DECISIONS

COMMISSION DECISION

of 9 March 2010

concerning the aid awarded for Farm Dairy Flevoland (C 45/08)

(notified under document C(2010) 1240)

(Only the Dutch text is authentic)

(2010/269/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union (TFEU) ([1]), and in particular the first subparagraph of Article 108(2) thereof,

After having, in accordance with this article, invited the interested parties to present their observations and having regard to these observations,

Whereas:

I. **Procedure**

(1) When examining a fact sheet sent in relation to an application for exemption based on Commission Regulation (EC) No 68/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to training aid ([2]), the Commission came across information regarding aid granted or to be granted to Farm Dairy Flevoland. By letter of 29 June 2004 (ref. AGR/16887), the Commission asked the Netherlands for information on this measure.

(2) The Dutch authorities replied by letter of 28 November 2005, registered as received on 29 November 2005.

(3) By letter of 22 May 2007 the Commission asked for further information; the Netherlands replied by letter of 22 June 2007, registered as received on 25 June 2007.

(4) The measure was entered in the register of unnotified aid under number NN 97/05.

(5) The Commission decision to initiate the formal investigation procedure was taken on 26 November 2008 and published in the *Official Journal of the European Union* ([3]). The Commission called on the other Member States and interested third parties to submit their comments on the aid in question.

(6) The Netherlands sent their comments by letter dated 19 January 2009, registered on the same day.

(7) Farm Dairy sent the Commission its observations as an interested third party by letter of 18 May 2009. Following a request for a deadline extension and in view of the particular circumstances expressed by Farm Dairy, supplementary annexes to the letter of 18 May 2009 were sent to the Commission by letter of 15 June 2009, registered on 18 June 2009. Those observations were sent to the Dutch authorities by letter of 24 June 2009. The Netherlands replied in turn by letter dated 17 July 2009, registered on the same day.

(8) The Commission asked the Netherlands some additional questions by letter dated 18 September 2009. The latter asked, by letter dated 16 October 2009, for the deadline for replying to be extended to 18 November 2009. This extension was granted to them by letter dated 10 November 2009. The Netherlands provided additional information by letter of 23 November, registered on the same day.

II. **Description**

II.1. *Background of the measure*

(9) Farm Dairy manufactures dairy products. It moved to its current location in Lelystad, Flevoland, which is a region classified as objective No 1. On 24 August 1998 Farm Dairy applied for investment aid pursuant to point 3.3 of the Flevoland Province SPD (Single Programming Document or 'Enig Programmeringsdocument'). The company intended to create both direct and indirect jobs in the region.

([1]) As of 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108, respectively, of the TFEU. The two series of provisions are identical in substance. For the purposes of this decision, the references to Articles 107 and 108 of the TFEU should be understood as referring to Articles 87 and 88 respectively of the EC Treaty, where necessary.

([2]) OJ L 10, 13.1.2001, p. 20.

([3]) OJ C 87, 16.4.2009, p. 5.

(10) On 23 September 1998, the Province gave a favourable opinion to this application for aid. In this decision, the Province based itself, inter alia on the favourable outlook in terms of job creation, environment, reduction of milk transport costs (up to then the milk produced in Flevoland was processed outside of Flevoland and even as far away as Belgium) and the company's prospects of profitability. Farm Dairy anticipated having contracts with the milk producers of Flevoland and agreements with a well-known supermarket chain, which would ensure the sale of the dairy products. Farm Dairy planned to handle 48 million kilos of milk a year.

(11) The Province applied to the Dutch Ministry of Agriculture [Ministerie voor Landbouw, Natuur and Voedselkwaliteit — LNV] for co-financing and an assessment of the project. There seemed to have been a difference of opinions between the Province and the 'Directie Noordwest' of the Ministry of Agriculture concerning the application for co-financing, in particular with regard to the innovative character of the project. For this reason, IKC gave a second opinion. This second opinion, issued on 17 December 1998, noted the project's qualities with regard to employment, outlets and profitability. However, it concluded that the innovative character of the project was poor. The production process itself was not innovative, although it used the most advanced techniques, but the project contained market innovations. This second opinion took several criteria into consideration, such as the development of the region and the financial outlook for the project. In view of the fact that the project would be particularly beneficial at provincial level (and less at national level), the usual scale for distributing the co-financing of subsidies was revised downwards, which meant that the provincial quota share was increased.

(12) In view of this position adopted by the Dutch Ministry of Agriculture, the Province issued a decision granting Farm Dairy a total amount of NLG 1 575 000 (EUR 715 909), informing Farm Dairy on 3 March 1999 of its intention to provide this grant. The grant was to be financed by contributions from the European Agricultural Guidance and Guarantee Fund (EAGGF), the central Government and the Province.

(13) Following doubts concerning the possibilities of obtaining authorisation for the aid from the European Commission, the Dutch Ministry of Agriculture decided not to grant the public financing, informing the Province of this by letter of 14 September 1999.

