II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 12 July 2000

on the state aid granted by France to Scott Paper SA Kimberly-Clark

(notified under document number C(2000) 2183)

(Only the French text is authentic)

(Text with EEA relevance)

(2002/14/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having given notice to the parties concerned to submit their comments in accordance with the said Article [1] and having regard to those comments,

Whereas:

1. **PROCEDURE**

(1) Following publication by the French Cour des Comptes (Court of Auditors) in November 1996 of the special public report entitled 'Local authority assistance for firms' [2], the Commission received by letter dated 23 December 1996 a complaint concerning the preferential terms on which the Ville d'Orléans ('the city council') and the Conseil Général du Loiret ('the county council') (together referred to as 'the local authorities') had sold 48 ha of the La Saussaye industrial estate to the United States company Scott Paper, a manufacturer of household and sanitary paper.

(2) By letter dated 17 January 1997, the Commission requested further information from the French authorities. By letter dated 14 February 1997, the French authorities requested a further extension of 15 days, which the Commission granted on 3 March 1997. By letter dated 19 March 1997, the French authorities supplied some of the information requested. Because the information was not complete, however, the Commission renewed its request in a letter dated 26 March 1997, to which the French authorities replied in part by letter dated 21 April 1997. In the same letter, they requested a further extension of 20 days, which the Commission granted on 2 May 1997.

(3) On 3 June 1997 the Commission received the supplementary information requested. On 8 August 1997 it once more asked the French authorities to clarify certain matters. It sent them reminders on 24 September and 24 October 1997. The French authorities provided additional information on 3 November 1997, which was communicated to the complainant on 17 November 1997. By letter dated 8 December 1997, the complainant provided further information, to which the Commission's services replied on 6 January 1998. The last additional information from the complainant reached the Commission on 29 January and 1 April 1998.

(4) On 20 May 1998 the Commission decided to initiate the procedure laid down in Article 88(2) of the EC Treaty in respect of the measures, in view of the doubts it still had about the circumstances in which the French authorities had acted in regard to Scott Paper and the compatibility of those measures with the Treaty. By letter dated 10 July 1998 (SG(98) D/5663) the Commission informed the French authorities of this decision.

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[1] OJ C 301, 30.9.1998, p. 4.

[2] 'Les interventions des collectivités territoriales en faveur des entreprises', Cour des Comptes, Paris, November 1996.

(5) By letter dated 31 July 1998, the French authorities requested a further extension of one month, which the Commission granted on 5 August 1998. By letter dated 18 September 1998 they requested a further extension of 20 days, which was granted on 25 September 1998. By letter dated 25 November 1998, the French authorities replied to the initiation of the said procedure.

(6) The Commission's decision to initiate the procedure was published in the *Official Journal of the European Communities* ([3]). The Commission invited interested parties to submit their comments on the measures in question.

(7) The Commission received comments on this subject from interested parties. The comments were translated into French and one third party was requested, by letter dated 16 February 1999, to withdraw its request for confidentiality. The comments were then sent to the French authorities by letter dated 2 March 1999. After the French authorities and third parties had submitted comments, there were still many aspects which needed clarification before the case could be closed. In the letter of 2 March 1999, therefore, the Commission also requested detailed information.

(8) By letter dated 18 March 1999, the French authorities requested a further extension of 10 days, which the Commission granted in its letter of 24 March 1999. The French authorities replied in part to the Commission's request in its letter of 30 April 1999.

(9) Since, after a considerable delay, its replies were still inadequate, the French authorities were ordered by the Commission on 8 July 1999 to provide the necessary information. This decision was notified to the French authorities by letter dated 20 July 1999 (SG(99) D/5459), requiring them to submit their observations within 15 working days of the date of notification of the decision, i.e. by 11 August 1999.

(10) By letter dated 9 August 1999, the French authorities asked for the deadline to be extended by 30 working days, which extension the Commission granted on 12 August 1999. On 15 October 1999, the French authorities replied in part to the order to supply information.

(11) At the request of the French authorities, a meeting with the Commission services was held on 7 December 1999. At that meeting, the Commission services exceptionally allowed the French authorities, in the interests of the proceedings, to provide additional information by the end of December 1999. This information was finally forwarded on 10 January and 21 February 2000.

([3]) OJ C 301, 30.9.1998, p. 4.

2. DETAILED DESCRIPTION OF THE AID

2.1. *AID BENEFICIARY*

(12) In 1969 the Scott Paper Company purchased the French firm Bouton Brochard, subsequently founding a separate company, Bouton Brochard Scott, which took over Bouton Brochard's business. Bouton Brochard Scott changed its name to Scott SA in November 1987 ([4]).

(13) Scott SA, whose shares were bought by Kimberly-Clark Corporation (KC) in January 1996, owned a household and sanitary paper production plant on the Orléans-Sologne industrial estate in the municipality of Saint-Cyr-en-Val, Loiret. Some 170 people were employed at the plant. KC announced its closure in January 1998. The plant's assets, i.e. the site and the paper mill, were bought by Procter & Gamble (P & G) in June 1998 ([5]).

2.2. *SALE OF THE LAND*

(14) To enable Bouton Brochard Scott (Scott) to build a household paper factory, the French subsidiary of the Scott Paper Company, the county council and the city council commissioned the Société d'economie mixte pour l'equipement du Loiret ('Sempel') on 12 September 1987 to carry out all the studies and work necessary for developing some 68 hectares of land on the 'La Saussaye' industrial estate and the 'La Planche' sector (the La Saussaye industrial estate) ([6]).

([4]) Comments from Scott, 23 November 1998, point B1.
([5]) Comments from Scott, 23. November 1998, point B1.
([6]) Preamble to the agreement of 31 August 1987 concluded between Bouton Brochard Scott SA, Orléans City Council and Loiret County Council ('the Scott agreement'); preamble to the Agreement on the improvement of the La Saussaye and La Planche sites of 12 September 1987 concluded between Loiret County Council, Orléans City Council and Sempel ('the Sempel agreement'); extract from the minutes of the meeting of Orléans City Council of Friday, 27 May 1994 ('the city council's minutes of 1994'), p. 1.

(15) To this end the city council sold the 68 hectares concerned to Sempel for a symbolic one franc ([7]). The land, which was agricultural land at the time, had been bought by the city council between 1975 and 1987 for FRF 16/m^2 (EUR 2,4/m^2), or a total price of FRF 10,9 million (EUR 1,7 million) ([8]).

(16) Sempel is a local semi-public company subject to private law and governed by law No 83-597 of 7 July 1983. Companies covered by this legislation are legal persons governed by private law which link local authorities (regions, departments and municipalities), and their associations, to private persons and, possibly, to other public persons, in order to carry out development and construction work, industrial and commercial services, or any other activity of public interest. Although controlled by public persons, in this case the local authorities, which must hold at least half the capital (subject to a ceiling of 80 %) they are governed by the rules of private law, in particular the Law of 24 July 1966 on trading companies ([9]).

(17) Under Article 2 of the Sempel agreement, Sempel was commissioned to carry out the following work in particular on land intended for Scott's proposed facilities:

'— all surveys and preparations of preliminary plans,

— all roads and miscellaneous networks, and all works for supplying with water, gas and electricity the site which is the subject of this agreement,

— parking space for lorries and light vehicles,

— the rail link to the site which is the subject of this agreement,

— the lighting for the roads and parking spaces,

— green areas,

— the formation level for receiving the factory warehouse and its superstructure, these structures to be built under contract with the developer, the Scott Paper company,

— tall primary, secondary and tertiary infrastructure facilities situated within the estate to be developed or necessary for directly connecting it to external networks, and

— all the development work required to make the land suitable for the use to which it has been allocated'.

(18) At the time when the Scott agreement was concluded, i.e. 1987, the city council and the Loiret undertook to finance the site-preparation costs 'up to a maximum of FRF 80 million' ([10]). This amount was divided 'into two parts, FRF 50 million for Orléans City Council and FRF 30 million for the Loiret of the Loiret' ([11]).

([7]) Article 3.1 of the Sempel agreement and the city council's minutes of 1994, p. 1.

([8]) By letters dated 17 March and 29 May 1997, the French authorities informed the Commission that the land had been bought by the city council for 15 FRF/m^2. But, according to point 2.2 of the city council's minutes of 1994, the initial value of the land was FRF 10,9 million, i.e. FRF 16/m^2.

([9]) According to the letter from the French authorities, 21 April 1997, p. 3.

([10]) Article 4 of the Scott agreement.

([11]) Point 1.1 of the city council's minutes of 1994.

(19) It is clear, however, from the statement of final account drawn up by Sempel for the improvement of the La Saussaye industrial estate and dated 26 July 1993 ([12]) (Sempel's statement of final account) and from the city council's minutes that the total cost of developing the site must have been considerably higher. According to Sempel's statement of final account, it was some FRF 140 million (EUR 21,4 million), broken down as follows:

Expenditure		**Receipts**	
Purchase of land	2,00	Advance from local authority	4 282 000,00
Ancillary costs (land)	47 181,35	Borrowings	57 304 659,94
Other ancillary costs	36,00	Sale of land	31 000 002,00
Other, pre-concession studies	2 372 000,00	Annual payments from local authority	39 424 345,03
Topographical surveys	118 295,63		
Soil surveys and boreholes	685 510,97	VAT refunded	8 315 950,00
Other general studies	621,26	Financial revenue	38 486,81
Studies for secondary works	45 942,90	Open credit:	
Secondary water supply	58 761,45	— Loiret County Council	8 280,68
Other secondary works	490,57	— Orléans City Council	8 280,68
Other individual structures	4 020 456,51		
Buildings studies and works	76 082 967,38		
Financial charges on loans	27 477 505,98		
Financial charges on non-interest bearing advances	291 106,92		
Company expenses	1 590 000,00		
Other expenses concerning the sale	519 283,08		
Miscellaneous charges	2 030 054,14		
Other sundry debtors	16 489 000,00		
VAT paid	8 552 789,00		
	140 382 005,14		140 382 005,14

(20) According to point 2.2 of the city council's minutes, the total cost of the operation to the Loiret was approximately FRF 37,2 million (EUR 5,7 million) and to the city council approximately FRF 92,5 million (EUR 14,1 million), of which FRF 65,85 million (EUR 10 million) was for the redemption of a loan of FRF 34,2 million (EUR 5,2 million) granted to Sempel, FRF 10,9 million (EUR 1,7 million) for the purchase of the land and FRF 13,6 million (EUR 2,1 million) for the land improvement operations carried out.

(21) In 1987 Sempel sold 48 ha of the available 68 ha to Scott at a price of FRF 65/m^2 (EUR 9,9/m^2), i.e. for a total price of FRF 31 million (EUR 4,7 million) ([13]). This price was already laid down in the Sempel agreement (point 12.3): '[…] the price for selling the factory warehouse and the supporting land to the Scott Paper Company shall be FRF 31 million inclusive of tax.' The remaining 20 ha were sold back to the Orléans municipal authorities at a symbolic price of one franc in 1989 and 1992 ([14]), after which Sempel was wound up ([15]).

([12]) Sempel's statement of final account prepared for Loiret County Council and Orléans City Council on the La Saussaye and La Planche industrial estate, 26 July 1993, p. 1.

([13]) Point 2.1 of the city council's minutes of 1994; letter from the French authorities, 3 June 1997, p. 2. In its letter of 23 November 1998, section B2, Scott claims, however, that it purchased the Orléans site in March 1988.

([14]) Point 2.1 of the city council's minutes of 1994.

([15]) Letter from the French authorities, 21 April 1997, p. 3.

(22) In 1998 the La Saussaye industrial estate covered some 200 hectares, on which 70 firms were established employing 2 000 staff ([16]).

2.3. *PREFERENTIAL RATE OF WATER TREATMENT LEVY*

(23) A water treatment levy expressed in FRF/m^3 is charged on the quantity of water consumed by a firm. Orléans City Council calculates the base for the levy in accordance with the interministerial circular of 12 December 1978 ([17]). The circular explains how to calculate the base (number of m^3 metred × effluent coefficient × coefficient of degressivity × pollution coefficient) for users with a consumption of over 6 000 m^3/year ([18]). The amount of the levy has been freely decided by the city council's deliberative assembly since 1 January 1986 ([19]).

(24) However, for quantities of water exceeding certain thresholds, Article R. 372 of the Municipalities Code (Code des Communes) ([20]) stipulates that 'The number of cubic metres recorded, which serves as the basis for the water treatment levy, is adjusted upwards or downwards to reflect the special costs imposed on the water board as a result, in particular, of the level and type of pollution caused by the firm'. This is known as the 'coefficient of degressivity', which is also fixed by Orléans City Council.

(25) Article 7 of the Scott agreement provides for a preferential rate of water treatment levy for Scott:

'Orléans City Council undertakes to change the rates of water treatment levy applicable to industrial users who are in an exceptional situation and to lay down a rate for them that does not exceed 25 % of the most favourable current rate. Subject to Scott's compliance with current technical standards and legislation, Orléans City Council will apply this preferential rate to it.'

(26) On 1 January 1989 Orléans City Council set a new amount for the water treatment levy ([21]) and a new coefficient of degressivity ([22]). For volumes between 0 and 50 000 m^3, the coefficient of degressivity was reduced from 1 to 0,5 in proportion to the volume. Between 50 001 and 150 000 m^3, the coefficient increases from 0,6 to 0,8. According to the city council's minutes of 1988, the aim is to encourage large-scale consumers of water to reduce their effluent ([23]). However, for consumption exceeding 150 000 m^3, the coefficient is reduced to 0,25, without any reason being given. The coefficients of degressivity are shown in the following table:

Coefficients of degressivity	
0 to 6 000 m^3	1,00
6 001 to 12 000 m^3	0,80
12 001 to 24 000 m^3	0,60
24 001 to 50 000 m^3	0,50
50 001 to 75 000 m^3	0,60
75 001 to 150 000 m^3	0,80
over 150 000 m^3	0,25

(27) In 1996 Scott's consumption was some […] (*) m^3 ([24]). The company was thus eligible for the 0,25 coefficient in respect of a [a substantial part] (*) of its consumption, i.e. that part which exceeded 150 000 m^3. However, according to the French authorities, Scott is not the only entity to qualify for the 0,25 coefficient; the Hôpital de la Source does as well. In 1996 its water consumption was approximately 155 000 m^3 ([25]); a coefficient of 0,25 was applied to that part in excess of 150 000 m^3, i.e. 3 %.

3. **GROUNDS FOR INITIATING THE PROCEDURE**

(28) In 1997 the Commission published a communication on state aid elements in sales of land and buildings by public authorities ([26]) (the communication). This clarifies a policy which had emerged over a period of more than 10 years. It describes a procedure for the sale of land and buildings which automatically excludes any state aid element (sale through an unconditional bidding procedure or on the basis of an asset valuation by an independent expert prior to negotiations in order to determine its market value) and lists the types of sale which have to be notified to the Commission.

