

JUDGMENT OF THE COURT (First Chamber)

2 September 2010*

In Case C-290/07 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 14 June 2007,

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

appellant,

the other parties to the proceedings being:

Scott SA, established in Saint-Cloud (France), represented by J. Lever QC, R. Griffith and M. Papadakis, Solicitors, and by P. Gardner and G. Peretz, Barristers, with an address for service in Luxembourg,

applicant at first instance,

* Language of the case: English.

supported by:

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

intervener in the appeal,

French Republic, represented by G. de Bergues, S. Seam and F. Million, acting as Agents,

intervener at first instance,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, E. Levits (Rapporteur), J.-J. Kasel, M. Safjan and M. Berger, Judges,

Advocate General: P. Mengozzi,
Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 17 December 2009,

after hearing the Opinion of the Advocate General at the sitting on 23 February 2010,

gives the following

Judgment

- ¹ By its appeal, the Commission of the European Communities requests the Court of Justice to set aside the judgment of 29 March 2007 in Case T-366/00 *Scott v Commission* [2007] ECR II-797 ('the judgment under appeal'), by which the Court of First Instance of the European Communities (now 'the General Court') annulled Article 2 of Commission Decision 2002/14/EC of 12 July 2000 on the State aid granted by France to Scott Paper SA/Kimberly-Clark (OJ 2002 L 12, p. 1; 'the contested decision') in so far as it related to aid granted in the form of a preferential price for developed land.

Legal context

- 2 Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty (OJ 1999 L 83, p. 1) is intended, in essence, according to the second recital in its preamble, to codify and reinforce the Commission's consistent practice for the application of Article 88 EC, in accordance with the case-law of the Court.
- 3 Article 6(1) of Regulation No 659/1999 provides that the decision to initiate the formal investigation procedure with regard to new notified aid is to 'call upon the Member State concerned and upon other interested parties to submit their comments within a prescribed period which is normally not to exceed one month', but which may be extended in duly justified cases.
- 4 Article 10(3) of Regulation No 659/1999 provides:

'Where, despite a reminder ... the Member State concerned does not provide the information requested within the period prescribed by the Commission, or where it provides incomplete information, the Commission shall by decision require the information to be provided...'

Facts

- 5 Scott Paper Company is an American company engaged in the manufacture of paper for sanitary and household use. To enable the construction of a manufacturing plant

in France, Bouton Brochard Scott SA – of which Scott SA ('Scott'), a French subsidiary of the American company, is the successor in title – acting together with the Département du Loiret and the City of Orléans in accordance with an agreement dated 12 September 1987, entrusted the task of carrying out all the studies and work necessary for the development of the land required for that factory (a plot of approximately 68 hectares) to the Société d'économie mixte pour l'équipement du Loiret ('Sempel').

- 6 The land in question had been sold to Sempel, for the nominal figure of FRF 1, by the City of Orléans, which had itself acquired the land earlier through three transactions: 30 hectares in 1975, 32.5 hectares in 1984 and 5.5 hectares in 1987. The City of Orléans and the département of Le Loiret undertook to cover the costs of developing the site up to a maximum of FRF 80 million.

- 7 At the end of 1987, Sempel sold Scott a parcel of the developed land – 48 hectares out of the 68 hectares available – for the sum of FRF 31 million (approximately EUR 4.7 million), in accordance with an agreement concluded on 31 August 1987 between the City of Orléans, the département of Le Loiret and Scott ('the Scott agreement').

- 8 That sale was not notified to the Commission under the rules on State aid.

- 9 In January 1996, Scott's shares were purchased by Kimberly-Clark Corp, which announced the closure of the manufacturing plant in January 1998. The plant's assets – namely, the site and its improvements – were purchased by Procter & Gamble in June 1998.

