

JUDGMENT OF THE COURT (Third Chamber)

17 September 2009*

In Case C-519/07 P,

APPEAL pursuant to Article 56 of the Statute of the Court of Justice, brought on 21 November 2007,

Commission of the European Communities, represented by H. van Vliet and S. Noë, acting as Agents,

appellant,

the other party to the proceedings being

Koninklijke FrieslandCampina NV, formerly Koninklijke Friesland Foods NV, formerly Friesland Coberco Dairy Foods Holding NV, established in Meppel (Netherlands), represented by E. Pijnacker Hordijk and W. Geursen, advocaten,

applicant at first instance,

* Language of the case: Dutch.

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Ó Caoimh, J.N. Cunha Rodrigues, J. Klučka and A. Arabadjiev (Rapporteur), Judges,

Advocate General: Y. Bot,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing of 12 March 2009,

after hearing the Opinion of the Advocate General at the sitting on 23 April 2009,

gives the following

Judgment

- 1 By its appeal, the Commission of the European Communities seeks to have set aside the judgment of the Court of First Instance of the European Communities of 12 September 2007 in Case T-348/03 *Koninklijke Friesland Foods v Commission* [2007] ('the judgment under appeal'), by which the Court of First Instance annulled, in part, Commission Decision No 2003/515/EC of 17 February 2003 on the State aid implemented by the Netherlands for international financing activities (O) 2003 L 180, p. 52; 'the contested decision'.

The national legal framework

2 The Law of 13 December 1996 amending the 1969 Law on Corporation Tax with a view to combating the erosion of the tax basis and reinforcing the tax infrastructure (*Wet tot wijziging van de wet op de vennootschapsbelasting 1969 met het oog op het tegengaan van uitholling van de belastinggrondslag en het versterken van de fiscale infrastructuur*; Stb. 1996, No 651) inserted Article 15b into the 1969 Law on Corporation Tax (*Wet op de vennootschapsbelasting 1969*; ‘the 1969 Law’), which provided for a specific tax scheme for the international financing activities of undertakings which are members of a group (‘the GFA scheme’). That scheme entered into force on 1 January 1997.

3 The first sentence of Article 15b(1) of the 1969 Law states:

‘In relation to any entity which belongs to an international group and which carries out financing activities solely in the Netherlands to the profit of entities belonging to that group which are established, or are situated, in at least four States or on two continents: at the request of the taxpayer, the inspector shall authorise, on conditions which he shall lay down, the establishment of a reserve to cover risks associated with those financing activities ...’

4 It is clear from Article 15b(3) of the 1969 Law that a taxpayer who joins the GFA scheme can set aside 80 % of its total taxable profit in a risk reserve. The amounts thus set aside can be used for various purposes as provided for by that law. Thus, according to Article 15b(5) of that law, in the event of an acquisition of shares in a Netherlands company or a foreign company, or a capital contribution to such a company, a quota, consisting of between 50 % and 100 % of the price of the acquisition or the capital contribution, can be taken from the reserve and is exempt from tax.

- 5 Article 15b(10) of the 1969 Law provides that the inspector is, at the request of the taxpayer, to grant the right to benefit from the GFA scheme and is to set out the conditions of that scheme in a decision which is open to appeal ('the GFA authorisation'). The GFA authorisation is granted for a period of 10 years.
- 6 Following the adoption of the contested decision, Article 1D of the Law of 15 September 2005 amending the 1969 Law on Corporation Tax — abolition of the financing scheme for undertakings belonging to a group (Wet van 15 september 2005 houdende wijziging van de wet op de vennootschapsbelasting 1969 — vervallen van concernfinancieringsregeling, Stb. 2005 No 468), repealed Article 15b of the 1969 Law.
- 7 Article 2 of the Law of 15 September 2005 states that, in regard to those taxpayers subject to corporation tax who, on 11 July 2001, met the conditions attached to the GFA scheme, Article 15b of the 1969 Law, and the provisions which flowed from it, remain applicable. Article 2 also provides that that transitional provision is to apply for a period of 10 years from the date on which the taxpayer was able to establish a reserve, without that period being able to extend beyond 31 December 2010.

The background to the dispute

The facts prior to the contested decision

- 8 In the course of a period of general reflection on harmful tax competition, the Council of the European Union and the representatives of the Governments of the Member States adopted, on 1 December 1997, a resolution on a code of conduct for business taxation (OJ 1998 C 2, p. 2). In that context, the Member States agreed to dismantle progressively specific tax measures categorised as harmful, while the Commission

expressed its intention to examine or re-examine, with regard to the rules governing State aid, the tax schemes in force in the Member States.