([16]) Letter from the French authorities, 26 November 1998, p. 1.
([17]) Letter from the French authorities, 6 October 1999, p. 5.
([18]) Idem.
([19]) Extract from the minutes of the Orléans City Council's meeting of 16 December 1988 ('the city council's minutes of 1988'), p. 2.
([20]) Decree No 77-241 of 7 March 1977.
([21]) The city council's minutes of 1988 (p. 2) state that 'to ensure that the 1989 initial budget for water treatment is in balance, it is necessary to increase the current rate by about 5 %, i.e. to raise it from FRF 2,40 to FRF 2,52'.
([22]) The city council's minutes of 1988, p. 3.
([23]) The city council's minutes of 1988 (p. 2) state that '[…] to encourage water-intensive businesses to reduce their effluent, it was decided by the city council on 19 December 1980 to increase the coefficient of degressivity for the proportion in excess of 50 000 m^3'.
([24]) According to Kimberly-Clark's water treatment bill for 1996.
([25]) According to the hospital's water treatment bill for 1996.
([26]) OJ C 209, 10.7.1997, p. 3.
(*) Business secret.

(29) Since no unconditional bidding procedure or valuation by an independent expert took place in this particular case, the Commission took the view in the decision to initiate the procedure that the price at which the land was sold could be justified, provided (i) it covers at least the land-related costs incurred by the authorities or, if there were an excessive supply of similar sites bringing prices down, (ii) it corresponds at least to the market price ([27]).

(30) On the basis of the information available to it at the time, the Commission found that it was not possible to establish with certainty that the price at which the land was sold to Scott (i) covered the costs incurred by the French authorities or (ii) corresponded to the market price. It also wondered whether the rate of water treatment levy might not contain elements of state aid.

4. GROUNDS FOR THE ORDER TO SUPPLY INFORMATION

(31) Since the French authorities had not given a satisfactory reply to the questions raised in the decision to initiate the procedure, the Commission ordered them to provide the information requested. The questions were virtually identical to those set out in the Commission's letter to the French authorities dated 2 March 1999.

(32) The Commission regarded the French reply as inadequate, since none of the following information was supplied:

— a detailed description, and evidence, of the publicity given to the sale in France and Europe,

— a detailed breakdown, by type, of the work carried out by Sempel on the land occupied by Scott (levelling, electricity, infrastructure, construction, etc.) and its actual cost, a breakdown of the use of the funds arising from the loans contracted by Sempel, and a copy of the tripartite agreement between Orléans City Council, Loiret county Council and Sempel,

— the various sales contracts concluded, including in particular the sale prices agreed between Orléans City Council and the other six firms which had bought plots on the remaining 20 ha ([28]),

— an explanation of how Decree No 77-241 of 7 March 1977 can provide the legal basis for a reduction of the water treatment levy on the basis of the quantity consumed, since it stipulates that the levy should be adjusted according to the level of pollution caused by the firm,

— invoices for, and particulars of, all the other firms in the region which qualify, or would have qualified, for the same reduction of the water treatment levy as that offered to Scott Paper.

(33) Lastly, in the light of the comments received from third parties following its decision to initiate the procedure, the Commission required the French authorities to provide it in particular with:

— a copy of the agreements, concluded in 1987, between Scott Paper, Orléans City Council and Loiret County Council,

— a copy of the joint and several guarantee agreement with Orléans City Council, and of the loans contracted by Sempel under its agreement with the city council and the county council.

5. COMMENTS FROM THE PARTIES CONCERNED

(34) Both the complainant and the beneficiary firm, Scott, in its capacity as a third party, commented on the initiation of the procedure.

5.1. *COMMENTS FROM THE COMPLAINANT*

(35) In its letter of 28 October 1998, the Complainant confirms and supports, in the main, the Commission's position as set out in the decision to initiate the procedure. The complainant stresses in particular (see recitals 36 to 43) the need to clarify the links between the local authorities, Sempel and Scott Paper and (see recitals 44 and 45) the respective contributions from the various authorities in the Loiret. In addition, the complainant comments (see recitals 46, 47, and 48) on the terms of the sale of the Saint-Cyr-en-Val site to P & G and the new KC location in the Loiret.

([27]) For further details see OJ C 301, 30.9.1998, p. 4.

([28]) The Commission would point out in this respect that, in their letter of 2 June 1999, the French authorities expressly stated that '(they)' are not prepared to send the Commission the documents it requests (agreement between the local authorities and Sempel, sale contracts with the other firms), as these have nothing to do with the case and some are private.

5.1.1. THE NEED TO CLARIFY THE LINKS BETWEEN THE LOCAL AUTHORITIES, SEMPEL AND SCOTT PAPER

(36) As regards the obscurity of the links between the local authorities and Sempel, the complainant requests clarification of Sempel's use of the funds arising from the loans it contracted. It also draws the Commission's attention to the fact that Sempel was dissolved following an administration order, shortly after the expiry of the tripartite agreement between Orléans City Council, Loiret County council and Sempel of 12 September 1987 relating to the period 1987 to 1993, and that its object was 'to carry out all the surveys and work needed for the development of the sites on the La Saussaye industrial estate'.

(37) In this respect the complainant also points out that, in its administration order on Sempel of 19 March 1996, the Orléans Commercial Court noted that an audit report on the company dating from January 1995 found 'a deficit of FRF 4 to 5 million in 1994 and in 1995'. The complainant also invites the Commission to ask the French local authorities concerned to submit the tripartite agreement between Sempel, Loiret County Council and Orléans City Council.

(38) As regards the work carried out by Sempel for the benefit of Scott paper on the Saint-Cyr-en-Val site, the complainant maintains that the loans contracted by Sempel are in reality explained by the hidden financing, for the exclusive benefit of Scott Paper, of a number of works which should have been financed, under undistorted competitive arrangements, by Scott Paper alone.

(39) According to the complainant, the Journal de Gien of 17 September 1987 ([29]) reveals very clearly what the local authorities' policy was from 1987 onwards as regards getting Scott Paper to locate in the Loiret:

> 'While Orléans is putting out the flags, we can now reveal the factors which, after one year's negotiations, made it possible to win the day. The authorities have revealed the resources which they deployed to hook the United States giant: FRF 80 million.'

(40) The complainant adds that the article clearly shows that the bulk of the aid granted by the local authorities was for developing the land for the Scott Paper site and also for carrying out various infrastructure work for the exclusive benefit of Scott Paper:

> 'In this particular case the authorities are including in the package the public services needed to make the La Saussaye estate meet the expectations of Scott Paper, which also benefits from the sale free-of-charge, through Sempel, of 50 ha of land.'

(41) According to the complainant, the press article states in particular that: 'Sempel is responsible for all the work to be carried out: provision of services; miscellaneous development work and construction of a factory warehouse. Total bill: FRF 80 million, to be shared by the county council (FRF 35 million) and Orléans City Council (FRF 45 million). Next February, the two authorities will recover some of this stake when Bouton-Brochard-Scott, a subsidiary of Scott Paper, will buy the building for FRF 31 million. All these measures constitute the first instalment, the only one to which the authorities will make a financial contribution'.

(42) The complainant concludes that this information confirms the view set out in the French Court of Auditors' report of November 1996:

> 'To get round the urban planning rules, some authorities have no hesitation in hiding the purpose of the aid which they collect or allocate. This is the case with facilities in the Loiret, which are not eligible for regional planning grant. The agreements concluded with the firms stipulate that the aid relates to the land and its development; but, in several large cases, the aid is much greater than the cost of the developed land and is used to finance, quite illegally, much of the building work. In some cases, the aid intensity may be as high as 40 % to 50 % of the declared cost of the real estate investment project'.

(43) The complainant argues that the proposal from the Loiret authorities to finance such an infrastructure was thus decisive for Scott Paper's choice to locate in Saint-Cyr-en-Val rather than accept the 'competitive' offers of other French local authorities. Thus, in July 1987, the 'Nouvelle République' ([30]) noted Scott Paper's hesitations in deciding where it was going to locate in France:

> 'With the result that the Scott Paper dossier is making its way slowly between the government's

([29]) Scott Paper. Local authorities overwhelmingly in favour.

([30]) Scott Paper: 1 000 jobs to wrap up, *La Nouvelle République*, 18 to 19 July 1987.

doubts about opening national markets to a foreign giant and the municipalities' willingness to host the United States' firm, (a rivalry which Scott Paper is using) to obtain the best location terms'.

[…]

'As to the municipalities, Orléans seemed to have eliminated its rivals one after the other, when the availability of a 25 000 m^2 warehouse to the south of Sens caught Scott Paper's attention'.

[…]

'The challenge for Orléans now, therefore, is to find arguments that will save it time. The first is the commitment to put up buildings in no more than five months. This is an apparently satisfactory time frame, since it would enable Scott Paper to become operational at the end of that period, if the United States' multinational's initial aims are confined to using a warehouse and a processing chain which it would supply with paper from its Belgian and Italian factories (in Antwerp and Turin)'.

5.1.2. RESPECTIVE CONTRIBUTIONS OF THE VARIOUS AUTHORITIES IN THE LOIRET

(44) As regards the contributions of the different authorities, it should be noted that, in January 1998, Le Canard Enchaîné ([31]) mentioned that there was an agreement between Scott Paper and the local authorities:

(45) 'Orléans City Council and Loiret County Council can hardly hope to recover their stake. Nothing in the contract signed with Scott indicates that they will get a penny back, if the company fails to meet its obligations. The only hope is Brussels […]'.

5.1.3. TERMS OF THE SALE OF THE SAINT-CYR-EN-VAL SITE TO PROCTER & GAMBLE, AND KIMBERLY CLARK'S DECISION TO LOCATE IN THE LOIRET

(46) Early in 1998, KC/Scott Paper sold the Saint-Cyr-en-Val site to P & G. La République du Centre on 19 September 1998 ([32]) stated that P & G had acquired the Saint-Cyr-en-Val site (which used to belong to Scott Paper) on advantageous terms, noting that the site in question had been bought for 'a price of FRF 200 million when it is worth FRF 600 million'.

(47) On 22 October 1998, i.e. barely 10 months after the announcement of the closure of the KC factory at Saint-Cyr-en-Val, the daily 'Les Echos' reported that the company was to set up a new plant in the Loiret ([33]).

(48) Finally, the complainant stresses that, for the Commission to be able to verify the information provided by the French authorities, it should have access to 'the tripartite agreement concluded between Sempel and the local authorities on 12 September 1987' and 'the agreement concluded initially by Scott Paper and the local authorities'.

5.2. *COMMENTS FROM THE PRESUMED BENEFICIARY OF THE AID*

(49) In its letter of 23 November 1998, Scott comments on the initiation of the procedure with regard to the purchase price of the Orléans site (see recitals 50 to 59), the grant to Scott of a concessionary rate of water treatment levy (see recital 60) and repayment of the aid by Scott (see recital 61).

5.2.1. PURCHASE PRICE OF THE ORLÉANS SITE

5.2.1.1. ***The price paid by Scott was the market price***

(50) In order to expand its market share to France, Scott announced in June 1986 that it was looking to set up a plant in France in the medium term, for an expected investment of up to USD 80 to 100 million. At that time, Scott used to supply France from its plants in Italy and Belgium. According to Scott, the company thereafter began to look for sites in France, which would meet its various needs (location, to take account of transportation costs; size, allowing for possible future expansion; infrastructure; skilled labour; and a sufficient supply of water and energy). In response to the announcement, several regions sent the firm information on available sites and the financial conditions concerning location. Scott states that, despite the consultants' extensive marketing efforts and budget, they did not 'find' Scott, but 'responded' to Scott's announcement that it was interested in setting up in France.

([31]) *Le Canard Enchaîné*, 14 January 1998, US toilet paper absorbs FRF 550 000 in subsidies per new employee.

([32]) 'Procter & Gamble Ex-Scott Paper: first clouds over the Saint-Cyr site'.

([33]) *Les Echos*, Kimberly Clark: new location in the Loiret, 22 October 1998.

(51) Over the succeeding months Scott carefully investigated a large number of different sites. It finally shortlisted first eight and then four sites (March 1987), of which La Saussaye was one. Scott explains, however, that no definitive decisions were taken at that time, since it was understood that other local authorities in France were considering offering sites to the company.

(52) In this respect, Scott stresses that the market price is simply what a buyer and seller mutually agree is an acceptable price to each. The assessment that has to be made, therefore, is to determine the market price at which a private-sector owner and developer of the Sologne business park would itself have handled the case and the conditions on which such an investor would have sold the site.

(53) Scott remarks that, at the time, many local authorities were scanning the market for industrial investors, such as itself, to buy sites, invest in them and operate them. The number of such companies was limited at the time, however, so the market price had to reflect the fact that the demand for such firms exceeded their supply, thus enhancing their negotiating power.

(54) The price paid by Scott (FRF 31 million (EUR 4,7 million)) was the price it was prepared to pay for the site in question in the light of (i) the extensive research which it had carried out in the preceding months into the net cost of acquiring competing available sites and (ii) its own analysis of the total investment it was ready to make, plus the fact that (a) it could quite easily continue to supply the French market from elsewhere in the Community and (b) that the new French plant would be loss-making for five years.

(55) Scott claims that, apart from the fact that the company would have attracted other firms to the business park, the purchase price and the direct receipts generated by its activities would, over time, have more than repaid the costs incurred by the local authorities, who would of course have continued to benefit from this source of revenue thereafter. In this connection, Scott refers to the Commission decision in Daimler-Benz ([34]), which, it asserts, shows that the business rate and other forms of local tax can be included in a local authority's revenue to determine if it has been paid a proper price.

([34]) Seventeenth Report on Competition Policy 1987, point 220.

(56) Regarding the price difference between the site sold to Scott and the adjoining sites, Scott points out that the difference in size between a site of 48 ha and sites of only a few thousand square meters would obviously be reflected in the sales' prices obtained. It also points out that the sales of the adjoining sites took place some years after the sale of the site to Scott, and therefore the prices of these sites could have been influenced by a large number of factors, including of course the increase in the value of land in the area following Scott's arrival.

5.2.1.2. ***The site was sold after extensive marketing campaigns***

(57) Scott believes that all the marketing and promotional initiatives undertaken by the local authorities, or on their behalf by e.g. Recherche et Développement International (RDI), more than meet the requirement that they must be 'sufficiently well-publicised', as this could have been understood in 1986/1987 in the absence of any clarification or guidance from the Commission; consequently, Scott believes that, by the standards of the communication relied upon by the Commission, even though this was only published in 1997, it could not have received any aid in this case.

