COMMISSION

COMMISSION DECISION

of 21 January 1998

on aid granted by the Netherlands to a hydrogen peroxide works in Delfzijl

(notified under document number C(1998) 232)

(Only the Dutch text is authentic)

(Text with EEA relevance)

(98/384/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 93(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having given the parties concerned the opportunity to submit their comments, in accordance with those Articles,

Whereas:

I

A complaint drew the Commission's attention to the construction of a hydrogen peroxide plant in Delfzijl in the Netherlands.

FMC Industrial Chemicals (Netherlands) BV ('FMC'), a subsidiary of the US company FMC Corp., submitted a request to the Netherlands authorities for a contribution towards the cost of constructing a hydrogen peroxide production plant in Delfzijl in the province of Groningen. Production was scheduled to start at the end of 1995 and was targeted at northern Europe. The investment would amount to NLG 115 million, and the plant was to have a production capacity of 35 000 tonnes a year.

FMC's project was considered to be of special interest to the economic development of the province of Groningen, and in particular the town of Delfzijl, in view of the state of the local economy and the fact that it was the first time since 1986 that a large firm had settled in the area. The Netherlands authorities accordingly acceded to the company's request; they awarded a grant of 25 % of eligible costs, subject to a ceiling of NLG 25 million. The aid was to be paid under a scheme which the Commission had previously approved, the Regional Investment Project Subsidies Order *(Besluit subsidies regionale Investeringsprojecten* — 'the IPR scheme') [1]. The aid granted amounted to NLG 28,75 million.

On 18 September 1996 the Commission decided to initiate proceedings under Article 93(2) of the Treaty in respect of these measures. It informed the Netherlands Government accordingly by letter of 3 October 1996 [2]. By letter of 31 October the Netherlands authorities asked for an extension of the time allowed for observations until 15 January 1997, and the Commission agreed to this. The observations reached the Commission on 27 January 1997, followed by additional information on 28 February 1997.

The letter informing the Netherlands authorities that the proceedings had been initiated was published in a notice in the *Official Journal of the European Communities* [3]. Following that notice the Commission received observations from four firms, including the group to which the complainant belongs, the recipient, and one trade association.

On 2 June 1997 Commission staff met representatives of the recipient company; the company's lawyer was present.

By letter of 16 June 1997 the Commission sent the Netherlands authorities the observations received from interested parties, with translations into Dutch. The Commission received the Netherlands authorities' replies to these observations on 17 July 1997.

[1] Commission Decision of 27 December 1990: State aid measure No N 514/90 — Netherlands.
[2] SG(96) D/8632.
[3] OJ C 112, 10. 4. 1997, p. 3.

On 27 October and 6 November 1997 the advisers to the recipient company submitted further information to the Commission. Lastly, on 4 November 1997 the Netherlands Government supplied further details of the environmental aspects of the investments to be carried out by the recipient company.

II

The Commission decided to initiate the proceedings for the following reasons:

— The complaint that gave rise to the proceedings stated that in 1994, when the Netherlands authorities approved the aid to the company, the hydrogen peroxide market was in overcapacity. The complainant expressed surprise that in such circumstances the company could be given aid towards an investment which would create new capacity.

— The aid given to FMC exceeds the maximum aid intensity which the Commission approved in connection with the IPR scheme. The Netherlands authorities were authorised to provide no more than 20 % of gross investment, whereas in fact they approved a little over 25 % gross. In its initial inquiry, the Commission established that three kinds of aid had been given to FMC: the grant already referred to, a subordinated loan, and a site sold to the recipient company for less than its market value. The aid added up to a total of NLG 29,88 million. It should be borne in mind that these proceedings relate only to that part of the aid in excess of the maximum allowed in connection with the IPR scheme, that maximum being 20 % gross of the eligible costs.

III

In the course of the proceedings, the Netherlands authorities put forward the following arguments:

— they submitted a study of the market in hydrogen peroxide which was more detailed than the one that they had had carried out by Chem Systems, an independent chemical industry consultant, and the other data they had submitted to the Commission, which were reviewed at the initial stages of the proceedings.

  According to these studies, which are based on a maximum effective rate of utilization of 90% of theoretical capacity, capacity will be almost fully utilised by the year 2000. In the industry an effective capacity utilisation rate of 90 % is regarded as the maximum level of production that is reasonably feasible in the long term, for mainly environmental reasons. The data supplied by the complainant likewise suggest that the effective rate of capacity utilisation will be fully taken up. At this stage, the few percentage points' difference between effective capacity and demand have to be regarded as necessary in order to be able to deal with market fluctuations.

  These studies also show that in 1993 market growth was expected to average 6,3 % a year over the period 1991-2000. Thus, the prospect was for a rapidly growing market, and other producers announced that they were to increase capacity in the same period as FMC: Aussimont in 1993, and Oxysynthèse, EKA and Kemira in 1995,

— the gross investment, which is virtually completed, has cost NLG 115 million, as expected. Of this total NLG 2 million is not eligible for assistance under the IPR scheme, so that the sum provided in aid is NLG 28,25 million. As a percentage of the gross investment of NLG 115 million, this sum amounts to a rate of aid of 24,75 %.