- 9 In the course of that examination, the Commission, by letter of 12 February 1999, requested details on the GFA scheme from the Kingdom of the Netherlands. Those details were provided by that Member State in a letter of 8 March 1999.
- 10 On 27 December 2000, Koninklijke FrieslandCampina NV ('KFC') submitted a request for GFA authorisation to the Netherlands tax authority.
- 11 By letter of 11 July 2001, the Commission informed the Kingdom of the Netherlands of its decision to initiate the procedure laid down in Article 88(2) EC in respect of the GFA scheme ('the 11 July 2001 decision'). That decision and the request to the interested parties to submit their observations on that scheme were published in the *Official Journal of the European Communities* (OJ 2001 C 306, p. 6).
- 12 On 26 July 2001 the Netherlands tax authority informed KFC that it was initiating that procedure. Consequently, KFC's request for GFA authorisation was suspended.
- 13 By letter of 3 October 2002, the Kingdom of the Netherlands pointed out to the Commission that, having regard to the principles of protection of legitimate expectations and respect for acquired rights, the Commission should allow those undertakings then benefiting from the GFA scheme to continue to benefit from it until the expiry of those GFA authorisations which had been granted.

- 14 On 5 December 2002, the Netherlands State Secretary for Finance adopted a decision which stated as follows:

‘I have decided that, as and from today, any new request for the application of the [GFA] scheme will not be considered.’

The contested decision

- 15 In the contested decision, the Commission declared the GFA scheme to be incompatible with the common market. However, it acknowledged in points 111 and 112 of the grounds for that decision that, in so far as that scheme was comparable to the scheme established in Belgium by Royal Decree No 187 of 30 December 1982 on the taxation of coordination centres (‘the BCC scheme’), which had been regarded as not involving aid within the meaning of Article 87(1) EC, the beneficiaries of the GFA scheme at the time of the 11 July 2001 decision could properly rely on the principle of protection of legitimate expectations. Therefore, on the basis of Article 14(1) 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), which provides, inter alia, that ‘[the] Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law’, the Commission refrained from seeking recovery of the aid received under the GFA scheme.
- 16 Furthermore, in Article 2 of the contested decision, the Commission accepted that the beneficiaries of the GFA scheme at the time of the 11 July 2001 decision could continue to benefit from that scheme until the 10-year GFA authorisations which had been granted to them by the Netherlands tax authority expired, or at the latest until 31 December 2010. In particular, taking account of the advances made at Community level in the field of combating harmful tax competition, and from the viewpoint of a progressive reduction in the number of beneficiaries of the GFA scheme, the Commission took the view, in point 118 of the grounds for the contested decision, that

the beneficiaries of that scheme could continue, in view of the ‘exceptional circumstances’, both to constitute new reserves and use existing reserves.

The facts subsequent to the contested decision

17 By letter of 11 April 2003, the Kingdom of the Netherlands requested the Commission, inter alia, to confirm in writing that the transitional scheme provided for in Article 2 of the contested decision applied also to undertakings which, although not yet benefiting from GFA authorisation, had made a request for first GFA authorisation before 5 December 2002 — the date from which every new request for such authorisation had been refused — inasmuch as those undertakings met the conditions attached to the GFA scheme at the time of the 11 July 2001 decision.

18 In a letter of 7 July 2003 the Commission stated that it was clear from point 118 of the grounds for the contested decision, and from Article 2 of the contested decision, that the transitional scheme provided for by that decision did not apply to those undertakings. It also stated that, if the Netherlands authorities were to grant GFA authorisation to the undertakings concerned, that would be equivalent to granting new aid in contravention of that decision.

19 On 21 August 2003, the Netherlands tax authority rejected KFC’s request for GFA authorisation on the ground that the Commission had adopted a negative decision in relation to the GFA scheme, as explained in the Commission’s letter of 7 July 2003.

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

- 20 Before the Court of First Instance, KFC sought the annulment of Article 2 of the contested decision in so far as it excluded from the transitional scheme for which it provides operators who, at the time of the 11 July 2001 decision, had already lodged a request for GFA authorisation with the Netherlands tax authority but whose request had not yet been determined by that date.
- 21 As is apparent from paragraph 103 of the judgment under appeal, KFC based its action on three pleas. The first of those contained two limbs, claiming, first, breach of the principle of protection of legitimate expectations and, second, that the Commission was under an obligation to determine whether there were any requests for GFA authorisation pending at the time of the 11 July 2001 decision. The second plea alleged breach of the principle of equal treatment, and the third plea alleged breach of the duty to give reasons.
- 22 The Commission, primarily, submitted two pleas of inadmissibility and, in the alternative, requested the Court of First Instance to dismiss the action as unfounded.
- 23 The Court of First Instance rejected the pleas of inadmissibility. In the first place, as regards the absolute bar owing to the lack of interest in bringing proceedings, the Court of First Instance found, in paragraph 72 of the judgment under appeal, that if the action was upheld KFC would be able to make certain claims against the Netherlands authorities in relation to benefiting from the GFA scheme or, at the very least, have them consider its request, which justifies the interest in bringing proceedings.
- 24 As regards the absolute bar owing to the lack of standing, the Court of First Instance held, in paragraphs 94 and 98 of the judgment under appeal, that KFC is directly and individually concerned by the contested decision, because it forms part of a closed

group of taxpayers whose requests for GFA authorisation were pending on the date at which the Netherlands authorities took the decision to suspend consideration of those requests.