5.2.1.3. ***Retrospective application of the principles in the 1997 communication***

(58) Scott does not accept that the 1997 communication can apply to a sale of public land which took place in 1987. The Commission, it claims, is trying to apply a policy developed over the following ten years and more, which, as the institution itself has stated, needed clarifying through the publication of the communication in 1997, even though during those ten years a number of decisions had been adopted on the sale of land by public authorities. Scott also considers that the legal instrument — the communication of 1997 — which the Commission appears to be relying on is 'soft law' and therefore has no binding legal effect.

5.2.1.4. ***The legal basis of the aid granted to Scott was notified***

(59) According to Scott, France advised the company that if aid, of whatever description, had been allocated by one or other of the local authorities, it would have been granted as indirect aid under Law No 82-6, and that this Law had definitely been sent to the Commission in 1982. Scott claims that, even if Law No 82-6 was not formally notified to the Commission in 1982, the Commission received a copy of it, so it was obliged to act expeditiously in compiling the file and in carrying

out a preliminary investigation ([35]), failing which Law No 82-6 could be implemented by France on the ground that it had become an existing aid measure in accordance with the principles in Lorenz ([36]).

5.2.2. GRANT TO SCOTT OF A PREFERENTIAL RATE OF WATER TREATMENT LEVY

(60) Lastly, as to the alleged preferential rate of water treatment levy, Scott understands that the rate applies to all customers who use the same quantity of water as it does and that other firms or institutions pay the same rate. Thus Scott simply pays a rate provided for by law and available to all firms in the same category as itself.

5.2.3. REPAYMENT OF AID BY SCOTT

(61) Scott maintains that, in accordance with the decisions of the Court of Justice, the beneficiary of aid granted unlawfully may invoke exceptional circumstances, as a result of which it had legitimately assumed the aid to be lawful. The reasons why aid granted unlawfully should not be repaid in this case are as follows: (a) any advantage that Scott may have had when it operated the plant has been entirely neutralised by P & G buying the site and the plant at their combined market value; (b) Scott is not now retaining any advantage from any incompatible aid, as the book value of the site and the plant at the time of the sale to P & G was much less than the total cost of those assets to Scott, and those assets were sold to P & G at less than half their book value; (c) the non-transparent manner in which the Commission dealt with the various laws either notified or sent to it by France in 1982, on the aid that may be granted by French local and regional authorities, made it almost impossible for a firm to obtain information about the status of these enactments from a Community law perspective.

6. **COMMENTS FROM THE FRENCH AUTHORITIES**

(62) The French authorities replied to the Commission decision to initiate the Article 88(2) procedure and to its request for information by five letters (dated 25 November 1998, 30 April 1999, 6 October 1999, 7 January 2000 and 21 February 2000), which are summarised below.

(63) According to the French authorities, Scott did not receive any aid for the following reasons: there was no market for industrial sites in rural areas at the time of the sale of the land (recital 64); if the Commission were to find that there was a market, the land was sold at the market price (recitals 65 to 72); the land was sufficiently well-publicised within the meaning of the communication (recitals 73 to 88); if the Commission thinks that the sale of land does constitute aid, the following costs should be deducted (recitals 89, 90 and 91); the preferential rate of water treatment levy (recitals 92, 93 and 94); the limitation period (recital 95), and the status of KC in the case (recital 96).

6.1. *NO MARKET FOR INDUSTRIAL SITES IN RURAL AREAS*

(64) At the time of the sale of the land, there was no market at all for industrial sites in rural areas ([37]). According to the French authorities, there were, in 1987, no private developers in the Orléans area carrying out this type of work. The lack of a market in industrial land made it difficult to set a market price within the meaning of the communication. The French authorities claim that, in order to create such a market, and stimulate and develop the local economy, the local authorities had to prepare the land and sell it to firms. They point out that the first firm to establish itself on the estate, i.e. Scott, attracted other companies. It is not possible in any way to conclude from the size of the business park in 1998 that there was a market in 1987 for this type of land.

6.2. *THE LAND WAS SOLD AT THE MARKET PRICE*

(65) Even if the Commission should conclude that there was a market, the land was in fact sold at the market price, and for three reasons ([38]).

([35]) Case C-312/90 Spain v Commission [1992] ECR p. I-4117.
([36]) Case 120/73 Lorenz [1973] ECR p. 1471.
([37]) Letter from the French authorities, 25 November 1998, pp. 2 and 3; letter from the French authorities, 30 April 1999, p. 1 and letter from the French authorities, 15 October 1999, pp. 1 and 2.
([38]) Letter from the French authorities, 25 November 1998, p. 3; letter from the French authorities, 30 April 1999, p. 2 and letter from the French authorities, 21 February 2000, pp. 2 to 4.

6.2.1. THE DIFFERENCE BETWEEN THE PRICE OF THE LAND SOLD TO SCOTT AND THAT OF THE REMAINING LAND IS DUE TO ECONOMIES OF SCALE

(66) Sempel sold 48 ha to Scott in 1987 for FRF 31 million (EUR 4,7 million), i.e. FRF 65/m^2 (EUR 9,9/m^2). Of the remaining 20 ha sold back to the city council, only 2,8 ha were sold to firms at an average price of FRF 72/m^2 (EUR 11/m^2) between 1990 and 1994. By selling a plot of this size (48 ha) to Scott, the city council achieved economies of scale ([39]) of some FRF 11/m^2, which justified a selling price of approximately FRF 65/m^2 (EUR 9,9m^2) instead of FRF 72/m^2 (EUR 11/m^2). The different transactions are summarised in the table below:

Period	Number of transactions	Selling price
1986 to 1990	5	FRF 40/m^2
1992	1	FRF 80/m^2
1994	2	FRF 100/m^2

6.2.2. THE PURCHASE PRICE DID NOT COVER ALL THE EXPENSES ([40])

(67) The sale of the site by Scott to P & G clearly shows that sellers in the privately owned paper sector do not necessarily cover their expenses completely, even on the basis of the written down cost. Scott and KC sold the Orléans factory to P & G in May 1998 for […]. The transaction was concluded under normal market conditions. The total cost, to Scott and KC, of the factory sold was […]. The written down cost (or net value) of the factory was […].

(68) The factory sold to P & G belonged partly to Scott and partly to KC. The assets which Scott sold to P & G were the land bought from Sempel in 1987, the building on the land included in Sempel's selling price, and other buildings which Scott itself had had built and had paid for. The total cost to Scott of what it sold to P & G was […] (i.e. the FRF 31 million (EUR 4,7 million) paid to Sempel and the […] paid for other buildings). At the time of the sale, the written down cost of these assets was […]. Scott received […] from P & G for the assets which it sold to that company. Scott therefore made a loss of […] (or 38 %) compared with the purchase cost, and a slight profit of […] (or 5 %) compared with the written down value.

(69) In its communication on the decision to initiate the procedure, the Commission indicated that Scott had perhaps received aid of between FRF 59,3 million (EUR 9,0 million) and FRF 98,7 million (EUR 15 million). If one adds these sums to the price which Scott effectively paid for the assets it sold to P & G, the cost of these goes up from […] to […] or […]. The losses which Scott would then have made on the sale to P & G would have been as follows:

Acquisition cost of […]:

— on an undepreciated basis, the loss would have been […] or 59 %;

— on a depreciated basis, the loss would have been […] or 25 %.

Acquisition cost of […]:

— on an undepreciated basis, the loss would have been […] or 66 %;

— on a depreciated basis, the loss would have been […] or 38 %.

(70) According to the French authorities, the experience which Scott and KC gained from the Orléans site also taught them that experts' valuations should be treated with considerable caution, since the valuations given could often not be fulfilled on the market. The Galtier firm of consultants valued the assets belonging to Scott and KC, and sold to P & G, as follows: Scott […]; KC […], giving a total of […].

(71) The French authorities concluded that the expert valuation resulted in figures that were some 22 % lower than the written down cost of the assets […] but the two companies did not manage to obtain a price that was anywhere near that given in the valuation: Scott and KC only found a buyer prepared to pay […] they therefore had to accept a loss on the sale of their assets

([39]) In their letter of 30 April 1999, p. 2, the French authorities give the following explanation of the difference between the price per m^2 paid by Scott and that paid by the other investors on the estate:
'— the size of the plots, since the sale of a large plot reduces the landowner's financial carrying costs compared with a hypothetical situation involving many sales of smaller plots. […] The costs associated with the servicing of the site are not to be taken into consideration in this particular case, since Sempel developed the 68 ha,
— the appreciation of the estate as a whole following Scott's move,
— the land was sold to Scott in 1987, the other sales took place between 1990 and 1994'.

([40]) Letter from the French authorities, 21 February 2000, pp. 2 to 4.

to P & G of […] (or 30 %) compared with Galtier's expert valuation, and of […] compared with the written down cost of the assets.

6.2.3. THE 1987 VALUE AS A FUNCTION OF THE ACTUAL 1998 MARKET PRICE ([41])

(72) The French authorities claim that the market value of the land in question was probably FRF 31 million (EUR 4,7 million), and for two reasons. First, Scott sold to P & G in 1998 for […] what it had bought from Sempel in 1987 for FRF 31 million (EUR 4,7 million), despite the increase at the time in the price of land. Second, Scott applied the Commission's time value concept inversely to the land and buildings which it sold to P & G in order to calculate the current value of the aid granted in the past. At an average interest rate of 6 %, the market value in 1987 of what Scott sold to P & G in 1998 […] would have been […] and for just the land and buildings bought from Sempel would have been […].

6.3. *THE LAND WAS SUFFICIENTLY WELL-PUBLICISED WITHIN THE MEANING OF THE COMMUNICATION*

(73) As regards the publicity given in France and the Community to the sale, the French authorities point out that Scott Paper set up its plant in 1987 and that it is difficult today to produce evidence of the publicity organised at the time ([42]).

(74) The French authorities emphasise first of all that to find a potential investor it is not enough to 'publish' in the press a notice announcing a piece of land is available. The search involves: (a) identifying target firms that could locate to Europe or France permanently and on a substantial scale; (b) approaching such firms directly or indirectly through a consultant or specialised intermediary; (c) presenting the region; (d) selecting, after initial contacts, those firms that are likely to react to the tender, and (e) the discussions associated with the final move ([43]).

(75) The search cannot be conducted on the basis of just one available site, in case negotiations with potential investors are concluded too quickly: as a rule, several sites are proposed to potential investors, and, if an industrial estate is planned, it is often not prepared, or a rough draft only is made: local authorities are disinclined to invest heavily in site preparation unless they are sure their search will succeed ([44]).

(76) In the present case, the French authorities claim ([45]) that the county council and the city council made a substantial commitment over the years as regards marketing by setting up an agency for the economic development of the Loiret (ADEL) and *inter alia* a business investment consultant in the United States of America, RDI, to promote the location of new businesses in the city, including of course the Orléans-Sologne site. In 1986 a French consultancy, DML et Associés, was recruited by the county council to conduct the same campaign vis-à-vis European and non-European potential investors located in the Paris area ([46]).

(77) According to the French authorities ([47]), marketing activities focused initially, in 1986 and 1987, on the state of Michigan. They took the form in particular of: (a) stands at industrial exhibitions to alert United States companies to investment opportunities in the Loiret (e.g. at Detroit in September 1986); (b) the search for investors wishing to come to the Loiret and/or Orléans; (c) a meeting in Orléans of local development agencies, to which representatives of agencies in Michigan and Hannover were specifically invited; (d) in May 1987, an official fifteen-day visit to the United States was organised for the city's and Loiret's local development agencies; and (e) important contacts were maintained in the United States with local chambers of commerce, lawyers' offices, accountants, French companies and banks, development agencies and DATAR (Directorate for Town and Country Planning and Rural Action). Through these activities, RDI succeeded in identifying a number of United states companies (such as Symplex Inc., Saturn Inc. or ICB) initially interested in investing in the Loiret or Orléans.

(78) ADEL has also produced a business atlas entitled 'Orléans, an environment for business people' ([48]). In Orléans, ADEL took on the role of the Chamber of Commerce and Industry in order to find buyers, having been specially set up and hired to find potential investors. As part of its programme, ADEL was in contact with other local chambers of commerce and industry ([49]).

([41]) Letter from the French authorities, 21 February 2000, p. 4.
([42]) Letter, 6 October 1999, p. 1.
([43]) Letter, 7 January 2000, p. 1.
([44]) Letter, 7 January 2000, p. 1.
([45]) Letter from the French authorities, 25 November 1998, p. 3 and 4, and letter from the French authorities, 6 October 1999, p. 2 and 3.
([46]) Letter, 7 January 2000, p. 1.
([47]) Letter from the French authorities, 25 November 1998, p. 3 and 4 and letter from the French authorities, 6 October 1999, p. 2 and 3.
([48]) Letter from the French authorities, 7 January 2000, p. 4.
([49]) Idem.

(79) The French authorities also provided ([50]) a letter from the DML consultancy to Scott, dated 17 December 1999, describing how potential investors could be identified for the sites available in the Loiret in 1985/86. According to the letter, DML specialises in assistance for restructuring companies and industrial groups and assistance to local authorities and regional development agencies for identifying industrial investors.

(80) In the letter DML explains its working methods. It first identifies the activities which the region concerned wants to attract, and the companies in those sectors in the target zone. Secondly, once it has identified a potential interest, its consultants meet the company to determine its requirements and the level of investment envisaged. ADEL then examines the sites available in the region, to identify those which are most likely to meet the potential investor's requirements. It presents them to the investor, which itself selects those it wants to visit. Lastly, ADEL presents technical and economic studies to enable the investor to decide whether its project is viable in the region selected and on the particular site proposed.

(81) Regarding the present case, DML writes 'As an example of our work for ADEL, which began in July 1986, we initially identified over 500 companies to contact in the south of the Paris region. In the first three months, 150 companies were contacted, with the following results: 130 were not interested at all, 12 wanted more information about the Loiret and five wanted to be contacted. […] In the following months, DML contacted the 350 remaining companies to determine their interest, identify new leads and follow up the projects identified'.

(82) According to DML, the identification of potential investors is not usually achieved by placing advertisements in the press and waiting for companies to reply, but rather by directly contacting the managers of firms.

(83) DML explains that 'DML's method of operation is predicated on the awareness that potential investors can be found only after substantial preparatory work has been carried out, personal contacts established and assistance provided over a long period. We have to persuade the potential investor to choose, first, the region concerned and then a particular site. The final decision as to its place of establishment or location is of course the investor's. The job of companies like ours, which have been hired by local development agencies, is to direct the potential investor to the region concerned rather than to a particular site. The choice of the site itself is determined by the technical and financial requirements of the investor'.

(84) DML concludes by stating that 'lastly, we can confirm to you that DML was not involved, and did not play a part, in the identification and location of Scott Paper's investment project in Orléans'.

(85) The French authorities consider that, since the Commission had not clarified its policy in 1987, the initiatives described above should be regarded as meeting the condition in the communication that the bidding procedure should have been 'sufficiently well-publicised', as this could have been interpreted at the time ([51]).