- 10 Following a report by the French Cour des comptes (Court of Auditors) for 1996 which commented on the sale of the parcel of land to Scott, the Commission received a complaint. In May 1998, it decided to initiate the procedure provided for under Article 88(2) EC, which led to the adoption of the contested decision.
- 11 The contested decision, as amended by the corrigendum of 2 March 2001, declared incompatible with the common market the State aid implemented in favour of Scott in the form of a preferential purchase price for 48 hectares of land – worth an amount assessed at FRF 39.588 million (approximately EUR 6.03 million) or, at present-day values, FRF 80.77 million (EUR 12.3 million) – and the application of the water treatment levy at a preferential rate, the value of which is to be determined by the French authorities. Article 2 of that decision required repayment of the amounts already unlawfully made available in that way.

The procedure before the Commission

- 12 Between January 1997 and April 1998, the Commission sent the French authorities various requests for information, to which the latter replied in part.
- 13 On 20 May 1998, the Commission decided to initiate the procedure provided for under Article 88(2) EC and informed the French authorities accordingly by letter of 10 July 1998. That decision was the subject of a notice published in the *Official Journal of the European Communities* of 30 September 1998 (OJ 1998 C 301, p. 4) and granted the parties concerned a period of one month from that publication for the submission of their comments.

- 14 Scott and the French authorities submitted their comments to the Commission on 23 and 25 November 1998 respectively.
- 15 Since additional requests for information sent to the French authorities, with a view to establishing the market value of the land at issue, were only partly answered, the Commission enjoined those authorities, on 8 July 1999, pursuant to Article 10(3) of Regulation No 659/1999, to provide it with ‘all the documents, information and data necessary to assess the elements of the aid and the compatibility of the measures in favour [of Scott]’. That injunction also identified certain documents and specific information. It received only a partial response from the French authorities, on 15 October 1999.
- 16 Following a meeting on 7 December 1999 between the representatives of the Commission and those of the French Government, accompanied by representatives of Scott, the Commission authorised the submission, up to the end of 1999, of further evidence in relation to the aid in question.
- 17 In response to that invitation, Scott sent the Commission a letter on 24 December 1999 containing certain additional information (‘the Scott letter’). The French authorities sent similar information by letters of 7 January and 21 February 2000.
- 18 On 12 January and 22 February 2000, the Commission informed Scott that it could not place the additional comments contained in the Scott letter on the administrative file.

- 19 On the basis of all the information and evidence in its possession, the Commission adopted the contested decision.
- 20 After stating, in recital 29 of that decision, that the land at issue had neither been sold to Scott by means of an unconditional bidding procedure nor independently valued and, while pointing out on several occasions – in particular, in recitals 31, 32, 97, 160, 166 and 168 of that decision – that it had unsuccessfully attempted to obtain from the French authorities complete information so as to be able to examine the aid at issue, the Commission determined the amount of unlawful aid to be recovered.
- 21 To that end, the Commission proceeded to compare the market price of a similar parcel of land with the price actually paid by Scott.
- 22 In order to determine what could have been the market price in 1987 of the land at issue, the Commission considered the costs incurred by the City of Orléans in order to acquire that land and to carry out the improvements required for the construction of Scott's factory.
- 23 With regard to the undeveloped land, the Commission relied on the average price paid by the City of Orléans at the time of the three land transactions, between 1975 and 1987, by which it had acquired the land of which the 48 hectares at issue formed part. That amount – FRF 10.9 million – was corroborated by the minutes of the meeting of the City Council of Orléans of 27 May 1994 and roughly tallied with the assessment proposed by the French authorities in their letters of 17 March and 29 May 1997, as emerges from recital 15 of the contested decision.

- 24 With regard to the improvement operations carried out on the land at issue, recital 19 of that decision reveals that the Commission accepted the costs incurred by Sempel according to its statement of final account, namely, FRF 140.4 million.
- 25 After deducting from that amount, inter alia, Sempel's borrowing costs and the price of FRF 31 million paid by Scott for the land at issue, the Commission found that the public aid paid to Scott amounted to FRF 39.588 million.
- 26 Accordingly, the enacting terms of the contested decision were worded as follows:

'Article 1

The state aid in the form of a preferential land price and a preferential rate of water treatment levy granted by France to Scott and amounting, in the case of the land price, to FRF 39.58 million (EUR 6.03 million) or, at present value, FRF 80.77 million (EUR 12.3 million) and, in the case of the second advantage, to a value which the French authorities will have to calculate using a method worked out by the Commission is incompatible with the common market.

