard to the second part of the second plea, the General Court, in paragraphs 166 to 180 of the judgment under appeal, held that the contested decision had been adopted in application both of Article 87(1) and (3) EC and of the Guidelines, in particular section 4.2.
- 21 It noted that, according to the case-law of the Court of Justice, when the Commission adopted guidelines, it was bound by them and the European Union judicature must check that the Commission has observed the rules which it has adopted. It noted that, in the present case, it followed from point 3.7 of the Guidelines that any positive aspect of the aid in question could be considered only in the context of the application of the criteria laid down in the Guidelines.
- 22 In that regard, it held that, in accordance with point 4.2.5 of the Guidelines, the Commission, after having found that the aid in question came within the scope of those guidelines, was required, first of all, to consider whether sufficient evidence had been produced that normal market outlets for the products concerned could be found. According to the General Court, in so far as, in the present case, that preliminary condition was not met, the Commission could not have approved the aid at issue without

infringing its own guidelines, so that an assessment of the objectives and beneficial effects of the aid was superfluous.

- 23 Moreover, it held that the appellant could not legitimately claim that the non-application of the Guidelines and the direct application of Article 87(3)(c) EC would have entailed taking into account the objectives and beneficial effects of the aid at issue for the purposes of finding that it was compatible with the common market. In that regard, it noted that, according to Case 310/85 *Deufil v Commission* [1987] ECR 901, paragraph 18, in the application of Article 87(3) EC the Commission has a discretion the exercise of which involves economic and social assessments which must be made in a Community context, and it does not exceed the limits of that power by considering that the granting of aid for an investment which increases production capacity in a sector in which there is already considerable overcapacity affects trading conditions to an extent contrary to the common interest and that aid of that sort is not of such a nature as to promote the economic development of the region concerned.
- 24 The General Court added that that conclusion could not be affected by the applicant's argument that the aid at issue had merely compensated for the economic disadvantages resulting from its decision to open a factory in a less economically developed area.

Forms of order sought by the parties

- 25 Holland Malt claims that the Court should:

— set aside paragraphs 168 to 180 of the judgment under appeal;

- refer the case back to the General Court or annul the contested decision, and

- order the Commission to pay the costs.

²⁶ The Commission contends that the Court should:

- dismiss the appeal, and

- order Holland Malt to pay the costs.

²⁷ The Kingdom of the Netherlands, like the appellant, claims that the judgment under appeal should be set aside and that the Commission should be ordered to pay the costs.

The appeal

²⁸ In support of its appeal, Holland Malt raises two grounds relating to the findings of the General Court concerning the second part of the second plea of the application at first instance.

- 29 The first ground of appeal alleges an error of law and inconsistent and inadequate reasoning in relation to the interpretation and application both of Article 87(3)(c) EC and of the Guidelines. The second ground of appeal alleges procedural error on account of the misreading and misrepresentation of the appellant's arguments.

The first ground of appeal, alleging an error of law and inconsistent and inadequate reasoning in relation to the interpretation and application both of Article 87(3)(c) EC and of the Guidelines

Arguments of the parties

- 30 In support of its first ground, Holland Malt adduces three parts alleging respectively an error of law in the interpretation and application of Article 87(3)(c) EC, an error of law in the interpretation and application of the Guidelines, and inconsistent and inadequate reasoning in their interpretation and application.

— The first part of the first ground of appeal

- 31 The appellant claims that the General Court erred in law in the interpretation and application of Article 87(3)(c) EC by inferring from *Deufil v Commission* that the Commission should not take into consideration the beneficial effects of a subsidy in the assessment of the compatibility of aid with the common market, where that subsidy

leads to increased production capacity in a sector in which there is already overcapacity on the market.