- 25 In paragraph 99 of the judgment under appeal the Court of First Instance held that the fact that the requests of taxpayers belonging to that closed group concerned a first authorisation for the right to benefit from a given tax scheme, and not for the renewal of an existing authorisation — as was the situation in Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission* [2006] ECR I-5479 — is not such as to preclude the finding that those taxpayers are specifically affected by the contested decision.
- 26 Subsequently, the Court of First Instance upheld KFC's action and annulled Article 2 of the contested decision in so far as it excluded from the transitional scheme for which it provides those operators who, at the time of the 11 July 2001 decision, had lodged a request with the Netherlands tax authority for GFA authorisation but whose request had not yet been determined.
- 27 The Court of First Instance held that the first and second pleas, alleging breach of the principles of protection of legitimate expectations and of equal treatment respectively, were well founded.
- 28 As regards breach of the principle of protection of legitimate expectations, the Court of First Instance stated, in paragraphs 125 and 126 of the judgment under appeal, that, since that principle seeks to ensure that situations and legal relationships which are governed solely by Community law remain foreseeable, it does not concern legal situations which are governed solely by national law. Therefore, the question whether KFC is a beneficiary of the GFA, and the question whether it meets the conditions enabling it benefit from that scheme, are irrelevant for the assessment of whether it has a legitimate expectation with regard to the compatibility of the GFA scheme with Community law.

29 Referring to *Belgium and Forum 187 v Commission*, cited above, the Court of First Instance pointed out, in paragraph 127 of the judgment under appeal, that the application of the principle of protection of legitimate expectations requires a Community institution to have caused an individual to entertain expectations which are justified, on the basis of precise assurances given by that institution, as the legitimate nature of expectation required implies that a prudent and circumspect economic operator could have reasonably relied upon the situation resulting from the act or conduct of the institution in question being maintained. It also recalled that an overriding public interest may, nevertheless, preclude the protection which that principle confers.

30 In the present case, as regards, first, the existence of an expectation on the part of KFC, the Court of First Instance held, in paragraph 131 of the judgment under appeal, that for the reasons set out in points 111 and 112 of the grounds for the contested decision, referred to in paragraph 15 of the present judgment, the Commission's conduct in respect of the BCC scheme created an expectation that the GFA scheme did not constitute a prohibited aid scheme.

31 Second, as regards the legitimate nature of that expectation, the Court of First Instance held, in paragraphs 132 to 135 of the judgment under appeal, that the initiation, by the 11 July 2001 decision, of the formal investigation procedure with regard to the GFA scheme could not have pre-judged how the Commission would classify that scheme in its final decision, with the result that the 11 July 2001 decision could not, in and of itself, preclude the possibility of KFC relying on the principle of protection of legitimate expectations. In paragraph 136 of the judgment under appeal, the Court of First Instance added that, even if that decision had been liable to undermine KFC's expectation that the GFA scheme complied with the rules of the EC Treaty, KFC could have nevertheless expected that — on the basis of the Commission's earlier assessment of a similar scheme, namely the BCC scheme — the contested decision would allow it the necessary time to take stock effectively of that change of assessment regarding the compatibility of the GFA scheme with the common market.

32 In that regard, the Court of First Instance held, in paragraph 137 of the judgment under appeal, that 'the period which passed between the publication of the decision to initiate the formal procedure, that is to say 31 October 2001, and the [contested] decision was

insufficient to allow [KFC] to take into account the effect of a possible decision bringing an end to the scheme at issue. The undisputed fact that [KFC] has taken the measures it considers necessary to comply with the legal conditions attached to the GFA scheme ... implies the implementation of accounting measures and financial and economic decisions which cannot be amended within a period of less than 15 months’.

33 Third, as regards the balancing of KFC’s interest based on legitimate expectations, on the one hand, against a possible Community public-policy interest, on the other, the Court of First Instance held, in paragraph 139 of the judgment under appeal, that, since the Commission itself had accepted in the contested decision that the current beneficiaries of the GFA scheme could invoke the protection of legitimate expectations in order to secure a transitional period which would allow them to continue to benefit from that scheme, both through the use of existing reserves and by means of the creation of new reserves, no overriding interest precluded the application of the principle of protection of legitimate expectations for the benefit of KFC.

34 It is on the basis of those factors that the Court of First Instance upheld, in paragraph 140 of the judgment under appeal, KFC’s first plea in so far as it alleged breach of the principle of protection of legitimate expectations.

35 As regards the second limb of that plea, the Court of First Instance then added, in paragraphs 141 to 143 of the judgment under appeal, that the issue as to whether the Community institution in question was actually aware of the situation of the operator, which intended to rely on the protection of legitimate expectations, is unconnected with the conditions under which that principle applies. In the light of the purpose of that principle, which is to ensure that situations and legal relationships which are governed by Community law remain foreseeable, its applicability cannot depend on whether the institution which has overturned an earlier assessment was actually informed of all the legal situations and relationships the predictability of which were affected by its change in attitude. For those reasons, the Court of First Instance held that the issue of the Commission’s actual knowledge of the genuine situation of KFC at the time of the 11 July 2001 decision was irrelevant for the assessment of the plea alleging breach of the principle of protection of legitimate expectations.