(86) In reply to the Commission's position that the circumstances of the Scott sale did not fall within the scope of the communication, since the advertising carried out by or on behalf of the public authorities was not sufficiently specific to the site, the French authorities emphasise that the Commission applied the 1997 communication flexibly in its decision on the Fresenius case ([52]).

(87) The French authorities claim that in Fresenius the conditions laid down in the communication were not met on two counts. First, the communication authorises land to be sold at up to 5 % below the valuation price, if no purchaser can be found after a reasonable period; in Fresenius' case, the land was sold at more than 10 % below the valuation price. Secondly, the communication also provides that if the land cannot be sold after a reasonable period for 95 % or more of the price at which it was valued, a new valuation may be carried out in order to determine a more realistic market value; no such valuation was done in the Fresenius case ([53]).

([50]) Letter from the French authorities, 21 February 2000, Annex 1.

([51]) Letter from the French authorities, 25 November 1998, p. 3; letter from the French authorities, 30 April 1999, p. 1; letter from the French authorities, 6 October 1999, p. 2 and letter from the French authorities, 7 January 2000, p. 1 and 2.

([52]) Letter from the French authorities, 10 January 2000, pp. 3 to 5; Notice C 36/92 (ex NN 108/92) concerning the terms of a land purchase agreement between the city council of Friedberg/Hessen and Fresenius AG (OJ C 21, 25.1.1994, p. 4).

([53]) Letter from the French authorities, 7 January 2000, p. 3.

(88) The French authorities conclude that Fresenius shows that in 1994 the Commission was not applying strictly and inflexibly the criterion which it was to establish more clearly three years later in the communication: the same approach should be adopted in the Scott case, especially since the events took place seven years before the Fresenius decision was adopted, with the result that in 1987 it was that much less clear which procedures the local authorities should apply in order to sell an undeveloped piece of land.

6.4. *IF THE COMMISSION WERE TO FIND THAT THE SALE OF LAND CONSTITUTES AID, THE FOLLOWING COSTS SHOULD BE DEDUCTED*

(89) As regards the total cost of the project to the city council, the following sums should be deducted ([54]):

— FRF 31,7 million (EUR 4,8 million) (FRF 65,85 million — FRF 34,2 million) for the amortisation of the loan of FRF 37,2 million (EUR 5,7 million). Only the nominal value of the loan should be included in the calculation of the cost,

— FRF 13,6 million (EUR 2,1 million) representing the cost of a public intercepting sewer serving not just Scott but the whole community, i.e. 25 000 inhabitants and other firms as well. Before this social overhead capital was built, waste water was treated and discharged directly into the river. Environmental pressures had for some time been leading the local authorities to consider such a facility. The decision was undoubtedly speeded up by Scott's locating to the area, but was not based on it,

— FRF 8,3 million (EUR 1,3 million) for the refund of VAT on the various site improvement operations,

— as a general point, it should be noted that these costs relate to 68 ha of land, and not just the 48 ha sold to Scott.

(90) The French authorities point out that, in accordance with the Commission's decision in Daimler Benz ([55]), 'the payment of local taxes by the purchaser of a site should be taken into account in the price paid for that site'. The Seventeenth Report on Competition Policy specifically notes that the expenses incurred by the Land of Baden-Württemberg and the Ratstatt authorities for (i) clearing the site and (ii) connecting it to the public services, such as water supply, were not regarded as constituting aid, since the purchaser had to pay them through local taxes. It is clear from the report that these costs were specifically incurred for the benefit of Daimler Benz.

(91) At its meeting on 7 December 1999, the Commission adopted a position whereby the payment of local taxes could not be taken into account in determining the price paid by the purchaser of the site. This was clearly neither the position nor the practice of the Commission when Scott bought the site from Orléans City Council (end of 1987), as the Daimler Benz case, which also occurred in 1987, shows.

6.5. *THE PREFERENTIAL RATE OF WATER TREATMENT LEVY*

(92) The French authorities maintain that the rate of the water treatment levy applied to Scott is part of a general measure and does not, therefore, constitute a selective advantage within the meaning of Article 87(1) of the EC Treaty ([56]). The Hôpital de la Source is subject to the same rate as Scott.

(93) The French authorities claim that the reference in the city council's minutes of 1994 to a 'preferential rate of water treatment levy' is linked to the inclusion, in the overall financial statement for the development of the La Saussaye estate, of the receipts lost as a result of a meeting on 16 December 1988 at which a degressive rate of levy based on the level of water consumption was introduced. The location of Scott Paper was undoubtedly the catalyst for such a decision, but the latter is a general measure which benefits, and will benefit, all plants meeting the same requirements ([57]).

(94) According to the French authorities, taxpayers with a water consumption of more than 6 000 m^3 qualify for a coefficient of degressivity in the calculation of their water treatment levy, to take account of that consumption. Orléans City Council wanted, for its part, to encourage large-scale consumers (over 50 000 m^3) to limit their effluent (hence the increase of the coefficient from 0,5 to 0,8 entered in the minutes), to reflect water treatment costs. This rationale is not applied in the case of taxpayers with a consumption of more than 150 000 m^3, since the volume of water consumed makes it

([54]) Letter from the French authorities, 25 November 1998, p. 5 and 6; letter from the French authorities, 30 April 1999, p. 2 and letter from the French authorities, 6 October 1999, p. 4.

([55]) Letter from the French authorities, 10 January 2000, p. 3; see footnote 34.

([56]) Letter from the French authorities, 25 November 1998, p. 5; letter from the French authorities, 30 April 1999, p. 3; letter from the French authorities, 6 October 1999, p. 5 and letter from the French authorities, 10 January 2000, p. 1 and 2.

([57]) Letter from the French authorities, 6 October 1999, p. 5.

possible to cover the related water treatment costs. The incentive effect of raising the coefficient of degressivity of the levy is less or even zero, if consumption is very high (hence the reduction to 0,25 entered in the minutes) ([58]).

6.6. *LIMITATION PERIOD*

(95) The French authorities draw the Commission's attention to the fact that Scott moved to the Loiret back in 1987 and that the first requests for information from the Commission date from 1997. The French authorities note that the new Procedural Regulation provides for a limitation period of ten years, and hope that in the case in point the virtually complete expiry of such a period will be taken into account by the Commission. They consider that the time the complainant has taken to acquaint the Commission with the facts shows that the loss suffered by the competition is probably non-existent ([59]).

6.7. *STATUS OF KIMBERLY CLARK IN THE CASE*

(96) According to the French authorities ([60]), KC can reasonably expect not to have to repay the aid, and for the following reasons:

(a) KC has received no aid from France. Any aid that may have been granted was paid to Scott some seven years before KC acquired an interest in the company;

(b) any diligence shown by KC with regard to Scott at the time of acquisition would not, in accordance with normal commercial and legal practice, have extended back as far as 1987 and would not have revealed any grant of aid to Scott in 1987;

(c) moreover, Scott's accounts between the date of their initial publication and 1995, the year when KC acquired Scott, did not show that the company had received any assistance whatsoever from any source in France;

(d) the only way KC could have discovered if Scott had received any aid in France would have been either to scan the relevant local or national press or the minutes of the meetings of the local authorities, or to contact the competent authorities. It is very unlikely that those authorities would have told KC that aid had been paid to Scott, if such were the case, and in what circumstances.

7. **ASSESSMENT OF THE AID MEASURES**

7.1. *ASSESSMENT OF THE AID MEASURES IN THE LIGHT OF THE ORDER TO PROVIDE INFORMATION*

(97) Although the Commission ordered the French authorities to provide information, it still does not have any information, or has inadequate information only, on the following points:

— a detailed breakdown of the work carried out by Sempel on the land occupied by Scott, by type of operation (levelling, electricity, infrastructure, buildings, etc.), and their actual cost, plus a breakdown of the use of the funds arising from the loans contracted by Sempel,

— the various sale contracts concluded, including in particular the selling prices agreed between Orléans City Council and the other six firms which bought plots on the remaining 20 ha. The Commission would point out in this respect that, in their letter of 2 June 1999, the French authorities expressly stated that 'they are not prepared to send the Commission the documents it requests (agreement between the local authorities and Sempel, sales contracts with the other firms), since these documents have nothing to do with the case and some are private',

— invoices and details relating to all the other firms in the region which are, or would have been, eligible for the same 'discount' on the water treatment levy as that granted to Scott Paper.

(98) According to the ruling in Pleuger, 'it is only if the Member State, notwithstanding the Commission's order, fails to provide the information requested, that the Commission is empowered to terminate the procedure and make its decision, on the basis of the information available to it, on the question whether or not the aids are compatible with the common market' ([61]). This power of the Commission's to take a decision on the basis of the information available if a Member State fails to comply with an information injunction was subsequently enshrined in Article 13(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 (now Article 88) of the EC Treaty (the Procedural Regulation on state aid, hereinafter 'the Procedural Regulation') ([62]).

([58]) Letter from the French authorities, 7 January 2000, p. 2.
([59]) Letter from the French authorities, 6 October 1999, p. 6.
([60]) Letter from the French authorities, 7 January 2000, p. 4.
([61]) Joined Cases C-324/90 and C-342/90 Pleuger [1994] ECR p. I-1173, point 26.
([62]) OJ L 83, 27.3.1999, p. 1.

(99) As a result, the Commission will have to base its assessment on the available information, in particular as regards calculating the value of the aid measures, the market prices of comparable plots and the preferential rate of water treatment levy.

7.2. *LEGAL BASIS*

7.2.1. PREFERENTIAL PRICE OF THE LAND

(100) Scott maintains that the preferential price of the land was granted as an indirect aid under Law No 82-6 and that there is no doubt that this Law was sent to the Commission in 1982. The company adds, referring to Case C-312/90 Spain v Commission ([63]), that even if Law No 82-6 was not officially notified to it in 1982, the Commission did receive a copy, so that it was obliged to act expeditiously as regards both the composition of the file and its preliminary examination, failing which Law No 82-6 could be implemented by France on the grounds that, in accordance with the principles laid down in Lorenz ([64]), it had become an existing aid.

(101) This position is rejected, for the following three reasons:

(102) Firstly, the French authorities never invoked this Law as the legal basis of the measure in question. Although all the comments of third parties, including Scott, were sent to the French authorities, the latter never referred to the Law in their correspondence with the Commission. Nor did the local authorities cite it in the agreement which they concluded with Scott; rather, they made the general statement that 'this agreement is concluded in accordance with the statutory provisions and other rules governing the powers of local authorities' ([65]). Furthermore, there was no reference to this Law in the city council's minutes of 1994.

(103) Secondly, even supposing that the measure concerned was granted under Law No 82-6, it is still the case that the Law does not constitute an existing aid within the meaning of the Lorenz judgment, as Scott claims.

(104) According to the Lorenz judgment, the effect of Article 88(3) of the Treaty is that, if the Commission, having been notified by a Member State of a plan to grant aid, fails to initiate the contentious procedure, that State may at the expiration of a period of two months grant the proposed aid, provided that it has given prior notice to the Commission, and that aid will then come under the system of existing aid ('the Lorenz rule') ([66]).

(105) In the case in point, the French authorities never submitted to the Commission that the Law should have been notified. Scott does not claim either that the aid was officially notified, but maintains that 'France advised Scott that […] Law No 82-6 was sent to the Commission in 1982' ([67]). Neither the French authorities nor Scott provided the Commission with written evidence that the Law had in fact been sent to it. In any event, contrary to Scott's position, the Lorenz rule does not apply where a measure has not been officially notified.

(106) It should be pointed out in this respect that, in accordance with its practice as determined in Article 2 of the Procedural Regulation, the Commission informs the Member State concerned without delay of the receipt of a notification. If they had not received such information, the French authorities should have recontacted the Commission to verify that it had indeed received the said notification.

(107) It should also be said that the quotation cited by Scott ([68]), according to which, even if an aid measure has not been officially notified to the Commission, the latter is obliged to act expeditiously as regards both compiling the file and the preliminary investigation, failing which the measure will be governed by the rule in Lorenz, is taken out of context. Firstly, the quotation is taken from the Opinion of Advocate-General Van Gerven and not from the Court of Justice's judgment. Secondly, the statement is made in a footnote commenting on the time limit within which the Commission should investigate an aid which it has itself discovered or following complaints made by interested undertakings.

(108) Advocate-General Van Gerven underlines that 'where unnotified aid is concerned, it is in principle not the case that the Commission has to complete its investigation within a two-month period. […] This does not mean that the Commission is not under a duty to act expeditiously in compiling the file and carrying out its preliminary investigation of it.' This means that when the Commission does investigate a case, either pursuant to a complaint or ex officio, it has to act expeditiously, but it by no means implies that, failing such notification, the Lorenz rule is applied in all cases.

([63]) See footnote 35.
([64]) See footnote 36.
([65]) Article 11 of the Scott agreement, p. 4.
([66]) See footnote 36.
([67]) Letter from Scott, 23 November 1998, p. 11.
([68]) Case C-312/90 Spain v Commission [1992] ECR p. I-4117.

(109) It should be pointed out in this respect that, following the complaint lodged in December 1996, the Commission compiled the present file and carried out its preliminary investigation, which lead to its decision in May 1998 to initiate an in-depth investigation.

(110) Lastly, as regards the Lorenz rule, neither the French authorities nor Scott claimed that the French authorities had given prior notice to the Commission before implementing Law No 82-6. Without such notice, an aid measure does not come under the system applying to existing aid pursuant to the Lorenz rule.

(111) Thirdly, even if the Commission treated Decree No 82-809 ([69]), which is based on Article 4(4) of Law No 82-6 ([70]), as existing aid without prior notification, this does not mean that Article 4(6) constitutes existing aid ([71]).

(112) At the time the measure was granted, Article 4 of Law No 82-6 approving the Interim Plan for 1982/83 of 7 January 1982 ([72]) stated that:

> 'The local authorities and their associations and the regions may, where the purpose of their action is to create or expand economic activity, grant direct or indirect aid to firms under the following conditions:
>
> Direct aid shall take the form of regional business start-up grants, regional employment grants, interest-rate subsidies or loans and advances at more favourable rates than the average yield on bonds. Direct aid shall be granted by the region under conditions laid down by decree of the Conseil d'Etat: the decree will determine in particular the rules as regards ceilings and zones which are essential for the implementation of national regional planning policy and compatible with France's international commitments.
>
> The various forms of direct aid may be supplemented by the Loiret, the municipalities or their associations, where the assistance from the region does not reach the ceiling laid down in the decree mentioned in the preceding paragraph.
>
> Indirect aid may be granted by local authorities and their associations, and by regions, severally or jointly.
>
> Local authorities, their associations and regions must sell or lease buildings on market terms. However, discounts on those terms may be granted, and abatements on the cost of renovating old industrial buildings, in accordance with the rules on ceilings and zones laid down in the decree mentioned in the second paragraph.
>
> Other indirect aid shall be unconditional.
>
> Local authorities and their associations and the regions shall determine the nature and amount of the guarantees required, where appropriate, of the firms receiving the aid and of their managers.
>
> In addition, agricultural measures of an industrial character may be taken by local authorities, their associations and regions under agreements concluded by them with the central government laying down the procedures for the aid which they may agree.
>
> This Law will be implemented as a national law'.