  NV Noordelijke Ontwikkelingsmaatschappij (Northern Development Corporation - 'NOM') granted a subordinated loan of NLG 12,5 million towards the project, at an interest rate of 5,92 %, largely because FMC provided a 100 % guarantee. In view of the reservations expressed by the Commission, and given that a better rate could be obtained from a non-Dutch bank, FMC repaid the loan early, in March 1997.

  As regards the sale of the land, the Commission denied that its Decision in the Fresenius case [1] was a relevant precedent here, because there was nothing to indicate that the land had been for sale over a long period, and because the depreciation of the land seemed to be due not to the lack of buyers but to the use to which the site had been put in recent years. (In Fresenius the Commission considered that although the price paid was 10 % lower than the theoretical market value estimated by the valuers, the local authority in question had for a number of years been offering the site for sale both directly and through intermediaries, without finding a buyer. The Commission concluded that these efforts to sell the land were comparable to an open and unconditional bidding procedure, and that consequently the price paid corresponded to the market value).

  The competent authorities observe, however, that during the 1980s and at the beginning of the 1990s the land was offered to interested firms at a price no lower than the cost price. This brought not a single investor to settle in the region, partly because of the price being asked. In view of the poor results, it was decided in 1992 to set the price on the basis of market value, and no longer on the basis of cost.

[1] State aid measure No C 36/92, ex NN 108/92: OJ C 21, 25. 1. 1994, p. 4.

Although the price asked was NLG 1 per square metre, or in some cases even less, only FMC accepted. The Netherlands Government also observes that Belgian and French regions were offering sites at prices comparable to what was being asked by the Delfzijl/Eemshaven harbour authority,

— according to the Netherlands authorities, the FMC site in Delfzijl is near the waters of the Waddenzee. The area has a special status as a conservation area. The Waddenzee is a nature reserve within the scope of Article 3 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds ([1]) and of Article 4 of Council Directive 92/42/EEC of 21 May 1992 on the conservation of natural habitats and of wild flora and fauna ([2]). It is also a wetland area covered by the Ramsar Convention. The Netherlands authorities have enacted legislation which allows economic activity in the area only in so far as it is not detrimental to the area's status.

FMC has taken a series of environmental measures in consequence; a large proportion of the investment, accounting for NLG 62,92 million, must be regarded as investment of this kind. It is important to establish, therefore, whether the investment can be described as 'excessive'. An independent consultant was asked to examine the question. The consultant defined 'excessive' as meaning 'higher than the minimum level required in other Member States, taking account of Community Directives'. Whether an investment is excessive has to be determined by comparing it with the customary environmental measures and with a generally accepted level of environmental protection.

A number of investments and measures aimed at environmental conservation were identified on the basis of applications for authorization submitted by FMC under the different environmental conservation measures in force in the Netherlands: the Environmental Management Act (Wet milieubeheer), the Pollution of Surface Waters Act (Wet verontreiniging oppervlaktewateren), and the permits granted by the municipal and provincial authorities under those Acts. The consultant identified from those documents the measures which were aimed solely at the protection of the environment, and excluded those which did not appear to be 'excessive'.

The consultant concluded that a number of investments costing a total of between NLG 12 million and NLG 21 million were 'excessive' in whole or in part. Some of these were 'locally excessive', that is to say necessitated by the vulnerability of the local environment. The consultant estimated the cost of these 'locally excessive' investments at between NLG 1,4 million and NLG 2,65 million. The Netherlands Government takes the view that in such circumstances additional aid should be allowed.

([1]) OJ L 103, 25. 4. 1979, p. 1.
([2]) OJ L 206, 22. 7. 1992, p. 7.

IV

In the course of the proceedings, the Commission received observations from four firms and one trade association in the industry. The four firms include the group to which the complainant belongs, and the recipient.

The four firms submitting observations supplied figures for the period 1994-96 and estimates for 1997-2000, relating to the question of production capacity for hydrogen peroxide. From an examination of these figures, some of which are confidential, it is clear that European demand falls short of installed production capacity, even taking the effective capacity (which is equal to 90 % of theoretical capacity, as indicated by Chem Systems). According to these four parties, the rate of utilisation is as follows, though it must be pointed out that no account has been taken of exports (equal to about 10 % of European demand):

(%)

	1994	1995	1996	1997	1998	1999	2000
(a)	84,05	85,47	76,90	74,43	75,45	79,79	84,55
(b)	77,88	82,72	72,78				77,78
(c)	82,26	80,38	74,52	73,12	75,12	78,25	81,48
(d)	81,94	83,98	76,61	73,35	74,12		80,62

The observations submitted can be summarised as follows:

— the complainant's group contends that the 1994 forecasts, according to which the expansion of capacity would outpace growth in demand for several years, have been proved correct,