- 36 Concerning KFC's second plea, alleging breach of the principle of equal treatment, the Court of First Instance held, in paragraphs 149 and 150 of the judgment under appeal, that the Commission had infringed that principle by not providing for transitional measures in respect of taxpayers whose requests were still pending on the date of the notification of the contested decision. In that regard, the Court of First Instance based itself on its assessment of the plea alleging breach of the principle of protection of legitimate expectations.
- 37 In those circumstances, the Court of First Instance took the view that it was not necessary to examine KFC's third plea.

Forms of order sought

- 38 The Commission primarily requests the Court to set aside the judgment under appeal, to dismiss KFC's action seeking annulment of the contested decision, and to order KFC to pay the costs. In the alternative, the Commission requests the Court to set aside the judgment under appeal in so far as it grants rights to operators, other than KFC, which at the time of the 11 July 2001 decision had submitted a request for GFA authorisation to the Netherlands tax authority, and to dismiss the action for annulment of the contested decision in so far as it seeks to confer rights on such operators.
- 39 KFC contends that the appeal should be dismissed and that the Commission should be ordered to pay the costs.

The appeal

- 40 In support of its appeal, the Commission submits six pleas. The first and second pleas allege that the Court of First Instance erred in law both in paragraph 66 of the judgment under appeal, by holding that KFC had an interest in bringing proceedings against the contested decision even if it did not meet the conditions laid down in Netherlands law for it to be able to benefit from the GFA scheme, and in paragraph 100 of that judgment, by finding that KFC was individually concerned by the contested decision.
- 41 The third plea alleges that the Court of First Instance erred in law when, in paragraphs 141 to 143 of the judgment under appeal, it found that the fact that the Commission was unaware of KFC's existence, of its situation, and that of the other undertakings which found themselves in an identical situation to KFC, was irrelevant for the purposes of determining whether KFC had a legitimate expectation.
- 42 The fourth plea is set out in two limbs. The first limb alleges a distortion of the facts by the Court of First Instance in paragraph 137 of the judgment under appeal, and the second alleges that the Court of First Instance erred in law in its assessment, in paragraphs 125 to 140 of the judgment under appeal, of the legitimate expectation on which KFC was relying.
- 43 The fifth plea alleges that the Court of First Instance committed an error of law in holding, in paragraphs 149 and 150 of the judgment under appeal, that the Commission had breached the principle of equal treatment by treating differently taxpayers who could all claim entitlement to the grant of a transitional period.
- 44 Lastly, the sixth plea alleges that the Court of First Instance committed an error of law in that, in its formulation of the operative part of the judgment under appeal, the Court of First Instance granted rights to all operators who had submitted a request for first GFA authorisation by 11 July 2001.

The second plea

Arguments of the parties

45 By its second plea, which it is appropriate to examine first, the Commission claims that the Court of First Instance erred in law by holding, in paragraph 100 of the judgment under appeal, that KFC was individually concerned by the contested decision. KFC was not individually concerned, according to the Commission, because that decision is a measure of general application and, as KFC was not a beneficiary of the GFA scheme, it belonged to an open group of potential beneficiaries of that scheme. The fact that KFC had submitted a request for GFA authorisation before the 11 July 2001 decision is of no consequence in that regard. In addition, the Commission was not aware of the existence of undertakings in an identical situation to that of KFC, which did not make use of the possibility, provided for by Article 88(2) EC, to submit comments in the course of the formal investigation procedure relating to the GFA scheme, initiated by the 11 July 2001 decision.

46 In particular, the Commission criticises the Court of First Instance for failing to distinguish KFC's situation, involving a request for first authorisation, from that involving a request for renewal of authorisation, as in *Belgium and Forum 187 v Commission*. According to the Commission, KFC is affected in the same way as all other undertakings which have never benefited from the GFA scheme, and is not 'specifically' affected, as the undertakings covered by the judgment in *Belgium and Forum 187 v Commission* were in relation to the BCC scheme, and for whom the existing situation would have been amended by the decision which was annulled by that judgment, which is not the case for KFC in relation to the contested decision.

Findings of the Court

47 Under the fourth paragraph of Article 230 EC, a natural or legal person may institute proceedings against a decision addressed to another person only if that decision is of direct and individual concern to the former.