- ³² In that regard, it points out that the present case concerns a measure which is different from that at issue in *Deufil v Commission*. In that case, the subsidy granted was not of general interest, whereas in the contested decision the Commission acknowledged the importance of the Holland Malt project for the development of the region. Furthermore, in that case there was significant overcapacity on the market in the sector, with production capacity utilisation rates of 72% and 64%, whereas in the present case the production capacity utilisation rate exceeds 90%.
- ³³ The Kingdom of the Netherlands shares the appellant's view that the General Court erred in finding that the Commission — by failing to take into account the beneficial effects of the aid at issue — was not in breach of Article 87(3)(c) EC. It also agrees with the criticisms of the General Court's interpretation of *Deufil v Commission*. It maintains that, in the interests of the correct application of that provision, as well as to preserve its full effects, the Commission was obliged to weigh the beneficial effects of the aid at issue against its negative effects, and that it was not sufficient merely to conclude that there was no evidence of the existence of normal outlets on the malt market.
- ³⁴ In response, the Commission contends that the starting point for any analysis of the rules applicable to State aid is that Article 87(3) EC provides for exceptions to the general prohibition provided for in Article 87(1) EC, and these must be interpreted restrictively. However, the Guidelines fix only absolute minimum standards which must be respected for aid in the agricultural sector to be considered compatible with the common market. The Commission also notes that, in view of its wide margin of

discretion when assessing aid under Article 87(3)(c) EC, it may narrow that discretion by issuing guidelines as to how it will apply that provision to a particular sector or type of aid, provided that those guidelines do not depart from the rules of the Treaty. As a consequence, according to the Commission, once it has adopted such guidelines for a sector or type of aid, it may no longer depart from them. This is because, by issuing guidelines, the Commission limits the exercise of its own discretion, which consequently consists only in assessing the conditions set out in the guidelines.

35 In the present case, the Commission considers that it had to apply point 4.2.5 of the Guidelines, since the existence of normal market outlets for malt was not sufficiently shown.

36 Concerning the argument alleging misinterpretation of *Deufil v Commission*, the Commission points out that in that case the evaluation of the compatibility of the aid measure was carried out directly on the basis of Article 87(3)(c) EC, because at the time of the contested decision no other provisions were applicable to the product which would have benefited from the aid. Furthermore, with regard to the factual differences relied on by the appellant in relation to that case, the Commission contends that they are not relevant since, in the present case, the Guidelines do not mention the requirement to establish that there is significant overcapacity in the sector, but merely the requirement to show that there are normal market outlets.

— The second part of the first ground of appeal

37 According to Holland Malt, the General Court's interpretation of the Guidelines is not correct in that it introduces a preliminary condition to the Commission's assessment

of the compatibility of the aid with the common market. The General Court held that an aid measure falling within the scope of the Guidelines cannot be approved on the basis of the balancing test relating to its disadvantages and beneficial effects, as provided for in Article 87(3)(c) EC, where the condition laid down in point 4.2.5 of the Guidelines is not met. By contrast, Article 87(3)(c) EC does not contain a condition that normal market outlets must be available before the Commission can take into account the beneficial effects of the aid.

³⁸ The Kingdom of the Netherlands takes the same view as the appellant. It states that, even though the General Court held that the Guidelines could not be construed on the basis of their wording alone but must be interpreted in the light of Article 87 EC and of the objective sought by that provision, in actual fact it analysed those guidelines with reference only to their literal terms. As a result of the General Court's interpretation of the Guidelines, the test laid down in Article 87 EC is reduced to the single question of whether normal outlets exist or not. Such a restricted interpretation, which relies solely on a literal interpretation of the Guidelines, is incorrect and is detrimental to the correct application and full operation of Article 87(3)(c) EC.

³⁹ The Commission contends that the General Court's findings are not vitiated by any error of law. The balancing test provided for in Article 87(3)(c) EC is contained in the Guidelines and there is therefore no need to take into account other criteria where the aid at issue is subject to the rules set out in the Guidelines. The Commission could not take into account objectives other than those provided for in the Guidelines, if they go beyond what it established in the Guidelines. In the present case, point 4.2.5 of the Guidelines unequivocally states that no aid may be granted for investments in connection with the processing of agricultural products unless sufficient evidence is produced that normal market outlets for the products concerned can be found. This

means, according to the Commission, that if that condition is not met, the purported beneficial effects of the aid at issue cannot be weighed against its impact on trading conditions.