— the same group, basing itself on its own experience in the last few years, states that the rate of utilization that can be achieved on a steady basis with world-scale capacities (and there are no others in western Europe) is 95 %. Demand has to be looked at against this figure. None of the other parties objects to the 90 % capacity utilisation rate calculated by Chem Systems,

— the same group states that the growth of the market for hydrogen peroxide was previously buoyed up by a changeover from chlorine to the less environmentally damaging hydrogen peroxide in the bleaching of cellulose; that changeover came to an end in western Europe in 1994, which is why growth has stagnated since,

— another party argues that pressure from environmental activists for the replacement of chlorine by hydrogen peroxide was very strong at the beginning of the 1990s. That pressure has diminished in the last few years. Demand has consequently risen less rapidly than most producers had expected at the beginning of the 1990s,

— another party asks the Commission to investigate the investment costs of the Delfzijl works carefully, in order to establish whether or not they have been made to include FMC's own internal costs,

— lastly, one party alleges that other companies have built production plants for hydrogen peroxide in Germany. The companies referred to are Solvay, Aussimont and Oxysynthèse. There are rumours in the industry that they received State aid.

V

As already explained, FMC also submitted observations on the initiation of proceedings. In so far as they differ from the observations of the Netherlands authorities they can be summarised as follows:

— on the purchase of the site, FMC argues that open bidding would have served little purpose in view of the lack of interested buyers over many years. The valuation carried out by Stichting Adviesbureau Onroerende Zaken cannot be taken as a reference. The agreement concluded in 1988 among the various authorities involved in the financial restructuring of the Delfzijl harbour authority required that that foundation's services be used. The price set may have been influenced by considerations other than economic ones,

— FMC observes that the loan granted by NOM has been fully repaid. FMC fails to see how this loan could have been considered an aid measure for purposes of Article 92(1) of the Treaty. As the Court of Justice of the European Communities held in its judgment of 17 March 1993 in Joined Cases C-72/91 and C-73/91 Sloman Neptun v. Bodo Ziesemer [1], a measure taken by the authorities is an aid measure only where it confers an advantage the cost of which is borne by the State or a public or private body designated or established by the State. The account from which NOM lent the money to FMC earned NOM a lower rate of interest than NOM charged FMC, so that there was no advantage granted through State resources of the kind referred to by the Court,

— on the alleged overcapacity on the market in hydrogen peroxide, FMC argues that between the decision to build a plant and the moment when production comes on stream there is a gap of eighteen months. An expected increase in demand can be met only by expanding output correspondingly, which requires that a decision be taken eighteen months beforehand. Producers have to anticipate, as can easily be seen from the fact that demand in 1994 was 647 000 tonnes and in 1992 effective production capacity was 646 000 tonnes (according to CEFIC figures cited at the initiation of proceedings) [2].

When FMC took the decision to invest, in 1992, it expected demand to increase by over 10 % a year over the period 1992-95. FMC also confirms, and provides figures to substantiate the claim, that the stagnation in sales between 1995 and 1996 was due mainly to the fall in demand from the paper industry. This was an unexpected development, given the historical data and the objective factors that influence demand,

— Other firms likewise received regional investment aid, for investments in Germany,

— If the Commission were to find that the aid was incompatible with the common market, any attempt to recover the aid would in any event be unjustified and out of time. Recovery would conflict with the protection of FMC's legitimate expectations. FMC has displayed great care in familiarising itself with the rules of all the applicable aid schemes and assuring itself that they had been approved by the Commission. FMC became aware of the 20 % gross ceiling governing the IPR scheme only when the notice announcing the initiation of proceedings was published [3].

On the basis of the information in its possession at the time of the investment decision, and the legal advice it had obtained, FMC could only conclude that the investment aid qualified for approval under the IPR scheme, and that the Commission clearly had not prohibited the provision for 'major cases' in the scheme which in the view of the Netherlands authorities allows the admissible amounts and intensities to be exceeded,

[1] ECR [1993] I-887.

[2] OJ C 112, 10. 4. 1997, p. 3.
[3] OJ C 112, 10. 4. 1997, p. 3.

— FMC takes the view that as the aid was approved in 1994 and the Commission has been aware of it since 1995, a long time has passed up to the present final decision. Citing the judgment of the Court of Justice of 24 November 1987 in Case 223/85 RSV v. Commission ([1]), FMC argues that the time the Commission has taken to reach a decision precludes recovery of the aid,

— Lastly, FMC's advisers have recently submitted that, in its Decision 97/542/EC ([2]) on tax exemptions for biofuels in France (State aid measure No C 51/94 France), the Commission had found that the aid was unlawful and incompatible, but had nevertheless decided not to require France to recover it. In FMC's view the same arguments apply to its own case.