Article 2

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

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

Article 3

France shall inform the Commission, within two months of notification of this decision, of the measures taken to comply with it.

Article 4

This Decision is addressed to the French Republic.’

The procedure before the General Court and the judgment under appeal

²⁷ In support of its action for partial annulment of the contested decision, Scott relied on four pleas in law alleging, *inter alia*, breach of essential procedural requirements in that the Commission had not taken into account certain documents and information sent by Scott before the deadline specified in the decision initiating the investigation procedure. In addition, Scott alleged, by its fourth plea, that the Commission had

made various errors of assessment in fixing the amount of the aid, in particular in the breakdown of the FRF 31 million paid by Scott for the land at issue.

- 28 The Commission contended that the action should be dismissed in its entirety, but also admitted, in its defence pleadings, that it had made an error in deciding that the sum of FRF 31 million paid by Scott had been to acquire the plot of 68 hectares and not the parcel of land at issue. Accordingly, it corrected the contested decision on 21 March 2001 and correspondingly reduced the amount of the aid to be recovered.
- 29 As a preliminary point, the General Court analysed the admissibility – disputed by the Commission – of four documents appended by Scott to its application. In that respect, the General Court stated in paragraph 44 of the judgment under appeal that those documents had been validly appended to the application initiating proceedings and therefore formed part of the file before the Court. The General Court accordingly held that the admissibility of those documents was not in question. It pointed out that the Commission was really arguing that those documents should not be taken into consideration by the Court in its assessment of the legality of the contested decision in as much as they did not form part of the Commission’s file during the administrative procedure.
- 30 After ruling on three of those documents, accepting the Commission’s arguments in relation to the first two and rejecting the objection of inadmissibility raised in relation to the third, the General Court held that the Commission had been wrong in refusing to place the Scott letter on the administrative file.
- 31 In particular, the General Court stated in paragraphs 58 to 61 of the judgment under appeal that, in the light of the circumstances of the case and the fact that the Commission had accepted similar information contained in the letters of 7 January and 21 February 2000 from the French authorities, it should have taken into consideration the information contained in the Scott letter.

- 32 In consequence, the General Court held, in paragraph 63 of the judgment under appeal, that that letter could be relied upon by Scott for the purposes of challenging the legality of the contested decision. On that basis, the Court directly examined the fourth plea for annulment, relating to the fact that errors of assessment had been made in the valuation of the contested aid.
- 33 In that regard, the reasoning of the General Court was set out in three stages.
- 34 First, the General Court identified errors made by the Commission as regards the method followed and the calculations made, and inaccuracies in the data which it had used for its assessments.
- 35 In particular, the General Court noted that, in seeking to assess the market value of the land at issue on the basis of the ‘costs-based’ method, the Commission had erred both in its choice of method and even in its application of the method chosen.
- 36 Thus, in the first place, the General Court held in paragraph 106 of the judgment under appeal that, by choosing the costs-based method to establish the value of the undeveloped land at issue, the Commission had relied on secondary and indirect information.
- 37 In the second place, the General Court held in paragraphs 110 and 111 of the judgment under appeal that the Commission had made an error of calculation in the determination of the purchase price paid for the land at issue by the City of Orléans, which led the undeveloped land at issue to be attributed a value close to the figure estimated by the French authorities during the administrative procedure, as referred to in recital 15 of the contested decision. The General Court held, in paragraph 111 of the judgment under appeal, that even though that error worked in Scott’s favour, that did not make it excusable. As it was, if that error had not been made, the Commission

might have recognised that the information contained in the minutes of the meeting of the City Council of Orléans of 27 May 1994 did not necessarily confirm its findings.