— The third part of the first ground of appeal

⁴⁰ According to the appellant, the reasoning in the judgment under appeal is inconsistent and inadequate as regards the interpretation of the Guidelines. In paragraphs 132 and 133 of that judgment, the General Court stated that the Guidelines cannot be understood on the basis of their wording alone or interpreted in a way which reduces the scope of Articles 87 EC and 88 EC or contravenes the aims of those provisions. On the other hand, in paragraphs 170 to 172 of the judgment under appeal, the General Court stated that the Commission was required only to take account of the criteria laid down in point 4.2.5 of the Guidelines, without interpreting them in the light of Article 87(3)(c) EC and therefore without assessing whether trading conditions were affected by the aid at issue to an extent contrary to the common interest.

⁴¹ The Kingdom of the Netherlands shares the appellant's point of view and states that the judgment under appeal is based on inadequate reasoning in respect of the interpretation and application of the Guidelines.

⁴² The Commission contends that the grounds of the judgment under appeal are not in any way inadequate or inconsistent. It states, in particular, that the General Court correctly pointed out, in paragraph 132 of the judgment under appeal, that the Guidelines must always be interpreted in the light of the objective of undistorted

competition in the common market and that it gave clear reasons, in paragraphs 173 to 177 of that judgment, why the direct application of Article 87(3)(c) EC would not entail taking account of the objectives and beneficial effects of the aid sought by Holland Malt. In that connection, the General Court stated in paragraph 176 of its judgment that the criterion referred to in point 4.2.5 of the Guidelines reflects the condition under Article 87(3)(c) EC to the effect that any aid adversely affecting trading conditions to an extent contrary to the common interest cannot be compatible with the common market.

Findings of the Court

- ⁴³ The three parts of the first ground of appeal concern the scope and interpretation of the Guidelines and are directed at the General Court's assessment relating to the second part of the second plea of the application at first instance. It is therefore appropriate to consider them together.
- ⁴⁴ In that regard, it should be noted that in the contested decision the Commission, applying point 4.2.5 of the Guidelines, held that the aid intended for Holland Malt was not compatible with the common market, in that there are no normal outlets on the market at issue. By the judgment under appeal, the General Court held, first, that in so far as the condition provided for in point 4.2.5 of the Guidelines was not fulfilled, the Commission could not have approved the contested aid. Secondly, referring to *Deufil v Commission*, it confirmed that the non-application of the Guidelines and the application of only Article 87(3)(c) EC would not have meant in the present case, contrary to the appellant's claim, that the Commission was obliged to take into consideration the beneficial effects of the aid at issue for the region concerned.

- 45 Those two findings are not vitiated by any error of law.
- 46 As is apparent from settled case-law, in the application of Article 87(3) EC the Commission enjoys wide discretion, the exercise of which involves complex economic and social assessments which must be made in a Community context (see Joined Cases C-75/05 P and C-80/05 P *Germany and Others v Kronofrance* [2008] ECR I-6619, paragraph 59 and the case-law cited). In adopting rules of conduct and announcing by publishing them that they will apply to the cases to which they relate, the Commission imposes a limit on the exercise of its aforementioned discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of general principles of law, such as equal treatment or the protection of legitimate expectations (see *Germany and Others v Kronofrance*, paragraph 60 and the case-law cited).
- 47 Therefore, according to that case-law, in the specific area of State aid, the Commission is bound by the guidelines and notices that it issues, to the extent that they do not depart from the rules in the Treaty (see Case C-288/96 *Germany v Commission* [2000] ECR I-8237, paragraph 62, and *Germany and Others v Kronofrance*, paragraph 61).
- 48 In that regard, it should be noted that, as is apparent from *Deufil v Commission*, Article 87(3)(c) EC must be interpreted as meaning that, in principle, when aid is granted in a market with overcapacity, it is such as to affect trading conditions to an extent contrary to the common interest.