VI

As the Commission pointed out when it initiated the proceedings, the Court of Justice held in its judgment of 30 June 1992 in Case C-47/91 Italy v. Commission (the Italgrani case) ([3]) that when the Commission came to consider cases where fresh aid was to be granted under a scheme the Commission had previously authorised, the Commission had only to establish that the terms of the scheme had been complied with. If the terms of such a scheme have indeed been complied with, there is no need to consider whether the individual case is compatible with the common market. If the Commission finds that the terms of the scheme have not been complied with, then it has to carry out a thorough assessment of the compatibility with the common market of the individual aid measures.

The Commission considers, for the reasons set out below, that the conditions of the IPR scheme have not been met in this case. A more detailed scrutiny is therefore called for.

The start-up of FMC's Delfzijl plant increases Dutch production capacity by 20 000 tonnes a year to 55 000 tonnes. According to data from various sources, the proportion of European hydrogen peroxide production traded between Member States in 1994 was between 30 % and 40 %. Of this total, the Dutch share varies between 10 and 15 %. It follows that the aid given to FMC for its Delfzijl works will affect trade between Member States.

([1]) [1987] ECR 4617.
([2]) OJ L 222, 12. 8. 1997, p. 26.
([3]) [1992] ECR I-4145.

The Commission deplores the Netherlands Government's failure to notify the measures sufficiently in advance for it to be able to reach a decision pursuant to Article 93(3) of the EC Treaty. By implementing the measures before the Commission has had time to state its position on them, the Netherlands Government has rendered them unlawful.

The case raises three important questions for the Commission to consider:

(A) it must be established whether or not the hydrogen peroxide market was in overcapacity in 1994, when the Netherlands authorities approved the aid, and in succeeding years, as the complainant contends;

(B) the Commission must decide how to handle aid in excess of the maximum intensity that it authorised in connection with the regional aid scheme that applies in Delfzijl, the IPR scheme. The Netherlands authorities were authorised to grant up to 20 % gross towards the investment, but in fact granted slightly more than 25 % gross;

(C) in conjunction with the preceding point, the Commission must consider what weight to give to the Netherlands authorities' argument that FMC has carried out substantial investment in the protection of the environment.

In addition, the Commission must consider the observations of the recipient company according to which recovery of the aid, should the Commission find it incompatible, would be unjustified and out of time.

A. **The market in hydrogen peroxide**

The Commission takes the view that the examination of the market in hydrogen peroxide and the way it has developed must begin with the time when it was decided to carry out the projected investment. It was on the basis of the information in the company's possession at that time that the decision whether or not to carry out the investment had to be taken.

In the course of the proceedings, four parties have supplied statistics describing the situation on the market in the past, up to 1995 or 1996 as the case may be, and estimates for the future. The demand figures provided by these four parties for the period 1994-96 show strong similarities. However, they do not give a good picture of the time when FMC decided to invest in the Delfzijl site.

The same applies to the remark made by one of the parties, the complainant's parent company, that according to its expectations in 1994, which were subsequently proven right, the overcapacity that existed at that time would continue for many years. One may question the consistency between what the company says now and what it said in 1994. According to its 1995/96 annual report, which the Netherlands authorities have supplied to the Commission, the hydrogen peroxide industry was then in continuous growth. The same report stated that growth of 7 % to 8 % a year was expected on the world market.

This company attributes the stagnation of growth in the hydrogen peroxide market to the fact that the changeover from chlorine to hydrogen peroxide in the bleaching of cellulose came largely to an end in 1994. The annual report just referred to, however, states that hydrogen peroxide is increasingly replacing the chlorine products used previously in a variety of uses in industries such as textiles and paper.

Another of the parties agrees with FMC that pressure from environmental activists for a changeover from chlorine to hydrogen peroxide has fallen off in recent years, with the result that demand has increased more slowly than most producers expected at the beginning of the 1990s. In 1993, 42 % of the hydrogen peroxide produced was used for the bleaching of textiles and paper ([1]). The same party claims that in 1993 demand for hydrogen peroxide was expected to grow by 8,2 % a year for the bleaching of paper, and 2,6 % a year for the bleaching of textiles, over the period 1991-2000.

To determine whether there is overcapacity account must be taken of the time between the investment decision and the opening of the new plant. A decision whether or not to invest will be taken on the basis of current expectations. FMC is of the opinion that the gap amounts to eighteen months. In the light of the annual figures received from all the parties, the Commission must work on the basis of a period of two years.

From the tables drawn up using the data supplied by the Netherlands authorities, to which the Commission referred when it initiated the proceedings, it will be seen that effective capacity (90 % of theoretical capacity) of year 't' is lower than anticipated demand in the year t + 2, a difference which can be overcome only by increasing the effective capacity utilization rate to over 90 % or by expanding capacity. If the same analysis is applied to statistical data supplied by third parties in the course of the proceedings, bearing in mind that they give a picture of the past only and do not forecast the future, it can be concluded that demand in 1996 was between 90 % and 100 % of the capacity actually installed in 1994.