(14) DG Agriculture conducted an inspection and decided that the project could not be financed via the SPD, and that consequently the part of the financing to come from the EAGGF would not be granted. It informed the Province of this decision by letter of 25 June 1999.

(15) The Province nevertheless decided to finance the project exclusively out of its own funds. Farm Dairy was informed of the final award and payment of the aid by letter of 20 November 2000.

(16) On 23 February 2001 an informal meeting was held between DG Agriculture officials and representatives of Flevoland Province, at the latter's request. At this meeting the officials pointed out that the aid to Farm Dairy was not compatible with the common market and would have to be recovered or allocated to another project.

(17) The Province decided to grant the aid in the form of compensation to Farm Dairy for the damage suffered as a result of the withdrawal of the decision granting the aid. The compensation was equal to the amount which Farm Dairy would have received if the aid had been authorised. The Province estimated that as the award decision did not provide for the possibility of the aid being withdrawn, it was bound by this decision and obliged to award the aid, or risk Farm Dairy taking legal action against it. The Province informed Farm Dairy of its proposal for compensation by letter dated 10 May 2001. Farm Dairy accepted this proposal by letter dated 21 May 2001.

II.2. *Legal basis*

(18) Originally, the aid had been awarded under the SPD for Flevoland Province as aid for investment under point 3.3 of the SPD. Subsequently, and for the reasons explained above, the aid was granted as compensation for the losses suffered as a result of the decision to withdraw the granting of the aid.

II.3. *Aid amount*

(19) The aid amounts to NLG 1 575 000 or EUR 715 909. This amount corresponds to 8,5 % of the amount of the total investments, namely NLG 18 597 000 or EUR 8 438 951.

II.4. *Recipient*

(20) The beneficiary is Farm Dairy Holding B.V. situated in Lelystad. This is a company which produces dairy products (including yoghurts and other milk-based desserts).

II.5. *Duration of the measure*

(21) The aid was awarded for the period from 1 October 1998 to 1 May 2000, corresponding to the start and end dates of the Farm Dairy project. The award decision as such was taken on 3 March 1999.

III. **Points raised by the Commission in the context of initiating an investigation procedure**

(22) The Commission initiated the investigation procedure provided for under Article 108(2) of the TFEU because it had serious doubts as to the compatibility of this aid with the internal market.

(23) In particular, the Commission has, in a preliminary fashion, examined the compatibility of the measures in question from the perspective of aid for investment and aid for compensation of damage.

(24) In the case of the aid for investment, the Commission applied the rules applicable at the time of granting the aid, i.e. the guidelines for State aid in connection with investments in the processing and marketing of agricultural products [1] (hereinafter 'the guidelines'), given that it related to an investment. These guidelines exclude, in a general way, aid for investment in the sector of cow's milk and products of this milk, except in the case of one of the exceptions referred to in point 2.3 of the Annex to Commission Decision 94/173/EC of 22 March 1994 on the selection criteria to be adopted for investments for improving the processing and marketing conditions for agricultural and forestry products [2]. These exceptions include investments with a major innovative element. In this regard, in the decision to open the investigation procedure, the Commission concluded that there were not enough elements to be able to conclude that the aid in question met the conditions to benefit from one of the exceptions. Point 3 d) of the guidelines provides for the possibility of declaring certain aid compatible if it is eligible for co-financing. In the decision to open the procedure, the Commission concluded that this possibility could not be applied in the case in question, given that a letter from the Commission to the Netherlands dated 25 June 1999 refused all financing based on the SPD.

(25) The Commission also examined the argument of the Dutch authorities, according to which the aid had been granted by way of compensation for damage suffered as a result of an error by the authorities in initially granting aid which had later turned out to be illegal and perhaps incompatible with the common market. The Commission concluded that the company which received the aid could not however have believed in good faith in the legitimacy of the aid if it had not been awarded in accordance with the procedure laid down. It consequently expressed doubts that the compensation was an adequate justification allowing the conclusion that the measure in question did not constitute aid.

(26) As the Dutch authorities did not advance any other legal basis, the Commission concluded that there were doubts as to the compatibility of the measures in question and considered that it could not be excluded that they constituted operating aid.

IV. **Comments from third parties**

(27) First of all, Farm Dairy indicated its surprise at the publication of the decision to open the formal investigation procedure. Farm Dairy was convinced that the case had long since been closed. Farm Dairy then complained that it had not been able to exercise any influence on the correspondence between Flevoland Province and the Commission, not having been informed of the Commission's investigation until the formal investigation procedure was opened.

(28) Farm Dairy's comments are subdivided into four parts: firstly, the general background of the measure and the recipient's legitimate faith; secondly, the application of the Flevoland SPD measures; thirdly, the assessment with regard to Decision 94/173/EC; and fourthly, the contesting of the application of compound interest in the event of a negative decision with recovery.