- 48 In relation to the first condition set out therein, it is settled case-law that, for a person to be directly concerned by a Community measure, that measure must directly affect the legal situation of the individual and leave no discretion to its addressees who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules (Case C-386/96 P *Dreyfus v Commission* [1998] ECR I-2309, paragraph 43 and the case-law cited).
- 49 In the present case, as the Court of First Instance held in paragraph 94 of the judgment under appeal, it is clear from Article 2 of the contested decision that the Netherlands Authorities were obliged, without having any discretion whatsoever in the matter, to reject any pending request for first GFA authorisation, as the undertakings which were not beneficiaries of the GFA scheme at the time of the 11 July 2001 decision could not benefit from the transitional scheme.
- 50 In those circumstances, the Court of First Instance was correct to hold that the contested decision affected KFC directly.
- 51 As regards the second condition set out in Article 230 EC, it should be borne in mind that the fact that a disputed provision is, by its nature and scope, a provision of general application inasmuch as it applies to the traders concerned in general, does not of itself prevent it being of individual concern to some (*Belgium and Forum 187 v Commission*, paragraph 58 and the case-law cited).
- 52 However, natural or legal persons may claim that a contested provision is of individual concern to them only if it affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons (*Belgium and Forum 187 v Commission*, paragraph 59).

- 53 An undertaking cannot, in principle, contest a Commission decision prohibiting a sectoral aid scheme if it is concerned by that decision solely by virtue of belonging to the sector in question and being a potential beneficiary of the scheme. Such a decision is, vis-à-vis that undertaking, a measure of general application covering situations which are determined objectively and entails legal effects for a class of persons envisaged in a general and abstract manner (Joined Cases 67/85, 68/85 and 70/85 *Kwekerij van der Kooy and Others v Commission* [1988] ECR 219, paragraph 15; Case C-6/92 *Federmineraria and Others v Commission* [1993] ECR I-6357, paragraph 14; and Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines v Commission* [2000] ECR I-8855, paragraph 33).
- 54 By contrast, the Court has held that, where a contested measure affects a group of persons who were identified or identifiable when that measure was adopted by reason of criteria specific to the members of the group, those persons might be individually concerned by that measure inasmuch as they form part of a limited class of traders (see Case 11/82 *Piraiiki-Patraiki and Others v Commission* [1985] ECR 207, paragraph 31; Case C-152/88 *Sofrimport v Commission* [1990] ECR I-2477, paragraph 11; and *Belgium and Forum 187 v Commission*, paragraph 60).
- 55 It is not in dispute, first, that the contested decision had the effect that requests for first GFA authorisation, which were pending on the date of notification of the contested decision, were rejected without being examined and, second, that the undertakings concerned were easily identifiable, owing to the very existence of such a request, at the time when that decision was adopted. In that regard, it should be recalled that KFC was part of a group of, at most, 14 applicants for first GFA authorisation, whose requests were pending at the time of the 11 July 2001 decision, that those requests were suspended following that decision, and that the Netherlands authorities announced on 5 December 2002 that they would be ceasing, with immediate effect, to consider any new requests for the application of the GFA scheme.
- 56 Thus, as the Court of First Instance stated correctly in paragraphs 98 and 100 of the judgment under appeal, KFC formed part of a closed group of undertakings — and not

of an indefinite number of undertakings belonging to the sector concerned — specifically affected by the contested decision.

57 It should be borne in mind that, in order to benefit from the GFA scheme, an undertaking which had made a request for first GFA authorisation must have had already taken the necessary measures in order to fulfil the criteria required for that scheme. Furthermore, as the Netherlands authorities did not have any discretion in that regard, they were obliged to grant such an authorisation if those criteria were fulfilled. Thus, the undertakings whose requests for first GFA authorisation were pending must be regarded as being concerned by the contested decision, by reason of attributes which are peculiar to them and by reason of circumstances in which they are differentiated from every other undertaking in that sector which had not lodged a request for first GFA authorisation.

58 It follows that those undertakings have standing to bring an individual action against the contested decision.

59 Doubt is not cast on that finding by the Commission's argument that, first, it was unaware of the existence of undertakings in KFC's situation and, second, KFC had not made use of the possibility, provided for in Article 88(2) EC, of submitting observations in the course of the formal investigation procedure of the GFA scheme. The Commission's knowledge of the situation of the undertakings which had requested first GFA authorisation has no bearing on the fact that those undertakings may be individually affected by the contested decision.

60 Accordingly, the Court of First Instance was right to find that KFC had standing to bring proceedings.

61 It follows that the second plea must be rejected as unfounded.

The first plea

Arguments of the parties

- 62 The Commission takes the view that, by holding, in paragraph 66 of the judgment under appeal, that KFC had an interest in bringing proceedings even though it did not meet the conditions of the GFA scheme, the Court of First Instance committed an error of law. It claims that, according to settled case-law, the existence of an interest in bringing proceedings presupposes that the annulment of the contested measure would be capable, in and of itself, of having legal effects. Given that the annulment sought will be advantageous to KFC only if the Netherlands authorities state, subsequently, that it meets the conditions attached to the GFA scheme, should they not do so that annulment will have no legal effect on KFC's situation.