Lastly, on the basis of all the information it has received, the Commission notes that FMC was by no means the only firm to expand its capacity in the second half of the 1990s. Several competitors set up new production plants, frequently with production capacities larger than that of Delfzijl, despite their claims that there was overcapacity on the market at that time.

Between 1994 and 1996 the capacity expansions announced totalled 245 000 tonnes, only 35 000 tonnes was to be installed by FMCI ([2]).

The Commission accordingly takes the view that although there may have been overcapacity on the market in hydrogen peroxide in 1994 (data from before that year would be needed to allow a more precise assessment), nevertheless at the time FMC decided to expand its capacity it might reasonably expect the market to grow by about 7 % a year, as many of its competitors did. The competitors also confirm that most of them did not foresee the later stagnation of growth. The growth in the market was consequently sufficient to encourage firms to invest in order to take advantage of it. Between 1993 and 1995 various other firms announced comparable investments (in the former German Democratic Republic and Scandinavia).

In these circumstances, FMC's decision to build a works in Delfzijl was not exceptional. There is a difference, however, in that FMC received State aid for the purpose, which several of its competitors did not. Indeed, some of the interested parties take the view that the Commission ought to challenge the whole of the aid received by FMC. The aid allegedly received by other hydrogen peroxide producers at about the same time as FMC is the subject of a separate Commission inquiry.

The Netherlands authorities have stated that they grant aid only provided the applicant satisfies the requirements for eligible costs laid down in the relevant legislation. Aid is paid only once the costs have been audited. The Commission does not propose to pursue its examination of this point.

([1]) Source: Chem Systems; data supplied by the Netherlands authorities.

([2]) Source: Chem Systems; data supplied by the Netherlands authorities.

B. **Exceeding the maximum permitted aid intensity**

FMC was given aid in three forms: a direct grant, a subordinated loan, and a site sold at a price apparently below the market value.

(1) As regards the grant, the Commission cannot accept the Netherlands authorities' view that while the costs eligible for aid are less than the total investment, the aid intensity should nevertheless be calculated by reference to the total sum invested.

According to the Netherlands authorities, there is a misunderstanding regarding the maximum rate of aid under the IPR scheme. The scheme allows aid to be granted at a maximum intensity of 20 % of the eligible costs, and the eligible costs may amount to a maximum of NLG 18 million. This rule applies in normal cases. In more important cases, known as 'major cases' (belangrijke gevallen), in which the NLG 18 million eligible costs ceiling set by the scheme is exceeded, the responsible Minister may exceed the amount of aid authorized by the scheme (20 % of NLG 18 million). Article 5(2) of the 1991 IPR rules *(Subsidieregeling regionale investeringsprojecten 1991)* provides that if the costs of a project within the scope of paragraph 1(a) or (b) of that Article amount to more than NLG 18 million and the project is of special importance to the development of a regional economy, the Minister may decide to give a grant higher than the maximum amount referred to in paragraph 1. The Netherlands authorities consider that the Minister was entitled to award a grant which was higher in amount and intensity. A grant of 20 % net to FMC was therefore in accordance with the scheme.

The Commission does not share this opinion, because the scheme does not provide that in 'major cases' aid may exceed the maximum aid intensity. Only the amount of the aid can exceed the ceiling laid down for normal cases. When they notified the IPR scheme, the Netherlands authorities nowhere mentioned that they wished to allow a special aid intensity for 'major cases'. The Commission decision on the IPR scheme specifies that the maximum aid intensity is 20 % gross. Before this particular case the Netherlands Government had never challenged that decision. That intensity must therefore be taken as the ceiling. The grant actually given amounts to 25 % gross.

(2) The Commission takes note of the fact that FMC has made early repayment of the whole of the loan granted to it by NOM, and has contracted another loan on more advantageous terms with a foreign bank. Both the recipient and the Netherlands authorities maintain that the NOM loan did not constitute aid, because NOM acted on the basis of purely commercial considerations. NOM was able to grant this subordinated loan of NLG 12,5 million at an interest rate of 5,92 % as a result of the 100 % guarantee that FMC provided. The account from which the funds were lent to FMC earned NOM a rate of interest lower than what it charged FMC, so that there does not appear to be any advantage granted through state resources of the kind referred to by the Court of Justice in the Sloman Neptun judgment [1], to which the recipient company refers. Lastly, the reference rate that the Commission was using in the calculation of regional aid in 1994 was 6,27 %, which differed by 35 basis points from the rate charged to FMC. That reference rate included a risk premium calculated at 75 basis points in the case of the Netherlands, representing the risk associated with the average debtor. As FMC acted as guarantor for the whole amount of the loan, and even then NOM charged a risk premium of 40 basis points, it must be concluded that the loan is outside the scope of Article 92(1) of the Treaty.

(3) As regards the sale of the site, the Netherlands Government takes the view, for the reasons set out in Section III above, that the sale is not a measure caught by Article 92(1) of the Treaty. The fact that no buyer was found for the site over a very long period is in its opinion sufficient proof that the price paid by FMC corresponds to the market value.