IV.1. *General background of the measure*

(29) In the month of August 1998, Farm Dairy applied to Flevoland Province for subsidies under the 1994-1999 SPD. This SPD particularly emphasised the need to extend the possibilities concerning the processing and marketing of agricultural products in Flevoland Province. In this context, the Farm Dairy project seemed particularly relevant, as it intended to build an independent milk processing plant in Lelystad.

(30) Farm Dairy reported a posteriori the positive results engendered by the construction of the Lelystad plant: emergence of competition on the Dutch dairy products market, dominated at the time by Friesland Coberco and Campina Melkunie; proximity of the milk producers; innovations (make-to-order system); introduction of 2-litre containers on the Dutch market; increase in employment in an 'objective 1' region; stimulation of economic growth in the region. At the time, Farm Dairy intended to develop a line of special and innovative products on the Dutch market.

[1] OJ C 29, 2.2.1996, p. 4.
[2] OJ L 79, 23.3.1994, p. 29.

(31) Farm Dairy indicated that the application for subsidies had been assessed positively by the Province and by the Dutch Ministry of Agriculture (LNV) on the basis of an independent opinion from the IKC, which concluded that the project was innovative in part. An agreement had consequently been signed on 24 February 1999 between Flevoland Province and Farm Dairy, awarding a subsidy under measure 3.3 of the Flevoland SPD. Farm Dairy emphasises that it was only in 2001 that it was informed by Flevoland Province that the aid was not authorised under State aid rules. To avoid legal proceedings, the Province proposed paying compensation. Farm Dairy noted that the decision to open the investigation procedure mentions that the incompatibility of the aid was brought up only in the course of a conversation between the Province and the Commission. Yet, the Province had indicated to Farm Dairy that a Commission official had suggested that compensation could be paid. In view of these elements, Farm Dairy indicates that it could have legitimate faith in the fact that the case was closed.

(32) As far as the intensity of the aid is concerned, Farm Dairy noted that the final intensity of the aid was […] (*) % of the real investment costs, contrary to the figure of 8,5 % of the estimated investment costs. This percentage is clearly lower than the authorised percentages (for example, in favour of small and medium-sized enterprises).

IV.2. *Farm Dairy's observations concerning assessment under the Flevoland SPD*

(33) Flevoland Province assessed the measure under measure 3.3 of the Flevoland SPD, which is intended to stimulate new agricultural activities and has environmental and job creation goals. Farm Dairy expressed its surprise to see the Commission qualify the measure as requiring assessment under point 3.2 of the Flevoland SPD regarding Council Regulation (EEC) No 866/90 of 29 March 1990 on improving the processing and marketing conditions for agricultural products ([1]). An assessment from this perspective entails an obligation to meet the criteria for investments in point 2.3 of the Annex to Decision 94/173/EC.

(34) Farm Dairy noted that it considered that the conditions set out in point 3.3 of the Flevoland SPD had been met: in particular, in 2000 Farm Dairy had created 61 jobs (instead of the 35 initially planned) and had invested a total of NLG […] million (instead of the 18,5 million initially planned). Moreover, the investment was positive in environmental terms: there was a reduction in the rates of CO_2 emissions and in the use of fuels because of the proximity of the milk producers. The innovative concept of the 'make-to-order' system reduced the need for refrigerated capacity, which consumes a lot of energy.

(35) Farm Dairy concluded this point by indicating that the Commission should have approved the subsidy under measure 3.3 instead of measure 3.2 of the Flevoland SPD.

IV.3. *Farm Dairy's observations concerning an assessment under Decision 94/173/EC*

(36) Firstly, Farm Dairy considered that the aid was compatible with the criteria set out in point 1.1 of Decision 94/173/EC. As indicated above, the investment was beneficial for the environment and featured technological innovations. Furthermore, the proximity of milk suppliers allowed the interim costs of collecting the milk to be reduced and the concept of centralising the production chain in one company allowed direct distribution.

(37) Secondly, Farm Dairy considered that the aid in question met the requirements made by the criteria mentioned in point 2.3 of the Annex to Decision 94/173/EC mentioned earlier.

(38) In particular, Farm Dairy argued that the investment included a major innovative part, for two reasons: firstly, the company's internal process is based on a 'make-to-order' system. This means that the raw material, the milk, is transformed within the company to a finished product, which is packed on site and loaded immediately into refrigerated lorries. Consequently, this eliminates the need to use a central distribution facility. The system also makes it possible to match the initial supply of milk exactly to the quantity of orders in hand. Consequently, this significantly reduces the refrigeration costs connected with transporting milk to the plant. Farm Dairy emphasised that it has invested in modern pasteurisation systems with a high yield in proportion to energy requirements. This production process has contributed to the high quality of the Farm Dairy products.

(39) Secondly, Farm Dairy reported having also innovated at production level by introducing 2-litre polyethylene containers on the Dutch market. In 1999, Farm Dairy was the first dairy product company to put containers like this on the market. At the time, only smaller cardboard containers were available. To this end, Farm Dairy had imported a special machine from the United States to manufacture these containers. In 1999 the demand for these containers was not yet very high. It was not until 2004 that these containers were in high demand. Since 2004 Farm Dairy has filled 2-litre containers with more than […] million litres of milk, which makes up […] % of its total milk production. Annexed to Farm Dairy's observations is a press article reporting on this innovation, along with company statistics indicating the growing proportion of milk sold in 2-litre containers in the period from 1999 to 2008.