Findings of the Court

- 63 According to settled case-law, for an applicant to have an interest in bringing proceedings in the light of the subject-matter of the action, that action must be capable, through its outcome, of procuring an advantage to the party which brought it (see, to that effect, Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, paragraph 23; Case C-277/01 P *Parliament v Samper* [2003] ECR I-3019, paragraphs 30 and 31; order of 5 March 2009 in Case C-183/08 P *Commission v Provincia di Imperia*, paragraph 19 and the case-law cited).
- 64 In the present case, it is not in dispute that, if the contested decision had extended the transitional scheme to include requests for first GFA authorisation that were pending on the date of notification of that decision, those requests would have been considered by the Netherlands authorities. In that regard, it should be recalled that those authorities had no discretionary power, as they were obliged to grant that authorisation if the criteria required to benefit from the GFA scheme were fulfilled.

65 Thus, on the date on which it brought its action before the Court of First Instance, KFC had a vested and present interest in bringing proceedings against the contested decision, in so far as, in the event that the contested decision were annulled, its request for first GFA authorisation would be considered, with the result that KFC could join that scheme if it were to fulfil the aforementioned criteria. As the Court of First Instance correctly held in paragraphs 59 and 66 of the judgment under appeal, that fact, on its own, was sufficient to procure an ‘advantage’ to KFC for the purposes of the case-law mentioned in paragraph 63 of this judgment.

66 The Commission’s submission that KFC did not fulfil the GFA scheme’s criteria is not such as to call into question that finding, since that submission is not a legally established and undisputed fact. In the event that the present appeal is dismissed, or if the annulment of the contested decision is confirmed at the end of, or following, these proceedings, it cannot be ruled out that the Netherlands authorities will be prompted to allow KFC to benefit from the GFA scheme (see, by analogy, order in Case C-111/99 P *Lech-Stahlwerke v Commission* [2001] ECR I-727, paragraph 19).

67 In those circumstances, the Commission has not established that KFC’s action before the Court of First Instance was not capable, through its outcome, of procuring an advantage to KFC.

68 Therefore, the Court of First Instance was correct to find that KFC had an interest in bringing proceedings.

69 It follows that the first plea must be rejected.

The second limb of the fourth plea

Arguments of the parties

- 70 By the second limb of the fourth plea, the Commission claims that the Court of First Instance committed an error of law by holding, in paragraphs 125 to 140 of the judgment under appeal, that the fact that KFC may not be able to benefit from the GFA scheme is of no consequence for the application of the principle of the protection of legitimate expectations on the ground that it concerns a legal situation governed wholly by national law.
- 71 However, the issue in the present case is to determine whether Community law required the Commission to authorise the Netherlands tax authority to grant GFA authorisation to KFC in application of that principle.
- 72 As it is, according to the Commission, that principle does not apply in the present case.
- 73 In the first place, the Commission had neither provided KFC — of whose existence it was unaware — with a specific assurance that the GFA scheme was compatible with the common market, nor did it give a specific assurance to that effect in respect of KFC.
- 74 In the second place, KFC is not a prudent and circumspect economic operator within the meaning of the case-law relating to the principle of protection of legitimate expectations.

- 75 First, it is necessary, in that regard, to distinguish between the situation of an economic operator which is requesting the renewal of an authorisation which gave it access to an aid scheme previously considered compatible with the common market, as was the case in *Belgium and Forum 187 v Commission* and that of an undertaking which, like KFC, has never had such authorisation and cannot therefore rely on a legitimate expectation in order to demand that it benefit from a transitional scheme providing for the temporary maintenance of the aid scheme in question.
- 76 Second, the Commission claims that, even if one accepts that KFC made considerable investments to meet the conditions imposed by Netherlands law in order to benefit from the GFA scheme, it submitted a request to the Netherlands authorities for first GFA authorisation on 27 December 2000, although, following the publication of the resolution on a code of conduct for business taxation, referred to in paragraph 8 of the present judgment, and of the Notice on the application of the State aid rules to measures relating to direct business taxation (OJ 1998 C 384, p. 3), all prudent and circumspect economic operators knew, from 1998, that it was likely that the Commission would classify the GFA scheme as a State aid scheme and declare it incompatible with the common market. Therefore, the finding in paragraph 135 of the judgment under appeal that ‘on the basis of the decision of 11 July 2001 alone, a prudent and circumspect operator was not in a position to foresee the adoption of the [contested] decision’ is incorrect and that finding alone merits the setting aside of that judgment.
- 77 Third, the fact that it was possible, after the 11 July 2001 decision, that the Commission would adopt a decision finding that the GFA scheme did not constitute a State aid scheme, does not mean, contrary to what the Court of First Instance held in paragraph 132 of the judgment under appeal, that KFC can properly rely on the principle of protection of legitimate expectations.
- 78 In the third place, as regards the balancing of interests, the Commission takes the view that KFC’s expectation would, in any event, be of a very general nature and that there is no logical connection between, on the one hand, the finding that the actual beneficiaries of the GFA scheme can rely on the principle of protection of legitimate expectations

and, on the other, the Court of First Instance's finding that there is no overriding Community interest which precludes KFC from effectively relying on that principle.