As the Commission stated when it initiated the proceedings, it considers as a rule that the value of a site put up for sale by the public authorities may be determined most accurately by an open and unconditional bidding procedure. During such a procedure potential purchasers are able to make their bids, the highest of which is accepted. This procedure also shows how great an effort the vendor has made to procure the best terms available. This view was discussed in the Commission's Fresenius decision [2].

[1] ECR [1993] I-887.
[2] OJ C 21, 25. 1. 1994, p. 4.

If the responsible authorities do not follow this procedure, the Commission is of the opinion that the market price of the site should be established by an independent valuer using generally accepted methods, working in particular from recent sales of comparable sites.

These criteria have recently been confirmed in the Commission Communication on State aid elements in sales of land and buildings by public authorities ([1]).

The Commission does not share the recipient company's scepticism regarding the valuation of the site in March 1994. The valuer's report, which the Netherlands authorities supplied with their letter of 9 January 1997, is sufficiently detailed, and in arriving at a final valuation takes account of a range of factors (geographic location, proximity of waterways and railways, the state of the property, and valuations carried out in the past). No considerations other than economic ones are considered in the report, apart perhaps for the observation that the State attaches great importance to the definitive conclusion of the deed of transfer of the property rights and the establishment of the company on the site. The valuer nevertheless valued the land at NLG 10 per square metre; the harbour authority sold it for one tenth of that price.

As the valuer reported that his own office had valued the site in 1987, and added that at the second valuation in 1994 the plots had previously (1993) formed part of an area for the dumping of silt, but that the land was now cleared and could be used as an industrial site, the Commission is satisfied that he took account of all relevant factors in valuing the property. It is important to note, therefore, that while the company has voiced various objections, it acknowledges that the valuation may reflect the possibility of using the site for industrial purposes.

The Commission concludes that the market price of the site for industrial use at the time FMC bought it was NLG 10 per square metre, as determined by the valuer, whose report clearly states that the site can be used for that purpose and that there are no special rights over the land or obligations borne by it which might reduce its value. In order to determine whether there is State aid, therefore, this is the price which must be taken as the point of reference.

The Commission notes that the Netherlands authorities tried in vain to sell the site in the 1980s and at the beginning of the 1990s. It therefore takes the view that the Fresenius precedent does apply in this case ([2]), and that, as no other buyer has come forward, the valuer's valuation can be reduced by 10 %. This approach is in line with the Commission Communication on State aid elements in sales of lands and buildings by public authorities, which has applied since 1996, except that the Communication considers that where the authorities have made vain efforts to sell the land the market price may be reduced by 5 %.

Given the area sold (10,5 ha), and the price the Commission regards as compatible with the market in view of the Netherlands authorities' efforts to sell the site (NLG 9 per square metre), FMC should have been buying the site for a total of NLG 945 000. The State aid component is consequently NLG 840 000. This brings the total aid received by FMC to NLG 29,09 million (NLG 28,25 million + NLG 840 000). The costs eligible for aid under the IPR scheme amount to NLG 113,945 million (NLG 113 million plus the corrected value of the site), so that the aid intensity is 25,52 % gross. In cash terms the excess is the equivalent of a sum of NLG 6,3 million. Given the position of the Netherlands in trade in hydrogen peroxide between Member States, this aid affects trade between Member States. As the aid did not comply with the ceiling set by the applicable regional scheme, it must be concluded that it distorts or threatens to distort competition, as it reduces the investment costs which would otherwise have to borne by the company. The aid is therefore caught by Article 92(1) of the Treaty, and does not qualify for any of the exemptions allowed.

The granting of the aid is also motivated by the difficulties and handicaps suffered by the Delfzijl area and by the favourable impact the assisted project is expected to have. These considerations are already reflected, however, in the applicable regional scheme, and in the authorized aid intensity, which is based on objective criteria (unemployment rate, GDP per capita, etc.). Although the sum involved is small, the fact that the authorized aid ceiling has been exceeded raises a problem of principle. The Commission can scarcely allow the aid ceiling permitted by the scheme to be exceeded without robbing the scheme of its purpose, and without setting a very dangerous precedent which would be invoked systematically in similar cases.

([1]) OJ C 209, 10. 7. 1997, p. 3.

([2]) OJ C 21, 25. 1. 1994, p. 4.

C. **The environmental investments**

The Commission cannot accept that the maximum intensity should be exceeded in the case of aid which is investment aid only, but it might nevertheless be permissible to exceed the ceiling if the Netherlands authorities had provided different forms of aid towards different classes of costs all being eligible for assistance (regional investment aid and environmental aid, for example), and the total then exceeded the maximum intensity for regional aid. When it initiated the proceedings, the Commission confirmed that it would consider whether FMC qualified for aid under the Community guidelines on State aid for environmental protection ([1]).

To justify exceeding the regional ceiling, the Netherlands authorities have stated that a large proportion of the investment is in environmental measures (NLG 63 million out of NLG 115 million).