(*) This information is confidential.
([1]) OJ L 91, 6.4.1990, p. 1.

(40) Also enclosed with the comments from Farm Dairy is a report entitled 'Innovations by Farm Dairy at the time of the SPD application in 1998', by […], who was the then […] of the competitor company […]. Farm Dairy emphasised that this independent report shows that the introduction of 2-litre polyethylene containers on the Dutch market was revolutionary to the extent that the two dominant parties (Friesland-Coberco and Campina Melkunie) tried to curb the introduction of this packaging. This container had numerous advantages in comparison with the cardboard containers available at the time. Farm Dairy was clearly the first to introduce this container to the Netherlands. Furthermore, the logistical concept of the company (production chain in one company) allowed the milk to be kept for longer because of the absence of central distribution facilities and the lack of need for extended supply chains.

(41) Farm Dairy also supplied a table where the specific costs of the investment relative to the production of 2-litre containers were isolated from the remaining investment costs. When Farm Dairy was built, four packaging lines were created, including one dedicated specifically to packaging 2-litre containers. These costs were also separated from the other investment costs.

(42) Farm Dairy also indicated that at the time of the application for investment, it envisaged launching a line of special products: cream in goblets, fruit yoghurts and other cream and fruit-based desserts.

(43) In response to the criteria mentioned in point 2.3 of the Annex to Decision 94/173/EC on the development of demand, Farm Dairy indicated that essentially the demand came from supermarkets and that they were extremely enthusiastic about the idea of having a new player on the market. From the start, Farm Dairy had supply contracts with the main supermarkets operating in the Netherlands.

(44) As far as the exception concerning the shortage of capacities and the existence of real and effective outlets is concerned, it is clear from the reaction of the supermarkets mentioned in recital 43 that the existence of real and effective outlets was clearly shown. According to Farm Dairy, the shortage of capacities is clear from the Dutch competition authorities decision of 23 December 1998 in the context of Friesland Coberco Dairy Foods taking over the De Kievit dairy product company. The Netherlands import more milk for processing than they export. The import-export balance shows that only 2,5 % of the milk processed in the Netherlands was imported. Farm Diary deduced from all this information that the fresh milk market in the Netherlands did not have excess capacity.

(45) In addition, Farm Dairy mentioned that the Flevoland milk suppliers had decided to no longer supply milk to Campina Melkunie, their client, to deliver their milk to Comelco in Belgium. However, Campina Melkunie's takeover of Comelco in 1991 and its final implementation in 1996 forced the milk suppliers to find another alternative. This other alternative was the arrival of Farm Dairy in 1999.

(46) Farm Dairy concluded this point by indicating the difficulties of finding more precise information ten years after the facts, and queries the duration of the procedure between the Commission and the Netherlands.

IV.4. *Payment of a compound interest rate*

(47) Farm Dairy noted the duration of the procedure and its legitimate faith that the case seemed to have been closed to contest the imposition of a compound interest rate as of the award of the aid. Farm Dairy cannot be held responsible for the fact that the case remained inactive for a long period, which caused the accumulation of interest rates. For this reason, Farm Dairy requested the application of a simple interest rate because if it had known that the aid was illegal and if it had had the choice, it would have chosen to repay the sum earlier.

(48) Farm Dairy based its request on the Commission communication dated 8 May 2003, which indicated that up until then it was not clear what type of interest rate should be applied. On the basis of the principle of equal treatment, Farm Dairy requested that the Commission decide that the compound interest rate period should not apply for the period before 8 May 2003.

V. **Observations presented by the Netherlands**

(49) By letter of 19 January 2009, the Netherlands presented their comments on the Commission's decision to initiate the procedure provided for in Article 108(2) of the TFEU in respect of the unnotified aid. The Netherlands reaction was limited to noting that they had no additional information to submit, having already supplied it in the context of the preliminary investigation procedure.

(50) In the light of Farm Dairy's comments, the Commission nonetheless wished to obtain additional explanations. To this effect, it asked the Netherlands to inform it whether the introduction of 2-litre containers was an innovation as Farm Dairy claimed, and whether this aspect was taken into consideration when the Dutch authorities assessed the project. As far as the make-to-order process was concerned, the Commission asked the Netherlands to comment on the information provided by Farm Dairy stating that this process constituted an innovation at the time of the application for investment. Lastly, the Commission asked the Netherlands to comment on the existence of realistic outlets and shortage of capacity at the time the aid was awarded, by providing it with any study or document that may be useful in this respect.