(113) In accordance with Article 4 of Law No 82-6 and French legal commentators ([73]), French national law appears to distinguish three types of aid. First of all, there are direct aid measures, the terms of which must be laid down by decree of the Conseil d'Etat (direct aid) ([74]) and for which only assisted regions are eligible. Then there are indirect aid measures relating to firms'

([69]) Decree No 82-809 of 22 September 1982 on aid for the purchase and leasing of buildings granted by the local authorities, their associations or the regions, *Official Journal of the French Republic*, 24 September 1982, (Decree No 82-809), p. 2853.

([70]) Article 4 of Law No 82-6 was repealed by Law No 96-142 of 21 February 1996.

([71]) Case C-295/97 Piaggio [1999] ECR p. I-3735, points 45 to 49.

([72]) *Official Journal of the French Republic*, 8 January 1982, p. 222.

([73]) L'action économique des collectivités locales, Ministry of the Interior (Local Authorities Department), Paris 1992 (report of the Ministry of the Interior), Droit administratif: L'encadrement juridique des aides des collectivités territoriales aux entreprises, Supplement No 1 to *La Semaine Juridique* No 5, 29 January 1998 (article in La Semaine Juridique), and Les interventions des collectivités territoriales en faveur des entreprises, special public report by the French Court of Auditors, Paris, November 1996 (report by the French Court of Auditors).

([74]) Decree No 82-379 of 6 May 1982 on the land-use planning grant, (hereinafter Decree 82-379), *Official Journal of the French Republic* of 7 May 1982, p. 1294; see Report of French Court of Auditors, p. 16 and 62, the report by the Ministry of the Interior, p. 94.

real estate (type I indirect aid) ([75]), for which rules on ceilings and zones have to be laid down by the same decree, i.e. only assisted regions may apply for them. Lastly, there is 'other indirect aid', which does not require supplementary implementing measures and which is 'unconditional' (type II indirect aid), i.e. independent of whether the region is assisted or not ([76]).

(114) Decree No 82-379 lays down the procedures for implementing direct aid. It was notified as the legal basis of the French scheme of regional planning grants. Commission Decision 85/18/EEC of 10 October 1984 on the French regional planning grant scheme ([77]) Decree No 82-379 cites Article 4 of Law 82-6 as the legal basis. Article 4 of Law No 82-6 was not notified directly to the Commission.

(115) Decree No 82-809 lays down the procedures for implementing type I indirect aid, i.e. real-estate aid. It cites Article 4 of Law No 82-6 as its legal basis. Even if this decree was never notified to the Commission ([78]), the latter has so far considered that the scheme constituted an existing aid.

(116) In the case in point, the measures concerned, namely (a) the building of a factory warehouse and (b) the development of the site, should be regarded as indirect aid within the meaning of Article 4(5) and (6) of Law No 82-6. It should be noted in this respect that the distinction between direct and indirect aid is still not recognised in Community law. This classification of the measures concerned is intended only to determine whether these measures can be regarded as coming under Law No 82-6.

(117) Measure (a) — the costs associated with building a factory warehouse — should be regarded as constituting type I indirect aid for the purposes of French law, i.e. a measure whose implementing procedures should be laid down by Decree No 82-809 and for which only assisted areas are eligible.

(118) Irrespective of the fact that the Commission, at the time of the building of the factory warehouse, considered that Decree No 82-809 constituted an existing aid, measure (a) does not in any case come under the said decree, since the Loiret is not an assisted area. Moreover, Article 2 of Decree No 82-809 provides that:

'In addition to the aid granted under the preceding Article, in the zones listed in Annex I to the abovementioned Decree of 6 May 1982 (Decree No 82-379), and in order to promote the creation or expansion of economic activity, local authorities, their associations or regions may, severally or jointly, grant discounts on the price of property which they sell or lease to firms up to 25 % of the sale value of buildings or leases of corresponding market value.'

(119) Annex I to Decree No 82-379 lists the areas which qualify for industrial projects. However, according to Annex II of the same decree, the Loiret is not eligible for the grant at all. Consequently, the costs associated with the building of a factory warehouse are not covered by Decree No 82-809. Measure (a) should therefore be regarded as a new aid, which the French authorities should have notified to the Commission under Article 88(3) of the EC Treaty.

(120) Measure (b) site development, should be regarded as type II indirect aid for the purposes of French law. This measure is based directly on Article 4(6) of Law No 82-6. It should be pointed out in this respect that this legal basis does not require any supplementary implementing procedure and applies in all regions.

(121) As mentioned in recital 105, Article 4 of Law No 82-6 was never notified. It cannot be inferred that Article 4(6) must constitute an existing aid, simply from the fact that the commission approved the French scheme of regional development grants, based on Decree No 82-379, which refers in turn to Article 4(2), not notified. It cannot be claimed either that Article 4(6)

([75]) Report by the French Court of Auditors, p. 19, 31. 37 and 62; article in *La Semaine Juridique*, p. 24 and report by the Ministry of the Interior, p. 94.

([76]) Report by the French Court of Auditors, p. 16, 62 and 126, article in *La Semaine Juridique*, p. 41 and 42 and report by the Ministry of the Interior, p. 14 and 94. The latter states (p. 94) that: 'Since indirect aid, apart from aid for industrial buildings, is unconditional, it has not been subject to specific rules. It does not, therefore, fall within the scope of schemes notified, or to be notified, to the Commission, since it makes general action affecting the economic environment of the region concerned possible and is not therefore caught by Article 92'.

([77]) OJ L 11, 12.1.1985, p. 28.

([78]) Contrary to what is stated in Commission Decision 93/193/EEC of 23 December 1992 on the aid granted for the creation of industrial enterprises in Modane, Savoie (OJ L 85, 6.4.1993, p. 22), 'local authorities can provide assistance in Modane under Article 1 of Order No 82-809 of 22 September 1982, which was approved by the Commission at the same time as the PAT (regional development premium)'; the said decree was never notified to the Commission.

must constitute an existing aid, simply because the Commission considered that Decree No 82-809, which is based on Article 4(5), was an existing aid. Measure (b), therefore, should be regarded as a new aid, which the French authorities should have notified to the Commission pursuant to Article 88(3).

7.2.2. PREFERENTIAL RATE OF WATER TREATMENT LEVY

(122) The basis for the water treatment levy is calculated in accordance with the interministerial circular of 12 December 1978 ([79]). The amount of the water treatment levy has been freely decided by the deliberative assembly of the City Council since 1 January 1986 ([80]). The coefficient of degressivity is based on Article R. 372 of the Municipalities Code (Code des Communes) ([81]). None of these legal bases was notified to the Commission, as is required by Article 88(3) of the EC Treaty.

7.3. *AID WITHIN THE MEANING OF ARTICLE 87(1)*

7.3.1. PREFERENTIAL PRICE OF LAND

(123) The question arises whether the price of land which Scott was charged is a preferential price that is caught by the prohibition in Article 87(1) of the Treaty.

(124) Under the said Article, any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.

(125) Thus the preferential price of land is caught by the prohibition in Article 87(1), if it satisfies the following three tests:

(a) it was granted by the state or through state resources;

(b) it favours certain undertakings and/or the production of certain goods;

(c) it distorts competition between the undertakings favoured and similar undertakings and/or types of production, where the products concerned are traded within the Community.

7.3.1.1. ***Granted by the state or through state resources***

(126) The first test, i.e. the grant of the measure by the state or through state resources, concerns the advantages granted both directly, i.e. by the public authorities themselves, and indirectly through bodies which are not strictly speaking part of the structure of the state. In the first scenario, the concept of the state should be understood in the broadest sense, comprising the organs of the central authority and also those of the decentralised local authorities at whatever level ([82]). In the second scenario, public or sometimes even private bodies are responsible for granting state aid, the important thing being that the aid in question is chargeable to the state.

(127) The criterion of chargeability is intended to determine whether the bodies in question act autonomously or whether their conduct, on the contrary, is dictated by the state under a supervisory power or controlling influence which it has in regard to them ([83]). The second criterion, for its part, makes it possible to check whether the aid was in fact financed, either directly or indirectly, through state resources ([84]).

(128) In this particular case, it was Sempel which sold the land in question to Scott at a preferential price. The question arises, therefore, whether (a) this preferential price is chargeable to the state, i.e. to the local authorities ('state' in the broadest sense), and (b) whether it was financed by them.

(129) The preferential price should be regarded as chargeable to the local authorities for the following reasons:

(130) Firstly, the agreement was concluded between Scott and the local authorities. It is clear from Article 2 of this agreement that it was the local authorities, through Sempel, which carried out the land improvements ([85]). To this end, the city council sold the land for development to Sempel for the sum of one franc ([86]).

([79]) Letter from the French authorities, 6 October 1999, p. 5.
([80]) City council minutes of 1988, p. 2.
([81]) Decree 77-241, 7 March 1977.
([82]) Case 323/82 Intermills [1984] ECR p. 3809 and Case 248/84 Germany v Commission [1987] ECR p. 4013.
([83]) Case 290/83 Commission v France [1985] ECR p. 439; Joined Cases 67, 68 and 70/85 Van der Kooy [1988] p. 219 and Case C-305/89 Italy v Commission [1991] ECR p. I-1603.
([84]) Case 82/77 Van Tiggele [1978] ECR p. 25 and joined Cases C-72/91 and C-73/91 Sloman Neptun [1993] ECR p. I-887.
([85]) Article 2 states that 'the local authorities, through a specialist company, Sempel (Société d'economie mixte pour l'equipement du Loiret), in which the local authorities are majority shareholders, will carry out the necessary improvements, as defined: parking space, roads, miscellaneous networks, site development etc. …, in accordance with Scott's specifications for the processing plant and warehouse (30 000 m^2 on the site of about 25 ha)'.
([86]) Point 3.1 of the Agreement on the development of the La Saussaye and La Planche sites states that 'the city council undertakes to sell to Sempel the sites which are to be developed, in accordance with the attached plans and references, for the sum of FRF 1 (one franc)'.

(131) Secondly, Sempel is an undertaking controlled by the local authorities and governed by private law. The local authorities must hold at least half the capital up to a limit of 80 % ([87]). Under Law No 83-597 of 7 July 1983, companies falling under this legislation are legal persons in private law, linking local authorities (regions, departments and municipalities) and their associations to private persons and, possibly, other public persons, in order to carry out development and construction operations, provide industrial and commercial public services or carry out any other activity of public interest.

(132) Thirdly and lastly, the price of the land and the factory warehouse was fixed by the local authorities. This is established by two documents: (a) Article 4 of the agreement between Scott and the local authorities sets the price for the sale to Scott of the factory warehouse and the land on which it is built at FRF 31 million ([88]); (b) point 12.3 of the Sempel agreement sets the same price ([89]).

(133) The preferential price must therefore be regarded as financed by the local authorities. According to point 12.1 of the Sempel agreement, the project is financed by the local authorities through the payment of annual instalments in respect of the loans contracted by Sempel for the purpose ([90]).

(134) It is clear from the above, therefore, that Sempel's behaviour must be regarded as dictated by the local authorities through the controlling influence which they have with regard to the company, and that the preferential prices were financed by the local authorities. Thus the first test of Article 87(1) is satisfied.

([87]) Letter from the French authorities, 17 April 1997, p. 1.

([88]) Article 4(2) of the agreement states that 'initially these development works are estimated at FRF 50 million, it being understood that Scott will build, under the conditions referred to at Article 2 above, a factory (processing plant and warehouse) of about 30 000 m^2 which will be bought from Sempel for FRF 31 million […]'.

([89]) Point 12.3 of the agreement states that '[…] the price for the sale of the factory warehouse and the site on which it stands to the Scott Paper Company [is] FRF 31 million inclusive of tax'.

([90]) Point 12.1 of the agreement provides that 'the local authorities undertake to give financial assistance to Sempel in the form of an overall amount of FRF 20 million inclusive of tax in the case of Loiret County Council and FRF 30 million in the case of Orléans City Council.'
These sums will be paid in annual amounts by the local authorities to Sempel to ensure payment of the annual instalments on the loans required for the performance of the operations contracted for by Sempel, up to a ceiling of FRF 50 million, and in accordance with their respective liabilities.

7.3.1.2. ***In favour of Scott***

7.3.1.2.1. **Commission communication on state aid elements in sales of land and buildings by public authorities**

(135) As regards the second test, i.e. whether the aid favours certain undertakings or the production of certain goods, the Commission considers that the sale of land is not a selective advantage for the purposes of Article 87(1), if the land is sold at its market value. It was to this end that the Commission published the communication ([91]). Although the sale of the land in question in the present case goes back to 1987, i.e. 10 years before the communication was published, the same principles apply, since the communication clarified a policy which, at the time, had emerged over a period of more than ten years. It should, however, be borne in mind that, at the time of the sale, case law on this subject was still limited.

(136) The communication describes two sale procedures which automatically exclude any element of state aid (sale through an unconditional bidding procedure, and on the basis of an asset valuation by an independent expert prior to the sale negotiations in order to establish its market value) and indicates those transactions which must be notified to the Commission. In the case in point, no valuation of the land was made at the time of the sale to Scott. The question arises, however, whether the manner in which the plot was sold met the criteria for a sale through an unconditional bidding procedure.

(137) The French authorities argue that, since in 1987 the Commission had not yet clarified its policy, their appointment of a consultant in France and the United States to promote the region (see recitals 73 to 88) should be regarded as satisfying the criterion that the bidding procedure should have been 'sufficiently well-publicised' within the meaning of the communication, as this could have been understood at the time. Scott takes the same line (see recital 57).

(138) This argument cannot be accepted.

(139) Under the communication, an offer is 'sufficiently well-publicised' when it is repeatedly advertised over a reasonably long period (two months or more) in the national press, estate gazettes or other appropriate publications (the intended sale of land and buildings of high value should be announced in publications having an international circulation) and through real-estate agents addressing a broad range of potential buyers, so

([91]) See footnote 26.

that it can come to the notice of all potential buyers ([92]).

(140) Even if it cannot be expected that the advertising carried out at the time of this sale complied with the letter of the communication, the basic principles as stated in decided cases must be observed, in other words the tender for an industrial site and a factory warehouse must have been widely disseminated (a) in the national and international press and (b) through estate agents. The Commission emphasises in this respect that the use of only one of these two means of advertising a sale of land is not sufficient, and that a combination of the two is required if all potential buyers are to be informed of the tender.