79 Lastly, the judgment under appeal will encourage, in the future, any operators which have submitted a request for aid before the initiation of the procedure laid down in Article 88(2) EC to bring an action for annulment.

80 KFC contends, first, that the case-law of the Court does not require that the legitimate expectation to be protected must be based on actual assurances given by a Community institution. Thus, it is contradictory on the Commission's part to accept, as it did in the contested decision, that its decision regarding the BCC scheme gave rise to a legitimate expectation, and to state, as it did in its appeal application, that the decision concerns 'merely a decision relating to another slightly similar aid scheme', and not a specific assurance in respect of KFC. Furthermore, none of the undertakings covered by the transitional scheme provided for by the contested decision had received such an assurance.

81 Next, as regards whether KFC should be classified as a prudent and circumspect economic operator, KFC contends that there is no reason to classify those beneficiaries of the BCC scheme awaiting a decision relating to their request for renewal of authorisation in the context of that scheme as prudent and circumspect economic operators, while not classifying KFC, which was awaiting a response to its request for first GFA authorisation, in the same way. Moreover, as the Court of First Instance stated, the 11 July 2001 decision could not, according to KFC, result in its legitimate expectation — as regards the compatibility of the GFA scheme with the common market — ceasing to exist from that date. A fortiori, that legitimate expectation could not have ceased to exist prior to that decision.

82 Lastly, concerning the balancing of interests, the issue of whether KFC's legitimate expectation is 'very general in nature' or otherwise is irrelevant. Once a legitimate expectation is established, whatever the means by which the Commission brought it about, the interest of the legal person concerned must be balanced against the Community interest.

83 In any event, the Commission in no way explains how the Community interest precludes the benefit of a transitional scheme being granted to 14 undertakings whose requests for first GFA authorisation were pending on the date of the contested decision. Furthermore, neither the scope of the aid granted, or to be granted, nor the number of undertakings which can rely on the principle of the protection of legitimate expectations can affect the application of that principle. Lastly, as situations such as those at issue are rare, the judgment under appeal will not, according to KFC, lead to a rush to aid schemes which have not been notified.

Findings of the Court

84 The Court has repeatedly held that the right to rely on the principle of the protection of legitimate expectations extends to any person in a situation where a Community institution has caused him to entertain expectations which are justified by precise assurances provided to him. However, if a prudent and alert economic operator could have foreseen the adoption of a Community measure likely to affect his interests, he cannot plead that principle if the measure is adopted (see, to that effect, *Belgium and Forum 187 v Commission*, paragraph 147 and the case-law cited).

85 Furthermore, even if the European Community had first created a situation capable of giving rise to legitimate expectations, an overriding public interest may preclude transitional measures from being adopted in respect of situations which arose before the new rules came into force but which are still subject to change (*Belgium and Forum 187 v Commission*, paragraph 148 and the case-law cited).

86 The Court has also held that, in the absence of an overriding public interest, the Commission will have infringed a superior rule of law if it fails to couple the repeal of a set of rules with transitional measures for the protection of the expectations which a trader might legitimately have derived from the Community rules (*Belgium and Forum 187*, paragraph 149 and the case-law cited).

87 In the light of the foregoing, it should be borne in mind, first, that, in points 111 and 112 of the grounds for the contested decision, the Commission itself took the view that the GFA scheme is similar to the BCC scheme and that, having found in its decision of 2 May 1984 on the BCC scheme [Fourteenth Report on Competition Policy (1984) p. 271] that the system on which the BCC was based did not constitute aid within the meaning of Article 92(1) of the EEC Treaty (subsequently Article 92(1) of the EC Treaty, now Article 87(1) EC), it was accepting the arguments of the Kingdom of the Netherlands and the interested third parties concerning the existence of a legitimate expectation on the part of the beneficiaries of the GFA scheme, thus refraining from ordering recovery of the aid granted.

88 It is important to emphasise, however, that KFC was in a different situation to that of those taxpayers who the Commission had accepted, in points 113 to 118 of the grounds for the contested decision, were entitled to have a legitimate expectation, since KFC was not a beneficiary of the GFA scheme but had merely submitted a request for first GFA authorisation.

89 Even if, as KFC claims, the inspector is required to grant GFA authorisation to any taxpayer who makes a request and satisfies the statutory conditions necessary to benefit from it, it is nevertheless true that Netherlands law requires the adoption of a decision by the inspector — after ascertaining that the taxpayer satisfies those statutory conditions — which can itself, moreover, be subject to conditions.

90 In addition, the situation of taxpayers who have submitted a request for first GFA authorisation cannot be properly compared to that of taxpayers who have submitted a request for renewal of authorisation under the BCC scheme, with regard to whom the Court recognised the existence of a legitimate expectation in its judgment in *Belgium and Forum 187 v Commission*.