(51) The Netherlands reported that as far as the introduction of the 2-litre containers is concerned, that really was an innovation in 1999. For this they based themselves on studies by the TNO [1], the Nederlandse Zuivel Organisatie (NZO) and [x], a supermarket chain. The Netherlands submitted the TNO report and letters sent by the NZO and [x]. This information shows that Farm Dairy was clearly the first to introduce the 2-litre containers on the Dutch market, and that these containers were an innovation in 1999, given that before then milk was sold only in 1 litre or 1,5 litre containers.

(52) This aspect was not taken into account during the IKC's assessment and the Province was not aware of this aspect. The Netherlands have indicated that this aspect would undoubtedly have changed the opinion given by the IKC at the time, by modifying the opinion on the innovative character of the project. Given that the IKC no longer exists, it is no longer possible to ask it for a second opinion.

(53) At the Commission's request, the Netherlands sent a detailed list of the costs related only to the specific investment for the introduction of 2-litre containers. According to these figures, a total of FL 1 840 000 (i.e. EUR 834 956) was devoted to the specific investment for the 2-litre containers. The Dutch authorities added the cost of a quarter of the packaging lines to this, given that of the four packaging lines, one line was dedicated entirely to filling the 2-litre containers. This sum amounted to FL 2 936 250 (i.e. EUR 1 332 412). The total sum thus amounted to FL 4 776 250 (i.e. EUR 2 167 367).

(54) With regard to the 'make-to-order' concept, the Commission asked the Netherlands to comment on its innovative character and to clarify whether the observations presented by Farm Dairy were liable to modify the earlier assessment, according to which the innovative nature of the project was quite poor. The Netherlands replied that the IKC's opinion considered that the project was innovative in part, in that the innovative character was not due to a product innovation but rather a market innovation. The assessment was made in the context of an application for co-financing from the Ministry of Agriculture. However, the Netherlands invoked other arguments to justify the innovative character of the project. They claimed that the 'make-to-order' system had increased the efficiency of the milk supply, by allowing milk to be kept for a longer period, and that in a country where people primarily consume pasteurised milk (rather than sterilised milk which keeps for longer). The Netherlands also cited the TNO study with regard to the innovative nature of the make-to-order system. This study indicates that the main system at the time was the 'make-to-stock' system, where a certain amount of stock is kept in reserve to be sold afterwards. This reduces delivery times, but also reduces flexibility with regard to the needs of clients 'such as supermarkets'. The 'make-to-order' system, for its part, is better able to meet this need for flexibility. Consequently, the Netherlands concluded that this concept was innovative in nature.

(55) With regard to the existence of outlets and the absence of excess capacity, the Netherlands cited a report from Rabobank International from April 2009, which notes that 2,5 % of all the farm milk processed is imported. When factory milk is taken into account (i.e. milk that has been pasteurised to allow for longer transport), 10,5 % of all processed milk is imported. This shows that the Netherlands consider that there was no excess capacity in the Netherlands. Regarding the existence of outlets, the Netherlands confirmed Farm Dairy's analysis (see recitals 44 and 45). Furthermore, Farm Dairy's statistics show the possibility of outlets. It is also clear from the letter from [x] that the sales of 2-litre bottles produced by Farm Dairy increased its turnover.

VI. **Appraisal**

(56) The Commission noted that Articles 92, 93 and 94 of the EC Treaty (which have become Articles 107, 108 and 109 of the TFEU) were applicable to the production of dairy products and other milk-based deserts at the time the aid was granted by virtue of Article 23 of Council Regulation (EEC) No 804/68 of 27 June 1968 on the common organisation of the market in milk and milk products [2].

VI.1. *Existence of State aid within the meaning of Article 107(1) of the TFEU*

(57) Article 107(1) of the TFEU states that 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 certain production is incompatible with the common market insofar as it affects trade between Member States.

(58) Aid awarded by the State: This condition was met, as the aid was awarded by Flevoland Province.

[1] TNO is an independent research organisation which works to apply scientific knowledge with the aim of strengthening the innovative power of industry and government (www.tno.nl).

[2] OJ L 148, 28.6.1968, p. 13.

(59) Measure which affects trade and distorts of threatens to distort competition: The dairy sector is open to competition at Community level [1] and is consequently sensitive to any measure favouring production in a particular country. Furthermore, in the case in hand, the aim was to process the milk in Flevoland Province, whereas earlier the milk was partly processed in Belgium. Consequently, this measure threatens to distort competition in the milk and dairy product sector.

(60) Measure which favours certain undertakings or the production of certain goods: the aid was awarded in favour of one single company, Farm Dairy.

(61) For these reasons, the Commission concludes that the measure in question comes under Article 107(1) of the TFEU and constitutes State aid. The comments received after opening the procedure have not changed this conclusion.

VI.2. *Classification of the measure as illegal aid*

(62) Since the aid was granted and paid without prior notification to the Commission, it is illegal within the meaning of Article 1(f) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [2].