(141) It should be pointed out at the outset that the principles derived from the Fresenius case mentioned by the French authorities are not applicable. In that particular case the land in question was valued, whereas it was not in the present case. If the communication was not followed to the letter in Fresenius, it is because the events took place in 1994 and the communication was only published in 1997. However, and this is one of the requirements in the present case, the basic principle laid down by the communication with regard to sales through an unconditional bidding procedure was observed, namely that an independent expert should carry out a valuation, a certain discrepancy as to price having been considered consistent with market conditions.

(142) The French authorities gave a long description of the advertising measures supposed to have been taken by ADEL and RDI (see recitals 73 to 88). However, despite an order to provide information, which explicitly called for a detailed description, plus evidence, of the advertising of the sale in France and Europe, the French authorities produced only two documents in support of their arguments.

(143) The first of these, entitled 'Orléans, A businessman's environment' (Orléans, environnement pour hommes d'affaires) ([93]), describes the Loiret under the following headings: (i) French government and Development of the Free-enterprise system; (ii) Political risk and union activity in the Loiret; (iii) Infrastructure; (iv) Industrial network and (v) Orleans Economic Policy. Nowhere does the document mention the creation of the La Saussaye business park nor the fact that a site and a factor warehouse are for sale. The document cannot be regarded, therefore, as meeting the criteria for a 'sufficiently well-publicised' tender within the meaning intended by the Commission in its established practice, as consolidated in the communication.

(144) The second document is a letter from the DML consultancy to Scott, dated 17 December 1999. The letter describes the methods used to identify potential investors for the sites available in the Loiret in 1985/86 (see recitals 79 to 84). It is nevertheless not necessary to examine whether the methods described meet the criteria of a 'sufficiently well-publicised' tender within the meaning of the communication, since at the end of its letter DML explicitly confirms that it was not involved in Scott's location to the region in 1987: 'lastly we can confirm to you that DML was not involved and did not play a part in the identification and location of the Scott Paper investment project in Orléans'. The description given in the letter is therefore irrelevant and its author not competent to give an opinion on whether the land and the factory warehouse sold to Scott were 'sufficiently well-publicised' before they were sold to the firm.

(145) As regards the description of the advertising measures taken by ADEL and RDI (see recitals 73 to 88), for which no evidence was produced, the Commission would point out that the plot of land was not advertised at all in the national or international press — a requirement of the communication (the first condition in (a)) as expressed in recital 140. As far as the second condition in (a) is concerned, namely through real-estate agents addressing a broad range of potential buyers, the efforts of the RDI consultancy were directed above all at the United States market, in particular the state of Michigan (see recital 77). The contention that DML et Associés was recruited by the Loiret 'to make the same approach to European and non-European potential investors in the Paris region' is totally at odds with DML's statement that it was never involved in Scott's location to the site in question.

(146) The Commission also lacks information on what was actually publicised. It would seem from the document entitled 'Orléans, a businessman's environment' that the marketing activities of the local authorities were intended to promote the Loiret in general and not the site of the factory warehouse in particular. But, for the criteria laid down in the communication to be met, the advertising should have specified the site and, in particular, the improvements and the building of the factory warehouse. The site and the factory warehouse would then have been sold, in accordance with the Commission's established practice as consolidated by the communication, after an open and unconditional bidding procedure, comparable to an auction, which is carried out by definition at market value and consequently does not contain state aid.

(147) In the case in point, however, it is clear from the agreement concluded between Scott and the local

([92]) Communication, II Principles, 1 Sale through an unconditional bidding procedure, point (a) concerning the definition of the term 'sufficiently well-publicised'.

([93]) Letter from the French authorities, 7 January 2000, Annex I.

authorities that the operation was 'made to measure' in order to meet Scott's desiderata. Article 2 of the agreement in question states that the necessary improvements to the land should be carried out in accordance with Scott's specifications and that a processing plant and warehouse covering 30 000 m^2 should be built ([94]).

(148) It is clear from the above that the marketing measures taken by the local authorities cannot be regarded as meeting the criteria for a sale through an unconditional bidding procedure within the meaning intended by the Commission in its established practice, as consolidated in the communication. Consequently, given that neither of the two sale procedures was applied to the sale of land in question, it cannot be ruled out that the sale does not contain an element of state aid to Scott.

7.3.1.2.2. **Principle of the private investor**

(149) The Commission considers that the sale of land does not constitute a selective advantage for the purpose of Article 87(1), if a private investor, on the basis of forecast potential profitability and ignoring any social, regional or sectoral policy considerations, would have invested in the land and then sold the plot at the same price as that asked by the local authorities ([95]).

(150) Consequently, in contrast to the position defended by the French authorities, the Commission, in its assessment designed to determine whether, in the case in point, the public authorities behaved like a lender acting under normal economic conditions, cannot take account of the importance for the local authorities of promoting and developing the local economy. Nor can any tax receipts be taken into account for this purpose, as is clear from Commission Decision 96/631/EC ([96]).

(151) This conclusion does not contradict the Commission's decision in Daimler-Benz ([97]), contrary to what the French authorities claim (see recital 72). It is clear from that decision that the Commission concluded that the proposed price for the sale of the site contained no aid element, since Daimler-Benz was to acquire unsuitable agricultural land at the market price for this type of land in the region and that the firm alone would then bear the costs of improving that land ([98]).

(152) In its Daimler-Benz decision, the Commission considered that certain connection costs (drains, electricity, water, etc.) did not constitute aid, since the firm would contribute to them through local taxes. Such connection expenditure is an example of general infrastructure, which is normally funded from the budget of the central government or the local authorities. It is therefore a general measure, provided that the infrastructure is not built solely for one or more firms. Contrary to what the French authorities maintain, there is nothing in the decision to indicate that this connection expenditure was incurred specifically for the benefit of Daimler-Benz and was therefore no longer general in nature. As regards the demolition cost mentioned in the Daimler-Benz decision, the Commission concluded that the measure did not constitute aid, since it was expenditure which all landowners had to incur in order to sell a piece of land ([99]).

([94]) Article 2 of the agreement between Scott and the local authorities states: 'The local authorities, through a specialist company, Sempel (Société d'economie mixte pour l'équipement du Loiret), in which the local authorities are majority shareholders, will carry out the necessary improvements, as defined: parking space, roads, miscellaneous networks, site improvements, etc., in accordance with Scott's specifications, for the processing plant and warehouse 30 000 m^2 on the site of about 25 ha)'.

([95]) Same principle as that established by the Court of Justice in Case 40/85 Belgium v Commission (Boch) [1986] ECR p. 2321.

([96]) Commission Decision of 17 July 1996 concerning State aid that the City of Mainz has granted to Grundstücksverwaltungs-gesellschaft Fort Malakoff Mainz mbH & Co. KG, OJ L 283, 5.11.1996, p. 43, point IV: 'When assessing whether in the present case the state acted in line with a normal market investor's behaviour, the future possibility of tax receipts cannot be taken into account. Also in cases where the state sells its own property the terms and conditions should be in line with the normal behaviour of a private investor that does not have the particular position of the state with its responsibilities regarding public interest and its corresponding right to collect taxes'.

([97]) See footnote 34.

([98]) The Seventeenth Report on Competition Policy states that 'Contrary to the initial plan, Daimler-Benz AG will now be acquiring agricultural land unsuitable for industrial use and the company will bear site-preparation costs, currently estimated at DM 132 million (ECU 63,6 million)'. The decision itself states (section 2, Assessment) that the firm alone will now bear all the site-preparation costs.

([99]) The decision itself states (section 2, Assessment) that, as owners of the site, the *Land* and the local authorities will also have to bear the normal cost of demolition, in accordance with usual practice before land is sold.

(153) In accordance with its reasoning in the Daimler-Benz decision, the Commission is excluding the cost of a public interceptor sewer from the valuation of the aid in this particular case. The French authorities have shown that the sewer was not intended exclusively for Scott, but served the whole community (see recitals 168 to 172).

(154) The argument of the French authorities that, at the time of the sale of the land, there was no market for industrial sites in rural areas has to be rejected. It is absolutely clear from the comments submitted by Scott in its capacity as a third party that the La Saussaye industrial estate was in direct competition, initially, with at least eight other sites, and subsequently with four shortlisted ones (see in particular recital 51).

(155) It should be pointed out in this respect that only projects for which the Commission considers that there were no objective or bona fide reasons for reasonably expecting an adequate rate of return, at the moment the investment decision was taken, can be treated as state aid ([100]).

(156) It is clear from the agreement concluded between the local authorities and Scott (Article 4) that, at the time of the sale, the former knew that the land improvement operations and the construction of a factory warehouse would cost at least FRF 80 million (EUR 12,2 million) and that Scott would pay FRF 31 million (EUR 4,7 million) for the plot:

> 'To enable Scott to set up under this project, which will have to be implemented in several stages, the local authorities undertake to improve the land on which the La Saussaye and La Planche industrial estate will be built, up to a ceiling of FRF 80 million.
>
> In an initial stage, the improvements are estimated at FRF 50 million, it being understood that Scott will build, under the conditions referred to in Article 2 above, a factory (processing plant and warehouse) covering about 30 000 m^2, which will be bought from Sempel for FRF 31 million […]'.

(157) If one includes the cost of the land, i.e. FRF 10,9 million (EUR 1,7 million), the local authorities knew when they concluded their contract with Scott that the loss would be at least FRF 60 million (EUR 9,2 million) (10,9 + 80 − 31) (see recitals 168 to 172). Consequently, there can be no doubt that the provision of public funds can only be explained as the granting of state aid. The alternative for the local authorities would have been not to sell the plot and, hence, lose the FRF 10,9 million (EUR 1,7 million) originally invested. It should be remembered in this connection that a private investor aims not only to maximise its profit but also to limit its losses.

(158) The French authorities maintain that the land was sold to Scott at the market price. In their view, the difference between the price Scott paid for 48 ha, i.e. FRF 65/m^2 (EUR 9,9/m^2), and the average price of FRF 72/m^2 (EUR 11/m^2), which the city council obtained between 1990 and 1994 for 2,8 of the remaining 20 ha, was justified by economies of scale.

(159) The Commission does not share this view.

(160) Firstly, despite being ordered to provide information, the French authorities refused to account for the price paid for the remaining land by providing a copy of the sale contracts. Without those contracts the Commission cannot check the correctness of the prices claimed.

(161) Secondly, it should be remembered that, at the time of the sale of the remaining, already prepared land, the situation of the local authorities was different to what it had been at the time of the sale to Scott. The cost of preparing the land was already a sunk cost, and a private investor could quite easily maintain that it was better to sell the 2,8 ha than not to sell at all. This argument does not apply, however, to the local authorities' situation when they took the decision to invest FRF 80 million (EUR 12,2 million) in land improvements while aware of the price Scott was willing to pay, i.e. FRF 31 million (EUR 4,7 million), not forgetting the initial cost of the land, i.e. FRF 10,9 million (EUR 1,7 million).

(162) The French authorities object (see recitals 67 to 71) that a price which does not cover all the costs can still be the market price. They point out, for instance, that the price at which KC sold the La Saussaye industrial estate and the factories to P & G in 1998 did not enable it to meet all its costs. Yet that price should be considered the market price. They also add (see recital 72) that the market value of the land and the factory warehouse in question ought probably to be FRF 31 million (EUR 4,7 million), since (a) Scott sold to P & G in 1998 for […] what it had bought from Sempel in 1987 for FRF 31 million (EUR 4,7 million) and (b) as a result of discounting the 1998 purchase at 6 % to 1987, the value of the site in 1987 was FRF 15,4 million (EUR 2,4 million).

([100]) Commission communication to the Member States, OJ C 307, 13.11.1993, p. 3, point 28.

(163) While there is no need to check the correctness of the French authorities' figures for the costs borne by KC for the La Saussaye estate and the price obtained from P & G for that estate (see recitals 67 to 72), their reasoning has to be refuted.

(164) First, as regards the argument that a market price does not have to cover total cost, the Commission would emphasise that the situation facing KC in 1998 differed significantly from that facing the local authorities in 1987. In 1998, KC had already invested in the site in question, so that those costs should be regarded as sunk costs. Before P & G purchased the site, KC had already decided to close it as part of its world-wide restructuring. Everything suggests that the operation of the site in question involved heavy losses for KC ([101]). Furthermore, in 1998, the household and sanitary paper sector in Europe was suffering from overcapacity ([102]), especially in France ([103]), whereas in 1987 it was booming (see recital 182 below). Consequently, the price paid by P & G for the site was probably the best price that KC could have obtained for a loss-making paper mill in a market suffering from overcapacity, regardless of the amount invested. The question, therefore, was not whether KC should invest in the La Saussaye estate, but what it could get out of it given the investments it had already made.

(165) In 1987, by contrast, the local authorities found themselves in a situation where no investment had been made apart from the initial purchase of the land in question for FRF 10,9 million (EUR 1,7 million). As explained in recital 157, when the local authorities decided to prepare the land and to build the factory warehouse, they already knew that the investment would result in a loss of some FRF 60 million (EUR 9,2 million). A private operator would not have gone ahead with such an investment.

(166) The same reasoning applies to the French authorities' second argument, namely that the market price in 1987 was probably that which Scott actually paid, i.e. FRF 31 million (EUR 4,7 million), given what P & G paid in 1998 and its discounted 1987 value. Irrespective of whether the […] is a correct price (the French authorities have not supplied any evidence establishing that this sum relates to the land and the site which Scott actually bought in 1987 and that this really was the price paid for the site by P & G), the Commission would again refer to the conditions on the market in 1998, which determined the purchase price paid by P & G, as compared with those obtaining in 1987. The latter are confirmed by the fact that Scott was ready in 1987 to increase its capacity in France. Lastly, the commission rejects the argument that a simple discounting operation consisting in the reduction of a 1998 market value to its 1987 value gives an indication of the market price as established in 1987.

(167) There were, therefore, no objective or bona fide reasons why the local authorities should have reasonably expected their investment, namely the transformation of agricultural land into an industrial site and the building of a factory warehouse before selling the plot to Scott, to give an adequate rate of return at the price paid by Scott for the site. The preferential price at which the local authorities sold the site in question to Scott must therefore be regarded as constituting an advantage for that firm.

7.3.1.2.3. **Value of the advantage**

(168) The problem in the present case is to establish with certainty the costs associated with the sale of the land in question and what those costs cover. Despite the order to provide information, the French authorities did not supply, as the Commission requested them, a detailed breakdown of (a) the work actually done by Sempel on the site (levelling, electricity, infrastructure, buildings, etc.), (b) the real cost of that work and (c) the method of financing used. The Commission must therefore restrict its assessment to the information available to it ([104]).

([101]) Extract from the *Tribune Desfossés*, 20 January 1998, 'Kimberly closes its doors': '[…] the factory, which had been occupied by 175 workers for several days, was liberated at the end of yesterday. The overproduction of household paper in France and the huge losses accumulated by the factory since it opened, more than FRF 500 million, made this decision apparently inevitable'.