- 38 Furthermore, the General Court held, in paragraphs 114 to 119 of that judgment, that the information used by the Commission was inaccurate. Thus, since the land sold to Scott had been purchased by the French local authorities in three stages over a period stretching from 1975 to 1984, the Commission could not take the average price of those transactions as a basis for assessing the market value in 1987 of the undeveloped land at issue.
- 39 Likewise, with regard to the assessment of the value of the improvements of the land at issue, the General Court identified, in paragraphs 120 to 122 of the judgment under appeal, evidence which should have made the Commission question the reliability of the method it was using in that regard, namely, the costs incurred by Sempel for making those improvements. In particular, the Court noted that the Commission had not taken account of the discrepancy between the surface area of the factory to be constructed as referred to in the Scott agreement and the surface area of the factory actually constructed as referred to in the minutes of the meeting of the City Council of Orléans of 27 May 1994. Similarly, no account was taken of the discrepancy between the cost of the works to be undertaken as quoted in the Scott agreement and the cost of the works according to Sempel's statement of final account. The General Court considered that, at the very least, the Commission should have questioned Scott about the discrepancies thus revealed.
- 40 Secondly, the General Court held that, if the Commission had taken due account of the information and the valuations contained in the Scott letter and in the series of observations from the French authorities, it should have noticed the serious discrepancies with regard to the assessment of the market value of the land at issue. In paragraphs 137 and 138 of the judgment under appeal, the Court found that, in the face of such doubts, the Commission should necessarily have made use of other means of assessment – such as the opinion of an independent expert – in order to determine the market value of the land at issue, or, at the very least, to request more detailed

information from Scott and the French authorities with regard to the valuations upon which they had relied in their comments.

- ⁴¹ Thirdly, the General Court held that the Commission could not shelter behind its right to adopt a decision in respect of State aid on the basis only of the available evidence, when, following an injunction to provide information, the Member State concerned had not shown the cooperation required.
- ⁴² On the basis of that threefold reasoning, the General Court held that, by the contested decision, the Commission had acted in breach of its obligation to conduct the investigation procedure referred to in Article 88(2) EC in a diligent manner and, accordingly, upheld the fourth plea in law. In consequence, without examining the other three pleas, the General Court annulled Article 2 of the contested decision.

Forms of order sought

- ⁴³ By its appeal, the Commission claims that the Court should:
- set aside the judgment under appeal and give judgment on the matters subject to appeal, or, for any matter for which it considers that the state of the proceedings does not permit it to give judgment, to refer the case back to the General Court for a decision;

— order Scott to bear, as well as its own costs, those incurred by the Commission both before the General Court and the Court of Justice;

— order the French Republic to bear its own costs, incurred both before the General Court and the Court of Justice.

⁴⁴ Scott contends that the Court should dismiss the appeal and order the Commission to pay the costs of the appeal.

⁴⁵ The Département du Loiret, which, by Order of the President of the Court of 17 July 2008, was granted leave to intervene in support of Scott, contends that the Court should dismiss the appeal and order the Commission to pay the costs.

The appeal

⁴⁶ The grounds of appeal put forward by the Commission are directed, in particular, against the various branches of the General Court's reasoning in the judgment under appeal.

⁴⁷ Thus, in particular, the 9th to 12th grounds of appeal, which it is appropriate to examine first, are directed against the first branch of the General Court's reasoning.

The 9th to 12th grounds of appeal alleging, in essence, that the General Court exceeded the bounds of its jurisdiction to review acts of the institutions (its 'review jurisdiction')

Arguments of the parties

- 48 According to the terms of its 9th ground of appeal, the Commission takes issue with the fact that the General Court held – in particular, in paragraphs 105 to 108 of the judgment under appeal – that, for the purposes of assessing the value of the land at issue and its improvements, the Commission was wrong in choosing the costs-based method used by the French authorities and that it had thereby acted in breach of its obligation to examine the facts of the case impartially and diligently.
- 49 According to the Commission, however, given the absence, at the date of the grant of the aid in question, of any valuation of that land or of the organisation of a public call for tenders, it was justified in using such a method.
- 50 On that point, first, the Commission submits that it has a broad discretion in the choice of method for assessing the value of the land and its improvements.
- 51 Secondly, it maintains that the costs-based method is particularly suitable in the case of a transaction consisting in the sale of land with improvements adapted to the needs of the aid recipient.