VI.3. *Assessment of the compatibility of the aid measure*

(63) The opening decision mentioned earlier referred to two possible justifications for the aid awarded by the Dutch authorities. At first, i.e. when the aid was awarded, they indicated that it was investment aid which should fall within the scope of the Flevoland SPD (see *supra* recital 9). The Flevoland Province authorities later converted this investment aid into compensation for the losses suffered when the aid was withdrawn. The information provided by Farm Dairy on the opening of the procedure will be examined in the section dealing with the compatibility of the aid as investment aid. The examination of the aid measure's compatibility will be divided into two parts: the examination of the compatibility of the aid as investment aid (VI.3.1) and as compensation (VI.3.2).

(64) At the outset, the Commission wanted however to examine the Farm Dairy's argument contesting the Commission's qualification of the measure as coming under point 3.2 of the Flevoland SPD although the Province had presented it to the Commission as a measure under point 3.3 of the Flevoland SPD (see recital 33 and those that follow).

(65) At first the Commission believed that this debate concerned the award of Community funds, which is not the subject of this Decision, which examines the measure granted solely on the basis of the Province's funds, after the Dutch Ministry of Agriculture took note of the Commission's refusal to award Community funds. This Decision does not explain the reasons why the Commission refused the award of these Community funds, which should have been contested in good time under the procedures applicable to the award of Community funds. The Commission's refusal to award Community funds was communicated to the Netherlands by letter dated 25 June 1999, and as the Netherlands took note of it without contesting the measure [3], that refusal should no longer be questioned in this decision.

(66) The Commission remarks, however, that the criteria used to assess the measures with regard to the rules on State aid on investment refer to the same criteria as those used for the assessment with regard to point 2.3 of the SPD. The rules on State aid applicable when the aid was awarded are contained in the guidelines and their point 3(b) refers to points 1.2 and 2 of Decision 94/173/EC. This Decision dealt in a general manner with the Community's selection criteria for investments that could benefit from Community financing under Regulation (EEC) No 866/90 and Council Regulation (EEC) No 867/90 of 29 March 1990 on improving the processing and marketing conditions for forestry products [4]. This was intended to harmonise Community financing and national financing. The Commission underlines, however, that it is not applying Decision 94/173/EC as such, but only insofar as the guidelines refer to it.

VI.3.1. **Investment aid**

(67) The Commission examined the measures in light of the guidelines applicable at the time the measure was granted, namely 3 March 1999.

[1] According to the case law of the Court of Justice, the improvement of the competitive position of an undertaking resulting from a State aid generally proves a distortion of competition with other competing undertakings not receiving such aid (Case 730/79 [1980] ECR 2671, grounds 11 and 12). As far as the existence of intra-Community trade in the milk sector is concerned, see *supra*, recitals 44, 45 and 55, which the Commission considers to be well-founded.

[2] OJ L 83, 27.3.1999, p. 1.

[3] In the letter of 15 July 1999 sent by the Dutch Ministry of Agriculture to Flevoland Province, the Ministry noted that the project was not approved by the Commission and therefore refused to provide any financing itself.

[4] OJ L 91, 6.4.1990, p. 7.

(68) By virtue of point 3(b) of the guidelines, the investment aid in favour of the investments mentioned in the second and third indents of point 1.2 in the Annex to Decision 94/173/EC cannot be considered to be compatible with the internal market. Likewise, the investments that are excluded by virtue of point 2 of the same Annex are considered to be incompatible with the common market if the particular conditions provided for in it are not met.

(69) Point 2.3 of the Annex to Decision 94/173/EC provides that 'The following investments are excluded in the sector of cow's milk and cow's milk products:

— […]

— investments concerning the following products: butter, whey powder, milk powder, butteroil, lactose, casein, caseinate,

— investments in the manufacture of fresh products or cheese, except production involving substantial innovation in line with trends in demand and products for which there is a shortage of capacity and for which the existence of realistic potential outlets has been demonstrated, as well as the manufacture of products using traditional or organic methods as defined by Community rules.

The following investments are not concerned by the prohibitions referred to in the preceding indents provided that they do not lead to an increase in capacity:

— investments to bring establishments into line with Community health standards,

— investments concerning environmental protection.'

(70) This means that, a priori, investment aid for developing fresh products such as the one in question here would not be compatible with the internal market unless this investment comes under one of the exceptions mentioned in point 2.3 of the Annex to Decision 94/173/EC.

(71) The question of knowing whether one of the exceptions mentioned in point 2.3 of the Annex to Decision 94/173/EC applies was one of the main questions asked in the opening decision. This decision therefore examines these three exceptions: the substantial innovation in production in line with trends in demand, a shortage of capacity and the existence of realistic potential outlets, the development of products using traditional or organic methods as defined by Community rules.

(a) Criteria concerning the substantial innovation in line with demand

(72) The documents that the Netherlands sent the Commission in 2005 show that the production process was not innovative in the light of the information provided at the time. As indicated in the opening decision, IKC considered that the project was not totally innovative. In particular, it considered that the project did not present innovative products but market innovations, and that the production process was not innovative, but used the most modern techniques. However, in view of the fact that the other criteria evaluated by IKC were met, IKC concluded that the project met the criteria to benefit from a subsidy, but reduced the size of it (see *supra* recital 11).