It is stated in point 3.2.B of the guidelines that: 'Aid for investment that allows significantly higher levels of enviromnental protection to be attained than those required by mandatory standards may be authorised up to a maximum of 30 % gross of the eligible costs. The level of aid actually granted for exceeding standards must be in proportion to the improvement of the environment that is achieved and to the investment necessary for achieving the improvement (. . .). If both Community and national mandatory standards exist for one and the same type of nuisance or pollution, the relevant standard for the purposes of applying this provision shall be the stricter one'.

In this case, it is clear that the area in which FMC is established is a nature conservation area which is protected under both Community and domestic legislation. The Netherlands Government confirms that FMC had to apply for a number of authorisations from different authorities in order to be able to build the plant in Delfzijl. It can be gathered that there are mandatory environmental standards in force in the area which are especially strict in view of its exceptional character.

In order to show that FMC had made particularly strenuous efforts in the environmental sphere, the Netherlands Government recently sent the Commission a report analysing the proportion of the investment that can be considered 'excessive' by comparison with what is customary in other Member States. An FMC plant in Spain is used as a yardstick to measure what is an 'excessive' effort in Delfzijl. The comparison identifies investments between NLG 12 million and NLG 21 million. The Netherlands authorities also claim that some of these investments (between NLG 1,4 million and NLG 2,65 million) are 'locally excessive', meaning that the company had to undertake these investments in order to adapt to local circumstances (a protected and vulnerable area).

The Commission is obliged to note that the Netherlands authorities are unable precisely to quantify these 'extra' investments on the part of FMC. The Commission wonders, therefore, what figure it should take as a basis for an assessment of the compatibility of these environmental aid measures with the Treaty. In addition, a large part of the sums in question relate to safety measures and accident prevention measures: in a recent State aid case (C 6/96, Hoffmann La Roche v. Austria) ([2]), the Commission decided that investment of this kind was in the company's own interests, as the company would be liable for any damage or injury, and consequently did not qualify for State aid.

The Netherlands authorities have not produced anything to show that FMC has gone beyond what is required by Netherlands environmental legislation, or if so that it has done so to any appreciable extent; nor have they shown that the aid is in proportion to the investment or to the extent to which standards have been exceeded. It may be added that the Commission allows aid up to the ceiling of 30% gross of the eligible costs referred to in the guidelines only in cases in which the measures being taken go very substantially beyond the compulsory standards.

The guidelines do not allow aid to be authorised for investment going beyond the standards in force in other Member States, but only for investment going beyond compulsory standards in the Member State concerned, and the Commission accordingly takes the view that the investments of an environmental nature carried out by FMC on this site do not qualify for aid under the guidelines. The fact that the regional aid ceiling applicable has been exceeded consequently cannot be justified on environmental grounds.

VII

It must be concluded, then, that the sum of NLG 6,3 million in aid by which the regional aid ceiling applying under the IPR scheme is exceeded should be declared unlawful and incompatible with the common market.

([1]) OJ C 72, 10. 3. 1994, p. 3.

([2]) OJ L 103, 3. 4. 1998, p. 28.

Where aid granted unlawfully is found to be incompatible with the common market, Article 93(2) of the EC Treaty requires the Commission to request the Member State to recover it from the recipient, as the Court of Justice has confirmed in its judgments of 12 July 1973 in Case 70/72 Commission v. Germany ([1]), of 14 February 1987 in Case 310/85 Deufil v. Commission and of 20 September 1990 in Case C-5/89 Commission v. Gemany (BUG-Alutechnik) ([2]).

The lawyers representing FMC have argued that if the Commission finds that the aid is unlawful and incompatible with the common market, any decision to require repayment would not only be contrary to the principle of the protection of legitimate expectations but would also be out of time.

In the BUG-Alutechnik case, the Court of Justice had this to say: 'However, it must be noted that, in view of the mandatory nature of the supervision of State aid by the Commission under Article 93 of the Treaty, undertakings to which an aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article. A diligent businessman should normally be able to determine whether that procedure has been followed.

In that regard, it must be pointed out that, by a Communication published in the *Official Journal of the European Communities,* the Commission informed potential recipients of State aid of the risk attaching to any aid granted them illegally, in that they might have to refund the aid (OJ C 318, 1983, p. 3).

It is true that a recipient of illegally granted aid is not precluded from relying on exceptional circumstances on the basis of which it had legitimately assumed the aid to be lawful and thus declining to refund the aid. If such a case is brought before a national court, it is for that court to assess the material circumstances, if necessary after obtaining a preliminary ruling on interpretation from the Court of Justice.

However, a Member State whose authorities have granted aid contrary to the procedural rules laid down in Article 93 may not rely on the legitimate expectations of recipients in order to justify a failure to comply with the obligation to take the steps necessary to implement a Commission decision instructing it to recover the aid. If it could do so, Articles 92 and 93 of the Treaty would be set at naught, since national authorities would thus be able to rely on their own unlawful conduct in order to deprive decisions taken by the Commission under provisions of the Treaty of their effectiveness.'