- 52 By taking the approach that it did, the General Court placed the Commission under a duty to request further information from the French authorities and Scott, or even to have recourse to an independent expert, in circumstances in which it is nevertheless justified in using the costs-based method, as is apparent from the Commission Communication on State aid elements in sales of land and buildings by public authorities (OJ 1997 C 209, p. 3; 'the 1997 Commission Communication').
- 53 Lastly, contrary to the General Court's finding in paragraph 139 of the judgment under appeal, the Commission had no reason to give preference to the price of the land at issue as it appeared from the sales transaction between Scott/Kimberly-Clark and Procter & Gamble in 1998, in order to determine the value that the property would have had 11 years earlier.
- 54 Scott contends that the Commission's objections are based on a misunderstanding of the judgment under appeal. Thus, the General Court found fault with the Commission, not for relying on the costs-based method, but for failing to consider other methods of assessing the value of the land at issue.
- 55 The Département du Loiret argues that the Commission was under a duty to study all methods for assessing the value of the land at issue, so as to select only the most reliable. As it is, the costs-based method used by the Commission is merely a secondary option as compared with the direct methods of valuation.
- 56 In the context of the 10th ground of appeal, the Commission submits that it relied on the assessment of the value of the property at issue which was the most advantageous to Scott. Furthermore, and contrary to the findings of the General Court, it was not for the Commission to clarify the discrepancies between the costs as shown in Sempel's accounts and the amount decided on in the Scott agreement.

- 57 In that regard, Scott replies that the General Court simply held that the Commission could not take the expenditure incurred by Sempel as the basis for assessing the market value of the improvements carried out on the land at issue.
- 58 In the context of the 11th ground of appeal, the Commission criticises the General Court for holding, in paragraph 118 of the judgment under appeal, that the minutes of the meeting of the City of Orléans Council of 27 May 1994 contained only a very brief summary regarding the cost of the undeveloped land, with no detailed explanation. In so doing, the General Court exceeded its review jurisdiction in an area in which the Commission enjoys a broad discretion.
- 59 In contrast, Scott contends that the references, made by the Commission in its appeal, to the meeting of the City of Orléans Council are incorrect in the light of the annexes provided by the Commission itself. Accordingly, Scott contends that that evidence must be rejected.
- 60 In the context of the 12th ground of appeal, the Commission claims that the General Court erred in law by holding, in paragraph 125 of the judgment under appeal, that the Commission should have taken account of the value of the undeveloped land at issue as assessed for the purposes of the tax audit carried out by the French authorities in 1993. In so doing, the General Court exceeded its jurisdiction.
- 61 Scott argues that, rather than relying on the costs-based method, it would have been more fitting to have accepted the valuation placed on the land at issue by the tax authorities.

Findings of the Court

- 62 First of all, it should be noted that the question whether the General Court was fully entitled to conclude, on the basis of the facts before it for assessment, that the Community institutions had, or had not, failed in their duty to act diligently is a question of law which is subject to review by the Court of Justice on appeal (see Case C-535/06 P *Moser Baer India v Council* [2009] ECR I-7051, paragraph 34).
- 63 It follows that the Commission's grounds of appeal relating to such a finding are admissible.
- 64 As regards the merits of those grounds of appeal, it should be noted that although, in the area of State aid, the Commission enjoys a broad discretion the exercise of which involves economic assessments which must be made in a European Union context, that does not imply that the European Union judicature must refrain from reviewing the Commission's interpretation of economic data.
- 65 According to the case-law of the Court, not only must the European Union judicature, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the relevant information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-987, paragraph 39).
- 66 However, when conducting such a review, the European Union judicature must not substitute its own economic assessment for that of the Commission (Case C-525/04 P *Spain v Lenzing* [2007] ECR I-9947, paragraph 57). The review by the European

Union judicature of the complex economic assessments made by the Commission is necessarily limited and confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or misuse of powers (see Joined Cases C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P *GlaxoSmithKline Services and Others v Commission and Others* [2009] ECR I-9291, paragraph 163).