(73) The issue is whether the information supplied by Farm Dairy and the Netherlands in the context of the opening of the procedure is likely to call into question the analysis performed at the time in the context of the examination of the evaluation criteria for the SPD subsidies. This information (see recitals 36 to 46) has shown that the part of the investment concerning the new 2-litre polyethylene container was totally innovative and that Farm Dairy was the first company to make this product and put in on the Dutch market. The report provided to this effect by Farm Dairy notes the innovative character of this product and seems credible insofar as it was written by an industry expert who was working for one of Farm Dairy's competitors at the time. The report in question does not call into question the analysis made by IKC and the Dutch Ministry of Agriculture at the time, but does include information that was not sent to the Commission before the decision to open the procedure and which was not mentioned in the documents previously sent to the Commission. The 2-litre container mentioned was already very successful on the British and American markets. Farm Dairy was the first to put this type of container on the market. Consequently, Farm Dairy proved to be a trail-blazer, the 2-litre container becoming commonplace in the Netherlands.

(74) On the basis of the case-law of the Court of Justice of the European Union, the Commission is obliged to consider the different information it is sent and examine all the necessary points of view, in particular by requesting information from the recipients, in order to make a finding in full knowledge of all the facts relevant at the time of adoption of its decision [1].

[1] CFI, 9 September 2009, Case T-369/06, *Holland Malt* v *Commission*, paragraph 195 (not yet published).

(75) In the case in question, the Commission asked the Netherlands to confirm the information provided by Farm Dairy. The Netherlands confirmed the information from Farm Dairy and provided three separate documents (see *supra* recitals 51 to 53) proving the innovative nature of the investment relating to the 2-litre containers. This information shows, on one hand, that the Netherlands did not take account of the element of investment for the part concerning the 2-litre containers when evaluating the innovative character, undoubtedly because the examination was on the basis of the SPD criteria and not specifically on the basis of the guidelines mentioned. On the other hand, the Netherlands did use independent experts who knew the market and the way in which dairy products were placed on the market. The studies conducted by these experts showed that, in fact, Farm Dairy was the first company to put this type of container on the Dutch market.

(76) On the basis of this new information presented by the authorities and by Farm Dairy following the opening of the procedure, the Commission considers that the introduction and production of the 2-litre containers is of an innovative nature.

(77) As far as the make-to-order concept is concerned, the question is similar: are the clarifications provided by Farm Dairy and by the Netherlands liable to modify the assessment made by the Commission at the time of the opening of the procedure?

(78) Unlike the 2-litre containers, the Netherlands did take the 'make-to-order' concept into consideration when the subsidies were applied for in 1998. At the time it was concluded that the production process was not innovative as such, but that it used the most modern technology and was effective in terms of reducing energy consumption and better for the environment. The Netherlands and Farm Dairy had already used these arguments in previous correspondence. No other innovation was shown for the 'make-to-order' concept.

(79) It is also important to verify whether production is in line with demand, as required by the first exception mentioned in Decision 94/173/EC. From the information supplied to the Commission (see recital 43), the demand for these products mainly came from supermarkets and that contracts had been concluded with at least five supermarkets. The Commission considers that this is a serious indication that the innovation was in line with trends in demand. This is corroborated by the fact that [x], cited by the Netherlands (see recital 55) significantly increased its turnover thanks to the milk sold by Farm Dairy.

(80) In conclusion, the Commission considers that the conditions for the first exception are met for the case in question for the investment part concerning the 2-litre containers, given that the investment had an innovative nature in line with trends in demand. Based on the information supplied to it after opening the formal examination procedure, the Commission must conclude that the conditions of this first exception are met. The Commission does not as a matter of course have to examine which information it could have been sent, but the Commission should, on one hand, examine all the necessary points of view and, on the other hand, base itself on the information it has at the time it adopts its decision [1]. In the case in question, on the one hand the Commission opened the procedure and asked the Netherlands, by letter dated 18 September 2009, to confirm certain information mentioned by Farm Dairy in its comments. In this way, the Commission thus used all the means at its disposal to obtain information from third parties or from the Member State. On the other hand, in this decision, the Commission is basing itself on all the information received after opening the procedure. However, no contrary information was provided that indicated that the investment for the part concerning the 2-litre containers was neither innovative nor in line with trends in demand.

(81) In view of the fact that the criteria mentioned in the guidelines in connection with Decision 94/173/EC are met with regard to the innovative character of the investment in relation to the 2-litre containers, but not for the rest of the investment, the costs relating to this investment must be isolated to allow the maximum aid intensity to be deducted from them.