([102]) Extract from *Le Monde*, 9 January 1998: 'As part of its worldwide restructuring, Kimberly Clark is closing its Orléans factory': '[…] Although the market is growing very slowly (2 % to 3 % a year), excess capacity has increased and now stands at more than 90 000 tonnes in Europe'.

([103]) Extract from *Le Figaro*, 9 January 1998: 'As part of its worldwide restructuring, Kimberly Clark is closing its Orléans factory': '[…] The closure of the site is part of a global restructuring of the household paper giant (handkerchiefs, toilet paper, kitchen towels). In France, Kimberley is a victim of the stagnant household paper market (+ 2 % a year) and has excess capacity of 50 000 tonnes a year and cumulative losses of nearly FRF 4 billion in ten years […]'.
Extract from the *Courrier Val de Loire-Sologne* (16 to 22 January 1998) 'The Chairman of Loiret County Council, Eric Doligé, reacts to the announcement of the proposed closure of the Kimberly-Clark Site at Saint-Cyr-en-Val': '[…] This development is justified by the group on the grounds of excess production capacity, which in France is about 49 %'.

([104]) See footnote 61 (Pleuger, paragraph 26). The rule was consolidated later by Article 13(1) of the Procedural Regulation.

(169) Because it does not have this detailed information, the Commission is unable to determine whether, as Scott claims, part of the infrastructure could count as infrastructure which is normally provided from the central government or local authority budget and therefore does not constitute aid. Such infrastructure, though, may be caught by Article 87(1), if work is carried out for the benefit of one or more firms or a certain type of product. In the case in point, the preparation of the site must be regarded as benefiting Scott alone, because that firm was the owner and sole user of the infrastructure provided ([105]). This is particularly so as far as the factory warehouse is concerned, which was built to Scott's specifications ([106]).

(170) It is clear from the document entitled 'Statement of final account: La Saussaye and La Planche industrial estate', dated 26 July 1993, which is the most detailed document provided by the French authorities, that the total cost to Sempel of the land improvement operations is approximately FRF 140,4 million (EUR 21,4 million). To this should be added the cost of the original land, i.e. FRF 10,9 million (EUR 1,7 million).

(171) From this amount should be subtracted FRF 29,4 million (EUR 4,5 million) for the financial cost of the loans contracted by Sempel ([107]), FRF 8,3 million (EUR 1,3 million) for the refund of VAT on land improvement operations and FRF 13,6 million (EUR 2,1 million) for the cost of a public intercepting sewer, which the French authorities showed was not intended solely for Scott but served the whole community, i.e. 25 000 inhabitants and other firms as well (see recital 89).

(172) The cost of the land sale is therefore some FRF 100 million (EUR 15,2 million). The cost of the transaction relating directly to Scott is 48/68 of FRF 100 million (EUR 15,2 million), or FRF 70,588 million (EUR 10,76 million). This figure, less the FRF 31 million (EUR 4,7 million) which Sempel received from Scott, gives a net loss of approximately FRF 39,58 million (EUR 6,03 million) or, at present value, FRF 80,77 million (EUR 12,3 million). In the absence of a breakdown of the work carried out by Sempel on the land occupied by Scott (levelling, electricity, infrastructure, buildings, etc.) and of an indication of its actual cost, which information the French authorities were requested to provide by the order that was sent to them, the Commission has thought it reasonable and appropriate to use the fraction of 48/68 without taking account of any economies of scale. The present value includes the application of an interest rate from the date when the unlawful aid was granted, i.e. the date the Scott agreement was signed, until its repayment. The reference rate used by the Commission to measure the aid element of public subsidies in France is 5,7 % as from 1 January 2000 ([108]).

([105]) Commission Decision C 20/94 (NN 27/94) concerning state aid for the development of the site occupied by Kimberly-Clark-Industries at Toul/Villey-Saint-Etienne (Meurthe-et-Moselle), communication published in OJ C 283, 27.10.1995.

([106]) Point 2.1 of the Sempel agreement refers in particular to 'the formation level for receiving the factory warehouse and its superstructure, these structures to be built under contract with the developer, the Scott Paper Company'.

([107]) The present value is then calculated, taking the years 1987 and 2000.

7.3.1.3. *Distorts competition and affects trade between Member States*

(173) For a measure to be caught by Article 87(1) EC, it must also distort competition and affect trade between Member States. In Phillip Morris ([109]), the Court of Justice defined this criterion as follows:

> 'when state financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by the aid.'

Accordingly, the product in question must be traded between Member States and the aid must strengthen the beneficiary's position vis-à-vis its competitors.

(174) In the present case, Scott manufactures paper products for sanitary use in particular ([110]). In 1987 apparent consumption of toilet and hygiene articles in the Community was 2 427 thousand tonnes, net exports were 132 thousand tonnes and Community production was 2 295 thousand tonnes ([111]). The relevant product is thus traded on at least a Community-wide basis. This conclusion is also supported by the fact that before the factory was established on the La Saussaye estate in the Loiret, Scott supplied France from its plants in Italy and Belgium (see recital 50).

(175) Even if the production of sanitary paper in the La Saussaye factory was mainly intended for the French market and was therefore not exported, the aid would still distort competition and affect trade between Member States, since Scott competes with products

([108]) See website http://europa.eu.int/comm/dg04/aid/tauxref.htm.

([109]) Case 730/79 Philip Morris v Commission [1980] ECR p. 2671, point 11.

([110]) Scott Paper Company Annual Report 1987, p. 1.

([111]) Panorama of Community Industry 1990, section 19-18.

coming from other Member States ([112]). Such a situation may also arise where there is no overcapacity in the sector in question ([113]). According to the Panorama of Community Industry 1990 ([114]), the sector concerned was one of the most dynamic in Community industry in the decade from 1980 to 1990 (output grew by about 5 % a year).

(176) The fact that Scott was able to buy the site at a preferential price strengthened its position vis-à-vis its competitors. The aid in question was intended to help Scott locate to the Loiret and, hence, increase its share of the French market (see recital 50). It thus reduced the cost of the investment to Scott and gave the company a competitive advantage over manufacturers making, or planning to make, a similar investment at their own expense.

(177) The French authorities claim that the time taken by the complainant to acquaint the Commission with the facts shows that the loss suffered by the competition is probably non-existent (see recital 95).

(178) This argument has to be rejected.

(179) Firstly, the possible strengthening of Scott's position through the preferential price granted to the company for the purchase of the site should be assessed in the light of the position of all its competitors generally and not just that of the complainant.

(180) Secondly, the fact that the complaint was not lodged until December 1996 does not prove that the loss suffered by the competition was non-existent. The Commission would point out that the complaint was lodged in December 1996 following the report in which the French Court of Auditors discussed the alleged aid measures and which was only published in November 1996 (see recital 1).

(181) It is clear from the above that the preferential price of the land was likely to affect competition within the Community.

(182) To sum up, given that the preferential price of the land satisfies the three tests of Article 87(1) of the EC Treaty, i.e. it was granted by the state or through state resources, it favours Scott, and it distorts competition between Scott and similar firms and/or types of production, sanitary and household paper being traded within the Community, the aid is caught by the prohibition in that Article.

7.3.2. PREFERENTIAL RATE OF WATER TREATMENT LEVY

(183) As with the preferential price of land, the question arises whether the preferential rate of water treatment levy granted to Scott constitutes a preferential price which is caught by the prohibition in Article 87(1) of the EC Treaty.

(184) The Commission would point out that, under the said Article, any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market.

(185) Thus the preferential rate of water treatment levy will be caught by Article 87(1), if it satisfies the following three tests:

(a) it was granted by the state or through state resources;

(b) it favours certain undertakings and/or the production of certain goods;

(c) it distorts competition between the undertakings favoured and similar undertakings and/or types of production, where the products concerned are traded within the Community.

7.3.2.1. ***Granted by the state or through state resources***

(186) It should be pointed out that the concept of the state comprises the organs of the central authority and also those of the decentralised local authorities at whatever level ([115]) (see recitals 126 to 134).

(187) The preferential rate of water treatment levy was granted by the city council in two stages.

(188) As a first stage the city council explicitly undertook, in Article 7 of the Scott agreement, to apply a preferential rate of water treatment levy to Scott (see recitals 191 to 203).

(189) As a second stage, the city council, pursuant to the agreement, adopted on 16 December 1988 a decision on the new levy rates for 1989.

([112]) Case 102/87 France v Commission [1988] ECR p. 4067, point 19.
([113]) Idem.
([114]) See footnote 111.
([115]) See footnote 84.

(190) The preferential rate of water treatment levy should therefore be regarded as granted by the state. Thus the first test of Article 87(1) is satisfied.

7.3.2.2. ***Favouring Scott***

(191) Apart from its state character, the aid should, still in accordance with Article 87(1), be selective and favour only certain undertakings or the production of certain goods, thus affecting the balance which exists between beneficiary firms and their competitors. This selective character distinguishes state aid from general economic assistance measures, which are applicable to all firms in all sectors of a Member State's economy.

(192) In Kimberly Clark ([116]), the Court of Justice held that where the body granting the aid enjoys a degree of latitude which enables it to adjust its financial assistance having regard to a number of considerations such as the choice of beneficiaries, the amount of the financial assistance and the conditions under which it is provided, the system is liable to place certain undertakings in a more favourable situation than others and thus to meet the conditions for classification as aid within the meaning of Article 87(1).

(193) Having examined the case in detail, and in particular in the light of the limited information provided despite the order to supply information, the Commission considers that setting the coefficient of degressivity at 0,25 for a level of consumption exceeding 150 000 m^3 should be regarded as constituting a selective advantage in favour of Scott Paper which is not justified on commercial grounds or by general tax policy considerations. The reasons for this are as follows:

(194) First, the city council explicitly undertook to grant Scott a preferential rate of water treatment levy. Article 7 of the Scott agreement concluded between that firm and the local authorities on 31 August 1987 lays down that:

> 'Orléans City Council undertakes to alter the rates of water treatment levy applicable to industrial users in special circumstances and to provide for them a rate which does not exceed 25 % of the most favourable current rate. Subject to Scott's compliance with the technical standards and legislation in force, Orléans City Council will apply this preferential rate to the company'.

(195) Second, pursuant to the agreement, the city council adopted on 16 December 1988 a decision on a new rate of water treatment levy for 1989, consisting in a new amount for the levy plus a new coefficient of degressivity.

(196) As described in recitals 23 to 27, the coefficient of degressivity (which was reduced from 1 to 0,5) for volumes between 0 and 50 000 m^3 is justified as a form of quantity discount. According to the city council's minutes, the coefficient increases (from 0,6 to 0,8) for volumes between 50 001 and 150 000 m^3 as a way of encouraging large-scale consumers of water to reduce their effluent (city council decision of 19 December 1980). The coefficient for volumes exceeding 150 000 m^3 is then set at 0,25 without justification. In their letter of 10 January 2000, the French authorities justify the latter rate by saying that 'the volume consumed makes it possible to cover the cost of water treatment'. Despite the order to supply information which was sent to them, the French authorities' 'justification' consists simply of this sentence, so that the Commission has nothing by which to judge whether such a claim has the slightest basis.

(197) The justification given by the French authorities seems to have been worked out after the event. To begin with, it directly contradicts the objective of reducing effluent, which is the reason given for the coefficient applicable to volumes exceeding 50 000 m^3. Furthermore, not only does the paper industry consume a large quantity of water, but the liquid effluent from bleaching requires extensive processing before it can be discharged to the environment. Thus, even if, logically, large quantities of water generate higher receipts, this is not in itself sufficient reason to reduce the rate of levy accordingly, since, given the characteristics of the paper industry, those quantities create more pollution.

(198) In addition, by setting the threshold for the preferential rate at 150 000 m^3 it is only water-intensive industries like paper, and in particular the firm of Scott Paper, that will actually qualify for it. Despite being ordered by the Commission to supply *inter alia* water bills and particulars of all the other firms in the region qualifying for the same 'discount' on the levy, the French authorities only sent in a single bill, that for the Hôpital de la Source in 1996. According to this, the hospital, whose water consumption was approximately 155 000 m^3, qualified for the 0,25 coefficient in respect of that part of its consumption which exceeded 150 000 m^3, i.e. 3 % of its total consumption. That same year, Scott's water consumption was nearly […] m^3, so that the firm qualified for the preferential rate in respect of (a substantial part) of it's total consumption.

([116]) Case C-241/94 France v Commission (Kimberly Clark) [1996] ECR p. I-4551, points 23 and 24.

(199) The Commission considers that the fact that, for the period from 1989, when the preferential rate came into force, to the present day, the French authorities were able to show, for just one year, that a hospital had qualified for the rate in respect of 3 % of its total consumption when Scott Paper had qualified for it in respect of (a substantial part) does not, in the light of the factual information described in recitals 192 to 198, deprive the measure of its selective character.

(200) Consequently, by setting a coefficient of degressivity of 0,25 for volumes exceeding 150 000 m^3, which de facto basically benefited Scott, the city council placed Scott in a more favourable situation than the others, which must be considered as constituting a selective advantage within the meaning of Article 87(1).

(201) Lastly, the value of the advantage should be calculated by multiplying the following factors: (a) the differential between a 'reasonable' coefficient of degressivity for a consumption level exceeding 150 000 m^3 and the preferential rate, (b) Scott's annual effluent coefficient, (c) the annual pollution coefficient and (d) Scott's annual offtake (m^3). The calculation should be done for each year since 1989. The results obtained would then be added.

(202) However, the Commission is unable to determine the value of the advantage, since, despite its order to supply information ([117]), the French authorities did not send it the information necessary for the calculations. As regards the 'reasonable' coefficient of degressivity for consumption exceeding 150 000 m^3, the French authorities will have to determine this in connection with the proceedings for the recovery of the aid. To do this, they will have to show that the coefficient is reasonable by producing evidence of the rates applicable to firms with comparable levels of consumption and effluent established in other French departments. Irrespective of the outcome, the coefficient of degressivity should not be less than 0,5, since this is the most preferential rate regardless of the quantity of water consumed.

(203) It is therefore for the French authorities to determine the value of the advantage as part of the recovery proceedings. This was established by the Court of First Instance in *Ladbroke*, when it held that 'neither the case-law nor any provision of Community law requires the Commission to determine the sum to be reimbursed when it demands repayment of aid declared incompatible with the common market' ([118]).

7.3.2.3. ***Distorts competition and affects trade between Member States***

(204) The Commission would point out (see recitals 173 to 182) that, for an advantage to distort competition and affect trade between Member States, (a) the relevant product must be traded between member States and (b) the aid must strengthen the position of the beneficiary vis-à-vis its competitors ([119]). As regards the first condition, i.e. whether the relevant product is traded between Member States, the Commission refers to its assessment in recitals 173 to 182, which also applies to the preferential rate of water treatment levy. Regarding the second condition, the preferential rate of water treatment levy strengthens Scott's position vis-à-vis its competitors, since it reduces the costs which Scott would have to bear in the course of its normal business.