- ⁶⁷ It is in the light of those criteria, relating to the scope of the review which, according to the case-law, the European Union judicature may carry out, that it is necessary to examine the 9th to 12th grounds of appeal on the basis of which the Commission complains that the General Court exceeded its jurisdiction by holding that the Commission had acted in breach of its duty to exercise due diligence in determining the market value of the land at issue and, in consequence, the amount of the State aid in question. In that regard, the 9th and 10th grounds of appeal relate to the assessment of the value of the improvements carried out on the land at issue and the 11th and 12th grounds of appeal relate to the assessment of the property value of that land.

– The choice of the costs-based method and the assessment of the market value of the undeveloped land at issue

- ⁶⁸ First of all, as was observed by the Advocate General in points 138 and 139 of his Opinion, in order to determine whether the sale of land by the public authorities to a private individual constitutes State aid, the Commission must apply the private investor test, to determine whether the price paid by the presumed recipient of the aid corresponds to the selling price which a private investor, operating in normal competitive conditions, would be likely to have fixed. As a rule, the application of that test requires the Commission to make a complex economic assessment (see, to that effect, Case C-56/93 *Belgium v Commission* [1996] ECR-I 723, paragraphs 10 and 11,

and Joined Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia v Commission* [2003] ECR I-4035, paragraphs 38 and 39).

- 69 In the present case, it is common ground that the Commission had to calculate the market value of land which had been sold in 1987, that is to say, it had to make that calculation 13 years after the sale in question took place.
- 70 Nor is it disputed that the sale of the land at issue to Scott took place without either an unconditional bidding procedure or a valuation by an independent expert. As a consequence, as was observed by the General Court in paragraph 96 of the judgment under appeal, the Commission's task was correspondingly complex and could not lead to anything but a rough estimate of the market value of the land at issue.
- 71 In order to reach an assessment of the value of the land at issue and the improvements carried out and to determine accordingly the amount of aid at issue, the Commission relied on the costs of purchase and improvement of that land.
- 72 Although, as is apparent from the 1997 Commission Communication, use of an independent expert is a method by which an assessment of the market value of land can be obtained, the fact remains that the General Court exceeded its review jurisdiction in so far as it merely held that, by giving preference to the costs-based method, the Commission had acted in breach of its duty to exercise due diligence, but did not demonstrate that the information thus overlooked could have led to a different assessment of the aid value. Moreover, the General Court failed to identify any manifest error of assessment.

- 73 As it is, by applying that method, the Commission arrived at a market value for the undeveloped land at issue – FRF 10.9 million – which roughly tallies with the information produced by the French authorities during the administrative procedure and which is borne out by the minutes of the meeting of the City of Orléans Council of 27 May 1994.
- 74 In that regard, it should be noted that the key information relied on by the Commission in those minutes is clearly identifiable. The minutes refer to an assessment of the property value of the undeveloped land at issue at the time of its sale to Scott. Consequently, the mere allegation by Scott that the Commission's references to those minutes clearly do not correspond to the document which the Commission appended to its appeal is not enough to cast doubt on the admissibility of that evidence.
- 75 Moreover, and for the reasons outlined by the Advocate General in points 160 to 163 of his Opinion, the Commission had no compelling reason to doubt the reliability of that information, in so far as it emanated from one of the public authorities involved in the transaction and, in the words of the minutes themselves, represented a preliminary official assessment of the 'property value' of the land at issue.
- 76 That said, it should also be noted that, in its calculation of the amount of the advantage received by Scott, the Commission did indeed make a technical error in equating Scott's land with all the parcels of land purchased by the City of Orléans between 1975 and 1987. However, it has not been shown that, in the absence of that error, the Commission would inevitably have questioned the reliability of the information it had used, as found by the General Court in paragraph 113 of the judgment under appeal.