According to the observations submitted by FMC, it had a legitimate expectation that the aid would be compatible with the common market because it had been very careful to enquire into the aid schemes available and to establish that they had been authorized by the Commission. At the meeting with the Commission, FMC developed this argument, and stated that it had assurances from the Netherlands authorities that the aid was covered by a Commission authorisation. At no stage in these proceedings was any detailed account or documentary evidence provided of the approaches FMC allegedly made to the authorities.

FMC also refers to a point in the Twentieth Report on Competition Policy, 1991, point 330; but it is there stated that for 'regional aid programmes in the Netherlands' the Commission 'agreed to investment aid up to 20 % gross'. The Report does not mention the 'major cases' because the scheme does not provide for any special aid intensity in such cases.

At no stage has FMC shown that its alleged legitimate expectation was attributable to any act on the part of the Commission. At the time it received the aid, FMC did not ask the Commission, nor does it claim to have asked the Commission, for a copy of the Decision of 12 December 1990 on the scheme. Only after the aid had been granted, in point of fact after the Commission decided to initiate the Article 93(2) proceedings, was this request first made to the Commission.

As for the decision to initiate the proceedings, it is obvious that by its very nature it cannot justify an expectation that the aid being examined is compatible.

As regards the contention that the Commission's final decision would be out of time, it will be sufficient to recall the succession of steps which the Commission took following the complaint and which are outlined in the decision initiating the proceedings, and to point out that the Commission had to base its decision on the situation on the hydrogen peroxide market, so that other parties

([1]) ECR [1973] 813.
([2]) ECR [1987] 901 and ECR [1990] I-3437 respectively.

had to be consulted in the course of the proceedings. The most recent information on 'excessive' and 'locally excessive' investments was supplied to the Commission only on 4 November 1997. The Commission could take a decision only once it had obtained all the necessary information, this in order strictly to ensure the right of the Member State concerned to defend itself in the course of the proceedings.

The lawyers representing FMC cite the arguments that the Commission put forward for not requiring recovery in the French biofuels case (C 51/94) [1], and ask the Commission to follow that precedent here:

— like biofuel, hydrogen peroxide helps to reduce pollution and is more expensive than the product it replaces,

— the investment aid does not overcompensate for the production costs,

— there is no indication that the aid will lead to an increase in sales and profits, as the FMC plant is still making a loss,

— recovering the aid would not restore the *status quo ante*.

In the first place, there is no Community policy of encouraging the production of hydrogen peroxide similar to that which exists in the case of biofuels. In addition, the aid towards biofuels is intended partially to offset the higher production costs of biofuels as compared with fossil fuels. In the case of FMC the Commission could not have authorized production aid or operating aid.

The aid reduced FMC's investment costs, and it logically follows that the cost of capital to FMC was lower than it was for competitors who had received no State aid. The advantage thus conferred might be reflected for example in the form of lower financing costs, because without the aid the company would have had to go to the capital markets for the money covered by the aid. Such a saving in the cost of capital might have an impact on FMC's results in the form of higher profits or lower losses than previously. The Netherlands authorities have not shown otherwise.

Lastly, the Commission takes the view that recovery of the aid will allow the financing costs to be brought back to the level the company would have had to bear if it had not received the incompatible aid that conferred an artificial advantage on it; it will thus allow the *status quo* to be restored.

The Commission accordingly concludes that the arguments that FMC has put forward give the Commission no cause to dispense with the recovery of the incompatible aid,

HAS ADOPTED THIS DECISION:

Article 1

The aid amounting to NLG 6,3 million which the Netherlands granted to FMC Industrial Chemicals (Netherlands) BV in excess of the aid ceiling laid down by the IPR scheme approved by the Commission is unlawful, in that it was granted before the Commission had submitted its comments in accordance with Article 93(3) of the EC Treaty.

That aid is also incompatible with the common market within the meaning of Article 92(1) of the EC Treaty and Article 61(1) of the EEA Agreement, and does not qualify for any of the exemptions laid down in Article 92(2) and (3) of the EC Treaty or Article 61(2) and (3) of the EEA Agreement.

Article 2

The Netherlands shall take whatever steps are necessary to recover the unlawful aid referred to in Article 1. Repayment shall be made in accordance with the procedures and provisions of Netherlands law; the amount to be repaid shall bear interest from the date on which the aid was granted until the date on which it is in fact repaid, the interest rate being equal to the reference rate in use on the date of repayment for the calculation of the net grant equivalent of regional aid in the Netherlands.

Article 3

The Netherlands shall inform the Commission within two months of the date of notification of this Decision of the measures it has taken to comply with it.

Article 4

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 21 January 1998.

For the Commission
Karel VAN MIERT
Member of the Commission

[1] OJ L 222, 12. 8. 1997, p. 26.