- 49 Next, the fact that aid also has beneficial effects for the region or the economic sector concerned does not necessarily imply that it must be considered to be compatible with the common market. It follows from Article 87(3)(c) EC that, where an aid measure affects trading conditions to an extent contrary to the common interest, it cannot be declared compatible with the common market, irrespective of its possible beneficial effects. However, when assessing the effects on trade, the Commission must take into consideration all the characteristics of the measure and the market concerned (see Case 47/69 *France v Commission* [1970] ECR 487, paragraphs 7 to 9).
- 50 There is no ground for concluding that that interpretation of primary law should not also apply to aid in the agricultural sector. It follows from the first paragraph of Article 36 EC, which acknowledges that the common agricultural policy takes precedence over the objectives of the Treaty in the field of competition, that any application in this field of the Treaty provisions is subject to account being taken of the objectives set out in Article 33 EC, namely those of the common agricultural policy (see Case C-311/94 *Ijssel-Vliet* [1996] ECR I-5023, paragraph 31).
- 51 Therefore, when assessing the compatibility of State aid granted in that sector, the Commission must take account of the requirements of that policy, which correspond to those of the common market as a whole (see, to that effect, *Ijssel-Vliet*, paragraph 33). Among those requirements is the control of production. Thus, in particular, in the field of Community financial aid, Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain Regulations (OJ 1999 L 160, p. 80), prohibits, in Article 6, the grant of aid to investment which has as its objective an increase in production of products for which no normal market outlets can be found.

- 52 In the present case, in point 4.2.5 of the Guidelines, the Commission determined that it considered as incompatible with the common market aid in connection with the processing and marketing of agricultural products granted in the absence of normal outlets. It follows from that point that, according to the Commission, such a measure is considered to be contrary to the common interest, in the light of the characteristics of the sector it affects. Furthermore, the Commission provided, also in point 4.2.5, that when assessing such aid measures it must take into consideration the market supply of the product in question and also any restrictions on production or limits on Community support possibly provided for by the common organisation of the market. It must therefore carry out a detailed analysis of that market.
- 53 Such rules of conduct are compatible with the provisions of primary law and in particular with Article 87(3)(c) EC, applied in compliance with the objectives of the common agricultural policy. Aid granted in a market with overcapacity does indeed adversely affect trading conditions to an extent contrary to the common interest. The Commission can therefore regard as incompatible with the common market a measure to promote the development of a region or an activity where it is granted in a sector, such as the processing of agricultural products, in which any increase of production in the absence of normal outlets can adversely affect intra-Community trade to an extent contrary to the common interest, irrespective of the beneficial effects for the region of the activity concerned.
- 54 It follows that the General Court was correct to hold that, in the contested decision, the Commission correctly applied both point 4.2.5 of the Guidelines and Article 87(3)(c) EC. Having found that there were no normal market outlets for malt on the basis of a very detailed analysis of that market, the Commission was obliged to hold that the measure at issue was incompatible with the common market.