- 77 First, the market value accepted by the Commission for the land at issue – FRF 16/m² – corresponded approximately to the average price proposed by the French authorities in their letters of 17 March and 29 May 1997, namely FRF 15/m².
- 78 Secondly, given that the Commission stated several times that it had accepted a very cautious assessment of that value, note must be taken of the fact that the calculation error identified by the General Court benefited Scott.
- 79 Lastly, even though it may be regrettable that the approach of the Commission was not completely logical in relation to the determination of the purchase costs of the undeveloped land at issue in so far as it took into account the average price of the three staggered transactions made between 1975 and 1987 for the purposes of determining the market value of the land at issue, the original plot not having been identified, the fact nevertheless remains that, confronted with an operation as complex as that at issue, the General Court exceeded its review jurisdiction, in the circumstances of the case before it, by holding – on the basis of a presumption – that the Commission had acted in breach of its duty to exercise due diligence. Likewise, the General Court also failed to identify any manifest error of assessment on the part of the Commission in the choice of method and its application.
- 80 In particular, it was entirely legitimate for the Commission to prefer to rely on the information provided by the French authorities and the minutes of the meeting of the City of Orléans Council of 27 May 1994, rather than on a valuation established by the French tax authorities for the purposes of a tax audit in 1993. In any event, in the circumstances of the present case, which – as was noted by the Advocate General in point 140 of his Opinion – were marked by a conspicuous lack of cooperation on the part of the French authorities, such a choice cannot constitute a manifest error of assessment.

– The assessment of the market value of the improvements carried out on the land at issue

- 81 It must be held that, also as regards the market value of the improvements carried out on the land at issue, the General Court failed to identify a manifest error of assessment made by the Commission in so far as it used the costs-based method, thereby exceeding the bounds of its review jurisdiction.
- 82 Although it is true that, as the General Court stated in paragraphs 120 and 121 of the judgment under appeal, the case-file reveals discrepancies in the costs of the improvements and in the surface area involved, it should nevertheless be noted that the extension of the surface area of the factory as compared with the area originally contemplated in the Scott agreement corresponds approximately to the cost overrun incurred by Sempel according to its statement of final account, namely, 75.5% cost overrun for 80% extension.
- 83 Thus, the Commission cannot be criticised for not requesting clarification from Scott on that point, in so far as a link between the extension of the surface area of the factory and the cost overrun can readily be inferred. At any rate, in paragraph 122 of the judgment under appeal, the General Court noted that the parties had been unable, at the hearing, to explain in what way the increase in the size of the factory could have put in question the costs as recorded in Sempel's statement of final account.
- 84 It therefore follows from all the above considerations that, in so far as the General Court did not demonstrate that the Commission had made a manifest error of assessment in the determination of the market value of the land at issue and its improvements, it exceeded its jurisdiction by holding that, on the facts, the Commission had,

in its examination of the market value of the land at issue, acted in breach of its duty to exercise due diligence.

- 85 In any event, although it is true that the General Court identified an error of calculation and certain approximations in the Commission's method and calculations, it should be noted that, in the operative part of the judgment under appeal, the General Court did not annul Article 1 of the contested decision, which implies that it did not consider, in the case before it, that the errors and approximations which flawed the investigation procedure were serious enough to call into question the lawfulness of the contested decision as a whole.
- 86 The 9th to 12th grounds of appeal must therefore be upheld.

The 7th ground of appeal, alleging that the General Court based its findings on speculation rather than evidence in order to call in question the assessments of the Commission

Arguments of the parties

- 87 By its 7th ground of appeal, the Commission criticises the General Court for finding that the Commission should have queried its assessments on the basis of the information contained in the letters from the French authorities and Scott. That information did not consist in evidence so incontrovertible that it could have raised doubts as to

the soundness of the assessments made by the Commission, but rather conjecture which the Commission need not necessarily take into consideration.

- ⁸⁸ Scott contends that the Commission overlooks the fact that the General Court based its findings on evidence. The statements made in the Scott letter constitute in themselves evidence.
- ⁸⁹ In any event, the Département du Loiret stresses that the documentary sources for the valuations referred to in the Scott letter exist.