91 In that judgment, the Court took account of the significant investments which those undertakings, which were benefiting from authorisation under the BCC scheme and were requesting renewal, had made, and of the long-term commitments which they had

undertaken. Those who have requested a first GFA authorisation are not, in principle, in the same situation as a taxpayer who is already a beneficiary of the GFA in relation to investments and commitments.

92 It should, in that regard, be pointed out that KFC has never referred specifically to investments already made or to commitments already undertaken. It is clear, on the contrary, from the position it adopted before the Court of First Instance, as summarised in paragraph 51 of the judgment under appeal, that 'if the Commission had not adopted the contested decision, it [KFC] could have increased, from 2000, its risk reserve before the definitive tax assessment was established.' Likewise, KFC refers to decisions which it could have adopted in relation to risk reserves and the location of the seat of the financing company.

93 Those various elements show that KFC challenges the fact of not being able to benefit, in the future, from the advantage of GFA authorisation.

94 Such a situation is different from that of beneficiaries of GFA authorisation which, if the transitional measures had not been adopted, would have suffered losses owing to investments made and commitments undertaken in the past, at a time when the legality of the tax scheme in question had not been in doubt.

95 Consequently, by holding, in paragraph 140 of the judgment under appeal, that the Commission had infringed the principle of protection of legitimate expectations by not allowing KFC to benefit from the transitional scheme provided for by the contested decision, the Court of First Instance erred in law.

96 It follows that the second limb of the fourth plea is well founded.

The third plea and the first limb of the fourth plea

- 97 As the second limb of the fourth plea has been upheld, it is not necessary to examine either first limb of the fourth plea, or the third plea.

Fifth plea

Arguments of the parties

- 98 The Commission considers that the Court of First Instance committed an error of law by holding that KFC could rely on the principle of equal treatment. It claims, *inter alia*, that on any view KFC cannot be equated with undertakings benefiting from the GFA scheme which submitted observations in the course of the procedure initiated by the 11 July 2001 decision and for whom the Netherlands authorities requested the establishment of a transitional scheme.
- 99 KFC takes the view that that plea must be held to be inadmissible to the extent to which it concerns factual issues, and should be rejected as to the remainder. In that connection, it points out that, as regards the principle of equal treatment, the only relevant question is whether there are objective differences of such significance as to justify different treatment. However, none of the alleged differences put forward by the Commission regarding the respective situations of KFC and undertakings benefiting from GFA authorisation at the time of the 11 July 2001 decision is capable of justifying such a difference in treatment.

Findings of the Court

- 100 It is settled case-law that a breach of the general Community law principle of equal treatment arises through the application of different rules to comparable situations or the application of the same rule to different situations (see, inter alia, Case C-390/96 *Lease Plan* [1998] ECR I-2553, paragraph 34, and Case C-156/98 *Germany v Commission* [2000] ECR I-6857, paragraph 84).
- 101 In the present case, it is common ground that the Commission treated differently, in the contested decision, those undertakings benefiting from the GFA scheme and those undertakings whose requests for first GFA authorisation were pending on the date of that decision, by granting a transitional scheme to the former and not to the latter.
- 102 It is clear from paragraphs 87 to 94 of the present judgment that that difference of treatment was justified, as the criterion which established the difference describes objectively different situations regarding those two categories of undertakings.
- 103 Therefore, by holding, in paragraphs 149 and 150 of the judgment under appeal, that in the contested decision the Commission had infringed the principle of equal treatment by not allowing KFC to benefit from the transitional scheme on the ground that, in so doing, the Commission had treated individuals in a similar situation differently in respect of the legitimate expectation which they could have had in the granting of a reasonable transitional period, the Court of First Instance erred in law.
- 104 It follows that the fifth plea is well founded.

105 Having regard to all of the foregoing, and without it being necessary to examine the sixth plea, the judgment under appeal must be set aside.

The action before the Court of First Instance

106 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice, in the event that the decision of the Court of First Instance has been quashed, the Court may itself give final judgment in the matter, where the state of the proceedings so permits, or it may refer the case back to the Court of First Instance for judgment.

107 In the present case, while it is clear from paragraphs 84 to 95 of this judgment that the first limb of the first plea submitted by KFC in support of its action against the contested decision is unfounded, it is necessary to examine the second limb of that plea and the second and third pleas submitted in support of its action.

108 The reply, in particular to the third plea, alleging infringement of the duty to give reasons, implies a factual assessment on the basis of information which was not considered by the Court of First Instance.

109 It follows that the state of proceedings does not permit the Court to give final judgment, with the result that it is necessary to refer the matter back to the Court of First Instance for it to rule on the second limb of the first plea, and the second and third pleas.

Costs

- 110 As the case is being referred back to the Court of First Instance, it is appropriate to reserve the costs relating to the present appeal proceedings.

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

- 1. Sets aside the judgment of the Court of First Instance of the European Communities of 12 September 2007 in Case T-348/03 *Koninklijke Friesland Foods v Commission*;**
- 2. Refers the case back to the Court of First Instance of the European Communities;**
- 3. Reserves the costs.**

[Signatures]