- 55 Furthermore, the factual differences between the aid at issue in *Deufil v Commission* and that at issue in the present case, as referred to by the appellant, are not relevant to the interpretation of the rules relating to the conditions of compatibility of aid provided for by Article 87(3)(c) EC.
- 56 In particular, the fact put forward by Holland Malt that the malt market does not have considerable overcapacity like the market at issue in *Deufil v Commission* does not mean that the Commission should have declined to apply point 4.2.5 of the Guidelines. It follows from that point that, with regard to the processing of agricultural products sector, an aid measure which involves even a minor increase in production is, by reason of the characteristics of that economic sector and the constraints of the agricultural policy, considered to be incompatible with the common market. Consequently, the judgment under appeal is not based on an incorrect assessment of the applicable rules as interpreted by the Court in *Deufil v Commission*.
- 57 Finally, with regard to the alleged contradiction in the reasoning of the judgment under appeal, referred to in the third part of the first ground of the appeal, it must be observed that, contrary to the appellant's claim, the General Court, after referring, in paragraphs 170 to 172 of the judgment under appeal, to the Commission's obligation to comply with the Guidelines, assessed the contested decision in the light of the provisions of primary law.
- 58 The General Court held that the contested decision, adopted on the basis of point 4.2.5 of the Guidelines, was not contrary to the relevant Treaty rules. The General Court therefore held without contradiction in the reasoning that that decision, which complies with the Guidelines, is not incompatible with a correct application of the Treaty rules.

- 59 Since the reasoning in the judgment under appeal is not contradictory, the third part of the first ground of appeal is also unfounded.
- 60 It follows from the foregoing that the entirety of the first ground relied on by the appellant in support of its appeal must be rejected.

The second ground of appeal, alleging procedural error on account of the misreading and misrepresentation of the appellant's arguments

Arguments of the parties

- 61 The appellant claims that the General Court, in paragraph 168 of the judgment under appeal, incorrectly stated that in its observations on the statement in intervention the appellant had not called into question the binding nature of the Guidelines or their compatibility with the provisions of the Treaty. It submits that, on the contrary, it maintained in that pleading that the Guidelines would fall short of the requirement under Article 87(3)(c) EC if they were interpreted as meaning that the Commission was not obliged to conduct a balancing test of the effects of the aid. In that respect, it had stated that 'in applying the provisions of its own Guidelines in a rigid and unbalanced manner, the Commission has clearly exceeded the boundaries of its discretion under Article 87(3)(c) as interpreted in the case-law of the Community Courts'.

- 62 The appellant infers therefrom that that procedural error adversely affected its interests, since the General Court should have reviewed its arguments to come to the conclusion that the Commission should have applied Article 87(3)(c) EC directly.
- 63 The Commission points out, to begin with, that even if the second ground of appeal was well founded, it can have no bearing on the assessment of the reasoning of the General Court or the conclusions it reached. The General Court did, in fact, examine whether the direct application of Article 87(3)(c) EC would have required the Commission to carry out an analysis different from that made in the contested decision on the basis of point 4.2.5 of the Guidelines.
- 64 As to the substance, the Commission observes that Holland Malt expressly stated, as is apparent from the judgment under appeal, that it did not contest that, by laying down its Guidelines, the Commission had limited its discretion.

Findings of the Court

- 65 In that regard, it should be noted that, in paragraph 168 of the judgment under appeal, the General Court indeed stated that the appellant, in its observations on the statement in intervention, did not call in question the binding nature of the Guidelines or their compatibility with the provisions of the Treaty.
- 66 Nevertheless, in paragraphs 169 to 177 of the judgment under appeal, the General Court examined whether the contested decision was compatible with the Guidelines

and whether it infringed Article 87(3)(c) EC. In other words, it examined whether the contested decision which ruled out the compatibility with the common market of the aid granted to Holland Malt solely on the basis of the characteristics of the market concerned was contrary both to the Guidelines and to that Treaty provision.

⁶⁷ The appellant cannot therefore successfully contend that the General Court did not respond to its argument that, by relying on the Guidelines, the Commission had not correctly applied that Treaty provision.

⁶⁸ It follows that the second ground of appeal is not well founded and must be rejected.

⁶⁹ It follows from the foregoing that none of the grounds relied on by the appellant in support of its appeal can be accepted and, accordingly, the appeal must be dismissed in its entirety.

Costs

⁷⁰ Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and Holland Malt has been unsuccessful, the latter must be ordered to pay the costs.

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

- 1. Dismisses the appeal;**
- 2. Orders Holland Malt BV to pay the costs.**

[Signatures]