(82) The Dutch authorities indicated that a total of FL 1 840 000 (i.e. EUR 834 956) was devoted to the specific investment for the 2-litre containers. The Dutch authorities added the cost of a quarter of the packaging lines to this, given that of the four packaging lines, only one line was dedicated entirely to filling the 2-litre containers. This sum amounted to FL 2 936 250 (i.e. EUR 1 332 412). The total sum thus amounted to FL 4 776 250 (i.e. EUR 2 167 367) (see recital 53). No general cost (such as the building or the grounds) was included in this total.

(83) The maximum aid intensity should thus be evaluated with respect to these eligible costs. As Flevoland was an Objective 1 region at the time of the application for investment, aid could be awarded for up to 75 % of the eligible costs. The subsidy granted — EUR 715 909 — represents less than 75 % of the eligible costs. Thus, the proposed investment is compatible with the rules on State aid.

[1] Case T-369/06, op. cit., paragraphs 195-198.

(b) The existence of outlets and the shortage of capacity

(84) Given that the conditions for the first exception mentioned in point 2.3 of the Annex to Decision 94/173/EC are met, and that this allows the aid awarded to be approved in full, there is no need to rule on the fact that the other exception conditions are met.

(c) The manufacture of products using traditional or organic methods as defined by Community rules

(85) As for point (b) above, the analysis of this third exception is not necessary insofar as the analysis of the first exception allowed the aid in question to be deemed compatible. Moreover, this point does not seem relevant in view of the investment project in question which has nothing at all to do with the manufacture of products using traditional or organic methods.

(86) However, the Commission examined the aid in question with regard to Article 3(d) of the guidelines referred to earlier, which states that 'the Commission shall examine, on a case-by-case basis, any aid measure which could be excluded by implementing these guidelines and appropriate measures, but what in principle is eligible for Community co-financing in accordance with the provisions of Council Regulation (EEC) No 2328/91 [1]'. The letter sent by the Commission to the Netherlands on 25 June 1999 shows that the project could not be financed through the SPD. Consequently, the Commission considers that the measure in question cannot benefit from the exemptions provided for in point 3(d) of the above guidelines.

VI.3.2. **Other arguments examined during the opening of the procedure concerning the compatibility of the aid in full**

(87) During the opening of the procedure, the Commission had examined the compensation of damage following the non-award of the aid as a basis for approving the investment in full. During the preliminary phase, the Dutch authorities had indicated that the aid had been granted by way of compensation for damage suffered as a result of an error by the authorities in initially granting aid which had later turned out to be illegal and perhaps incompatible with the common market.

(88) The Court of Justice has indicated the payment of liquidated damages did not constitute aid [2]. The Court based itself for this on the fact that State aid is fundamentally different in its legal nature from damages which the competent national authorities may be ordered to pay to individuals in compensation for the damage they have caused to those individuals. Therefore, in principle the payment of liquidated damages does not give the beneficiary a benefit, as it is simply compensation for a right to which he is entitled.

(89) In the case in question, it is difficult to speak of the recipient having a right to compensation, given that this claimed right is based from the outset on illegal behaviour of the Member State. However, case law has consistently held that in view of the mandatory nature of the supervision of State aid by the Commission under Article 108 of the Treaty, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that Article. A diligent economic operator should normally be able to determine whether that procedure has been followed [3].

(90) In the case in question, it must also be noted that the award of compensation would be tantamount to circumventing the prohibition on granting aid without the Commission's approval. This is confirmed by the fact that, when Flevoland Province stated that the aid in question had been granted in the form of compensation for an error by the authorities, it was well aware that the aid should have been notified to the Commission for approval before being paid.

(91) Consequently, the Commission considers that the whole investment cannot be considered to be compatible because the aid in question would constitute compensation for the damage suffered by the beneficiary.

VI.3.3. **Other points raised by Farm Dairy in the context of initiating an investigation procedure**

(92) Farm Dairy had contested the application of compound interest rates in the event of a negative decision from the

[1] OJ L 218, 6.8.1991, p. 1.

[2] ECJ, Joined Cases 106/87-120/87, *Asteris and others* v *Greece and European Economic Community* [1988] ECR I-5515.

[3] ECJ, Case C-169/95 *Spain* v *Commission* [1997] ECR I-135.

Commission with recovery (see *supra* recital 47). Given that the decision in question concluded that the aid was compatible, the recovery of the illegal aid is not envisaged and the comments from Farm Dairy are therefore no longer relevant.

VII. **Conclusion**

(93) The State aid that the Netherlands granted to Farm Dairy is compatible for the part of the investment that concerns the new 2-litre containers. The initial total of the aid was consequently recalculated in relation to this part of the total investment and it is clear from this calculation that the aid awarded is compatible with the requirements of the guidelines in connection with State aid in connection with investments in the processing and marketing of agricultural products.

(94) The Commission regrets, however, that the Netherlands implemented the above aid measure in contravention of Article 108(3) of the TFEU,

HAS ADOPTED THIS DECISION:

Article 1

The State aid of EUR 715 909 provided by the Netherlands to Farm Dairy is compatible with the internal market.

Article 2

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 9 March 2010.

For the Commission

Dacian CIOLOŞ

Member of the Commission