Findings of the Court

- ⁹⁰ As was pointed out by the General Court in paragraphs 56 and 95 of the judgment under appeal, the Commission is required, in the interests of sound administration of the fundamental rules of the EC Treaty relating to State aid, to conduct a diligent and impartial examination of the contested measures, so that it has at its disposal, when adopting the final decision, the most complete and reliable information possible for that purpose (see, to that effect, Case C-367/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719, paragraph 62).
- ⁹¹ It should also be borne in mind that the lawfulness of a decision concerning State aid falls to be assessed by the European Union judicature in the light of the information available to the Commission at the time when the decision was adopted (Case C-390/06 *Nuova Agricast* [2008] ECR I-2577, paragraph 54).

- 92 In the light of those observations, it should first of all be noted that the General Court did not criticise the contested decision on the basis of information which was unavailable to the Commission when it was adopted.
- 93 In the case before it, the General Court found, in paragraphs 124 to 142 of the judgment under appeal, that the Commission had overlooked information which could in fact have been useful for the purposes of determining the value of the land at issue.
- 94 In particular, as is apparent from paragraph 125 of the judgment under appeal, the General Court referred to the Scott letter as well as to the letter from the French authorities of 21 February 2000, both of which referred to a value placed on the land at issue by the French tax authorities in 1987. Those letters also referred to a professional valuation of the land at issue by the Galtier consultancy in 1996 and to a valuation of the assets sold by Scott to Kimberly-Clark Corp., carried out by the *Commissaire aux apports* in January 1996.
- 95 With regard to those three documents, it should be noted first of all that neither Scott nor the French authorities provided them to the Commission during the administrative procedure. Next, those letters did not reach the Commission until, in the case of the Scott letter, the end of the extra time exceptionally allowed by the Commission, or, in the case of the letter from the French authorities, even after that new deadline. Lastly, as was remarked by the Advocate General in points 120 and 121 of his Opinion, both the Scott letter and that of the French authorities contained only vague assertions as to the value of the property at issue, which could not be enough to require the Commission either to take them into consideration or to reopen the investigation procedure.
- 96 In that regard, first, the report prepared by the Galtier consultancy and the valuation drawn up by the *Commissaire aux apports* were carried out nine years after the sale of the land at issue to Scott. In those circumstances, the Commission was justified in not examining the contents of those valuations, on the view that it had the benefit of

more reliable information, in the form of the valuation derived from the minutes of the meeting of the City of Orléans Council of 27 May 1994.

⁹⁷ Secondly, and as was also noted by the General Court in paragraph 125 of the judgment under appeal, the value of the land at issue as used in the context of a tax audit does not necessarily show the market value of that land. Accordingly, and contrary to the finding of the General Court, the Commission was fully entitled to consider that its purpose would not be served by requesting production of that valuation of the land at issue by the tax authorities.

⁹⁸ It follows from the foregoing, therefore, that the General Court erred in law in holding that, on the basis of the evidence available to it when it adopted the contested decision, the Commission had acted in breach of its duty to exercise due diligence for the simple reason that the Commission had not requested either Scott or the French authorities to produce the valuations of the land at issue to which they referred merely in order to call in question the valuation used by the Commission and that it had not reopened the investigation procedure.

⁹⁹ The 7th ground of appeal must therefore be upheld also.

¹⁰⁰ It follows from all the above considerations that the judgment under appeal must be set aside, in so far as the General Court held that the Commission had acted in breach of its obligation to conduct a diligent and impartial examination.

Reference of the case back to the General Court

- ¹⁰¹ Under the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the appeal is well founded, the Court of Justice is to quash the decision of the General Court. The Court of Justice may itself give final judgment in the matter, where the state of the proceedings so permits.
- ¹⁰² Since the General Court examined only the fourth plea in law raised by Scott in support of its action, it is necessary to refer the matter back to the General Court.
- ¹⁰³ As the case is being referred back to the General Court, it is appropriate to reserve the costs relating to the present appeal proceedings.

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

- 1. Sets aside the judgment of the Court of First Instance of the European Communities of 29 March 2007 in Case T-366/00 *Scott v Commission*.**
- 2. Refers the case back to the General Court of the European Union.**
- 3. Reserves the costs.**

[Signatures]