(205) It is clear from the above that the preferential rate of water treatment levy was likely to affect competition within the Community.

(206) To sum up, since the preferential rate of water treatment levy satisfies the three tests of Article 87(1) of the EC Treaty, i.e. (i) it was granted by the state or through state resources, (ii) it favours Scott and (iii) it distorts competition between Scott and similar firms and/or types of production, sanitary and household paper being traded within the Community, the aid is caught by the prohibition in that Article.

7.4. *COMPATIBILITY OF THE AID*

(207) Article 87(3) of the Treaty lists the types of aid that may be considered to be compatible with the common market. Compatibility must be determined with reference to the Community as a whole, and not with reference to one Member State, or region thereof, taken individually. To ensure that the common market functions normally and given the principle established in Article 3(g) of the Treaty, the exceptions listed in Article 87(3) should be interpreted strictly when it comes to examining any aid scheme or individual aid measure. In particular, the exceptions may be relied on only where it can be demonstrated that, without the aid, market forces would not be sufficient on their own to induce the beneficiaries to act in such a way that would enable one of the objectives mentioned in the exceptions to be achieved.

([117]) See footnote 61. Rule consolidated by Article 13(1) of the Procedural Regulation.

([118]) Case T-67/94 Ladbroke Racing v Commission [1998] ECR p. II-1, point 187.

([119]) See footnote 111.

(208) The aid measure in question does not qualify for the exceptions under Article 87(2)(a) to (c). It is not social aid granted to certain consumers, but aid designed to attract an investor to a particular city. Nor is it related to natural disasters or other exceptional occurrences, or to the former division of Germany.

(209) As regards the exceptions provided for in Article 87(3)(b) and (d), the aid in question is not intended to promote the execution of an important project of common European interest. The fact that a producer of household and sanitary paper is located in a certain city is not of common European interest. The aid is not intended, either, to remedy a serious disturbance in the economy of France, nor does it have the characteristics of such a project. Therefore the exception in Article 87(3)(b) does not apply. Neither is the measure intended to promote culture or heritage conservation (Article 87(3)(d)).

(210) As far as the exception in Article 87(3)(c) is concerned, namely aid to facilitate the development of certain economic activities, it is clear that the measures under examination are not meant to promote small and medium-sized firms, research and development, environmental protection, job creation or training in accordance with the Community guidelines and frameworks on state aid.

(211) To complete the assessment of whether the aid in question is possibly compatible under the regional exceptions provided for in the Treaty, a distinction has to be drawn between investment aid (the preferential price of the land) and operating aid (the preferential rate of water treatment levy).

7.4.1. PREFERENTIAL PRICE OF THE LAND

(212) The preferential price of the land must be regarded as an ad hoc investment aid, aimed at reducing the cost to Scott of locating in Orléans-Sologne (see recital 182). The aid was granted outside the framework of an approved investment aid scheme (see recitals 100 to 121). Irrespective of whether this ad hoc aid may be regarded as contributing to the development of the Loiret, it should be noted that Orléans-Sologne is not situated in an area recognised as falling under Article 87(3)(a) or (c), so that the aid cannot be regarded as compatible with the common market because it is a regional investment aid (see recitals 100 to 121).

(213) Consequently, the aid granted to Scott in the form of a preferential land price does not qualify for one of the exceptions in Article 87(2) or (3) and should therefore be declared unlawful and incompatible with the common market.

7.4.2. PREFERENTIAL RATE OF WATER TREATMENT LEVY

(214) The Commission would point out (see recital 206) that the preferential rate of water treatment levy constitutes operating aid because it is intended to reduce the costs which Scott would have to bear in the course of its normal business.

(215) In the absence of any compensatory effects, operating aid may be granted on an exceptional and temporary basis to offset operating losses in Article 87(3)(a) areas, where justified by its contribution to regional development and its nature and where the amount of the aid is in proportion to the handicaps it is intended to alleviate. However, the exception provided for in that Article does not apply here, since the Loiret is not recognised as an area with an abnormally low standard of living or serious underemployment.

(216) Consequently, the aid granted to Scott in the form of a preferential rate of water treatment levy does not qualify for one of the exceptions in Article 87(2) or (3) and should therefore be declared unlawful and incompatible with the common market.

7.5. *RECOVERY OF ILLEGAL AND INCOMPATIBLE AID*

7.5.1. PREFERENTIAL PRICE OF THE LAND

(217) It has to be concluded that the sum of FRF 39,58 million (EUR 6,03 million), or at present value FRF 80,77 million (EUR 12,3 million), which is the net loss made by the local authorities from the sale of the La Saussaye site, including the factory warehouse, to Scott, should be declared unlawful and incompatible with the common market.

(218) Where aid granted unlawfully is found to be incompatible with the common market, Article 88(2) of the EC Treaty requires the Commission to request the Member State to recover it from the beneficiary, as the Court of Justice has confirmed on several occasions ([120]). This practice is also established by Article 14 of the Procedural Regulation, according to which the Commission decides that the Member State

([120]) See Case 70/72 Commission v Germany [1973] ECR p. 813; Case 310/85 Deufil v Commission [1987] ECR p. 901 and Case C-5/89 Commission v Germany (BUG-Alutechnik) [1990] ECR p. I-3437.

concerned shall take all necessary measures to recover the aid from the beneficiary. The rationale behind recovering unlawful and incompatible state aid is that effective competition should be restored ([121]).

7.5.1.1. ***Limitation period***

(219) Under Article 15 of the Procedural Regulation, the powers of the Commission to recover aid are subject to a limitation period of ten years, which begins on the day the unlawful aid is granted to the beneficiary. However, any action taken by the Commission with regard to the unlawful aid interrupts the limitation period.

(220) In the case in point, aid in the form of a preferential price for land was granted on 31 August 1987, when the Scott agreement was signed by Scott and the local authorities. The first measure taken by the Commission, following the complaint of 23 December 1996, dates from 16 January 1997. This took the form of a formal request for information made to the French authorities. The limitation period was therefore interrupted before the 10 years provided for had expired, so that the Commission has the power to recover the aid in question.

(221) Scott argues that the limitation period is designed to protect the beneficiary of aid and that, consequently, it is interrupted only where the beneficiary has been informed of the investigation which the Commission is conducting. Scott also maintains that it learned of the investigation being conducted only through the publication of the decision to initiate the procedure, i.e. on 30 September 1998. At that date more than 11 years had gone by since Scott had concluded the agreement with the local authorities. The Commission therefore no longer had the power to recover the aid.

(222) This argument has to be rejected.

(223) The purpose of the limitation period is to ensure legal certainty ([122]). Both the addressees of Commission decisions (i.e. the Member States) and the wider community, including in particular the beneficiary of the aid, benefit from this legal certainty. However, the question of who, ultimately, benefits from the limitation period is a separate matter from how that period is calculated, which is determined by Article 15 of the Procedural Regulation. That Article does not refer to third parties; it is confined to the relation between the Commission and the Member States. It confers no specific right on the beneficiary and lays no obligation on the Commission with regard to third parties. The beneficiary of the aid is mentioned only to determine the date from which the limitation period starts to run, i.e. 'the day on which the unlawful aid is awarded to the beneficiary'. The said Article 15, therefore, does not derogate in any way from the normal procedure, which is conducted exclusively between the Member State concerned and the Commission. In that procedure, the rights acknowledged to third parties are the procedural rights deriving from Article 88(2) of the EC Treaty.

(224) The Commission would point out that the beneficiary of aid must check whether the aid it was granted was notified ([123]). If the aid is not notified and not approved, there is no legal certainty. The Commission should not be bound by any obligation to provide information which is intended to protect the beneficiary of aid not in a situation that should be the subject of such protection.

7.5.1.2. ***Exceptional circumstances***

(225) Scott claims that the beneficiary of unlawfully granted aid may rely on exceptional circumstances which led him reasonably to suppose that the aid was lawful.

(226) According to Scott, the reasons why any unlawfully granted aid should not be repaid in this case are as follows:

(a) […] was neutralised by P & G buying the site and the factory at their combined market value (any advantage that Scott may have received when operating the factory), so that any competitive advantage deriving from the grant of the aid no longer affects competition; consequently, there is currently no distortion of competition which needs to be corrected by repaying the aid;

(b) […] since, when the land and the factory were sold to P & G, their book value was much less than their total cost to Scott; these assets were sold to P & G at less than half their book value (Scott is not now retaining any benefit from any incompatible aid), and

(c) the non-transparent manner in which the Commission dealt with the various laws notified or sent to it by France in 1982 concerning the aid that could be granted by French local and regional

([121]) Procedural Regulation, recital 13.
([122]) Procedural Regulation, recital 14.
([123]) Case C-5/89 Commission v Germany (BUG-Alutechnik) [1990] ECR p. I-3437, point 14 and Case C-24/95 Land Rheinland-Pfalz v Alcan [1997] ECR p. I-1591, point 25.

authorities made it almost impossible for a firm to obtain information about the status of these enactments from a Community-law perspective.

(227) None of these arguments can be accepted.

(228) The first and second arguments are irrelevant. The Commission would point out that, in accordance with established case-law, the lack of residual benefit to the final purchaser (several years after the aid was granted) is immaterial, since the economic activity of the original target firm (subsequently absorbed), in this case Scott, continued uninterrupted. As long as the unlawful aid is not recovered, the distortion of competition continues. The distortion is attributable to the legal entity remaining, even though Scott no longer operates in the paper sector. In this respect, the Commission would point out that, unlike the acquisition of Scott by KC, P & G acquired only the assets of the La Saussaye site. The aid should therefore be recovered from Scott and not P & G ([124]). The fact that the ownership of Scott has changed since the aid was granted is irrelevant.

(229) As regards the third agreement, the Commission refers to its reasoning in recitals 100 to 121.

(230) According to the French authorities, KC may rely on the legitimate expectation that it is not under a duty to repay the aid, in particular because any diligence exercised by KC with regard to Scott at the time of the acquisition would not have revealed if any aid had been granted to Scott. The only way KC could have discovered such aid would have been either to scan the local or national press or the minutes of the local authorities' meetings or to contact the competent authorities (see recital 96).

(231) This argument cannot be accepted, even if the Commission considers that, in the case in point, it is for Scott as the beneficiary to repay the aid received.

(232) The Commission would point out that firms receiving aid can in principle legitimately expect that aid to be lawful only if it has been granted in accordance with the procedure laid down by Article 88. A diligent economic operator should normally be able to ensure that that procedure has been followed ([125]). KC could have established, before buying shares in Scott, whether or not the latter had checked that the procedure had been complied with.

(233) At no stage did the French authorities show how KC's alleged legitimate expectation could be attributed to some act of the Commission's. Neither Scott, when it received the aid, nor KC, when it bought Scott, asked the Commission, or claim to have asked the Commission, whether the aid had been notified and approved. The fact that KC's diligence did not reveal any state aid problems when the company bought Scott is not a legitimate reason for not requiring the recovery of the aid. In this respect the Commission can only stress how important it is for a firm interested in acquiring another firm to show all due diligence with regard to state aid as well as other issues.

(234) As for whether it was possible for KC to detect if there was a state aid component in the preferential price of the land, the Commission would point out that the advantage conferred by the local authorities on Scott clearly derives from the agreement they concluded with that company (see recitals 191 to 203). Normally, Scott should have had a copy of that agreement.

(235) The Commission concludes, therefore, that the arguments put forward by Scott and the French authorities respectively do not give it any reason not to proceed with the recovery of the incompatible aid.

7.5.2. PREFERENTIAL RATE OF WATER TREATMENT LEVY

(236) Likewise, the advantage conferred in the form of a preferential rate of water treatment levy, whose value it is for the French authorities to determine in the recovery proceedings (see recitals 191 to 203), must be declared unlawful and incompatible with the common market. The Commission would point out (see recitals 217 to 218) that, where aid granted unlawfully is found to be incompatible with the common market, Article 14 of the Procedural Regulation requires the institution to request the Member State concerned to recover the aid from the beneficiary.

(237) The question whether the limitation period was interrupted or not does not arise as far as the preferential rate of water treatment levy is concerned, since the measure has been applied continuously since 1989, the year it was introduced. Given the continuous application of the preferential rate of water treatment levy, none of the arguments put forward by Scott applies. Not only Scott but KC too benefited from this advantage.

(238) The Commission concludes therefore that the arguments put forward by Scott and the French authorities respectively give it no reason not to proceed with the recovery of the incompatible aid.

([124]) Case C-305/89 Italy v Commission (Alfa Romeo and Finmeccanica) [1991] ECR p. I-1603.

([125]) Case C-5/89 Commission v Germany (BUG-Alutechnik) [1990] ECR p. I-3437, point 14.

8. **CONCLUSIONS**

(239) In view of the above and, in particular, of the following considerations:

(a) there are no objective or bona fide grounds why the local authorities should reasonably have expected their investment, namely the transformation of agricultural land into an industrial estate and the building of a factory warehouse before selling the plot to Scott, to give an appropriate rate of return at the price paid by Scott for the site, and

(b) setting the coefficient of degressivity at 0,25 for a level of consumption exceeding 150 000 m^3, with Scott as the de facto principal beneficiary, without this advantage being justified on commercial or general tax policy grounds,

the Commission finds that, in breach of Article 88(3) of the EC Treaty, France has unlawfully granted Scott the following aid:

(a) an ad hoc preferential price of FRF 39,58 million (EUR 6,03 million), present value FRF 80,77 million (EUR 12,3 million), for a 48 ha industrial site on the La Saussaye industrial estate, and

(b) a preferential rate of water treatment levy for any consumption of water exceeding 150 000 m^3, pursuant to Article R. 372 of the Local Authorities Code, whose value will have to be determined by the French authorities in proceedings for the recovery of the aid.

The aid referred to in (a) and (b) should be regarded as incompatible with the common market.

Consequently, in order to re-establish the economic conditions with which the company would have had to contend if it had not been granted incompatible aid, the French authorities must take all necessary steps to eliminate the advantages deriving from the aid and recover it from the beneficiary.

The aid must be recovered in accordance with the procedures of French law, and must include the interest which has accrued between the date on which it was granted and the date on which it is actually repaid, calculated using the reference rate for determining the net grant equivalent of regional aid in France ([126]),

HAS ADOPTED THIS DECISION:

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.

Done at Brussels, 12 July 2000.

For the Commission

Mario MONTI

Member of the Commission

([126]) Commission letter to Member States SG(91) D/4577 of 4 March 1991. See also Case C-142/87 Belgium v Commission [1990] ECR p. I-959. Rule consolidated by Article 14 of the Procedural Regulation.