OPINION OF ADVOCATE GENERAL LÉGER

delivered on 14 March 2002 [1]

1. By this action, the Kingdom of the Netherlands asks the Court to annul Commission Decision 1999/705/EC of 20 July 1999 [2] in so far as it declares the subsidies granted to certain categories of Netherlands service stations to be incompatible with the common market and with the functioning of the European Economic Area (EEA) and orders the aid granted to be recovered.

The Kingdom of the Netherlands considers that the Commission was wrong to treat these subsidies as State aid and that to treat them as such constitutes a violation of Article 92(1) and (3) of the EC Treaty (now, after amendment, Article 87(1) and (3) EC), Commission Notice 96C 68/06 on the de minimis rule for State aid [3] and the principles of legal certainty, equal treatment and the protection of legitimate expectations.

It further considers that the decision does not satisfy the requirement of 'sufficient particularity' flowing from Article 189 of the EC Treaty (now Article 249 EC) and that it fails to provide a proper statement of reasons as required by Article 190 of the EC Treaty (now Article 253 EC).

Lastly, the Netherlands Government challenges the obligation imposed on it to recover subsidies already paid out.

I — Legal framework

A — *The EC Treaty*

2. The Treaty imposes a general prohibition on aid granted by Member States to undertakings.

3. Article 92(1) of the Treaty provides:

'Save as otherwise provided in this Treaty, any aid granted by a Member State or

1 — Original language: French.

2 — Decision on the State aid implemented by the Netherlands for 633 Netherlands service stations located near the German border, notified under document number C(1999) 2539 (OJ 1999 L 280, p. 87, hereinafter 'the decision').

3 — OJ 1996 C 68, p. 9 (hereinafter 'the notice').

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.'

4. The exceptions to this general prohibition are set out in paragraphs (2) and (3) of the same article. [4]

5. Article 93 of the EC Treaty (now Article 88 EC) sets out the procedural arrangements governing the granting of State aid.

6. The first and second subparagraphs of Article 93(2) provide as follows:

'If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 92, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 169 and 170, refer the matter to the Court of Justice direct.'

7. Under Article 93(3) of the Treaty, '[t]he Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 92, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.'

B — *The notice*

8. The Commission has issued notices setting out its policy on de minimis aid. The most recent of these was issued in 1996. It is that notice that concerns us in the present case. [5]

4 — However, subsidies to certain sectors of the economy — essentially the agriculture, fisheries and transport sectors — receive separate treatment in the Treaty (see Articles 42 and 77 of the EC Treaty (now Article 36 EC and Article 77 EC)).

5 — The Council has since adopted Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid (OJ 1998 L 142, p. 1).

9. The notice is intended to interpret Article 92(1) of the Treaty and, more specifically, the concept of 'affecting trade between Member States'. [6] According to the notice, aid in small amounts has no effect on trade between Member States.

10. The notice states:

'Clearly, any financial assistance given by the State to one firm distorts or threatens to distort, to a greater or lesser extent, competition between that firm and its competitors which have received no such aid; but not all aid has an appreciable effect on trade and competition between Member States. This is particularly true where the amount of aid involved is small ... .' [7]

'In 1992, [8] ... the Commission introduced what is known as a de minimis rule: this sets a threshold figure below which Article 92(1) can be said not to apply, so that a measure need no longer be notified in advance to the Commission under Article 93(3)(1)'. [9]

11. The Commission also justifies the exclusion of aid below a certain threshold from the scope of Article 92(1) on more pragmatic grounds. [10]

12. The notice modified the conditions for the operation of the de minimis rule. [11]

13. Under the notice, Article 92(1) of the Treaty does not apply to aid up to a ceiling of EUR 100 000 over a three-year period beginning when the first de minimis aid is granted. [12] This ceiling applies to aid of all kinds, irrespective of the form it takes or the objective pursued, with the exception of export aid, which is excluded from the benefit of the de minimis rule. [13]

14. This de minimis aid, which does not have to be notified to the Commission, can

6 — This is one of four conditions for the operation of the prohibition laid down by Article 92(1) of the Treaty.

7 — First paragraph.

8 — Community guidelines on State aid for small and medium-sized enterprises, point 3.2 (OJ 1992 C 213, p. 2).

9 — Second paragraph.

10 — To make the most effective use of the scarce human and material resources available to the Commission and also to rationalise the work of national authorities (first sentence of the second paragraph of the notice).

11 — First, it had become clear to the Commission that the rule did not cover some aid measures which quite clearly did not threaten to distort competition and trade between Member States to any perceptible degree and, secondly, it had proved difficult to establish that the conditions laid down were being met, particularly where aid of this kind was combined with aid under other schemes approved by the Commission (second sentence of the second paragraph of the notice).

12 — *Ibidem*, first indent.

13 — *Ibidem*, third indent.

be additional to other aid granted under schemes approved by the Commission. [14]

15. The notice also states that the Commission has a duty to satisfy itself that Member States are not giving their enterprises aid which is incompatible with the common market and it reserves the right to take appropriate action in relation to aid which complies with the de minimis rule but infringes other provisions of the Treaty. [15]

16. The notice states that Member States are under an obligation to facilitate the achievement of the Commission's task of ensuring that aid is compatible with the common market. They are required, specifically, to establish machinery to ensure that, where aid is given to the same recipient under separate measures all of which are covered by the de minimis rule, the total amount of the aid does not exceed EUR 100 000 over a period of three years. Moreover, any decision granting aid or the rules of any scheme providing for aid of this kind must include an explicit stipulation that any additional aid granted to the same recipient must not raise the total de minimis aid received by the enterprise to a level above the ceiling of EUR 100 000 over a period of three years. The machinery established must also enable the Member State to answer any questions the Commission might wish to ask. [16]

14 — *Ibidem*, second indent.

15 — *Ibidem*, final paragraph.

16 — Idem.

II — Facts and procedure

17. Effective as of 1 July 1997, the rates of excise duty on petrol, diesel and liquefied gas in the Kingdom of the Netherlands were increased by NLG 0.11, 0.05 and 0.08 respectively per litre. However, mindful that this increase, which was prompted by environmental considerations, would have adverse consequences for Netherlands service stations located in border regions, in particular those along the German border, the Netherlands legislature decided that temporary measures were called for. The purpose of such measures would be to reduce the differential, in the border area, between the rates of excise duty resulting from the increase and German rates of excise duty on light oils. [17]

18. On 21 July 1997, the Kingdom of the Netherlands enacted the Tijdelijke Regeling Subsidie Tankstations Grensstreek Duitsland. [18]

19. The temporary scheme, which entered into force with retrospective effect as of 1 July 1997, provides for a subsidy of NLG 0.10 per litre of petrol to be paid to

17 — Article VI of the Wet van 20 December 1996 tot wijziging van enkele belastingwetten c.a. ('Law of 20 December 1996 to amend certain tax laws').

18 — 'Temporary aid scheme for service stations near the German border' (*Nederlandse Staatscourant* 1997, p. 138, hereinafter 'the temporary scheme').

operators located within 10 km of the Netherlands-German border and a subsidy of NLG 0.05 per litre to be paid to operators located between 10 km and 20 km of the border. [19] It also takes account of the fact that in the event of an increase in German excise duty the differential in excise rates justifying the subsidy scheme would narrow. In that event, the subsidies would then be reduced by 10/11 and 5/11 respectively of the equivalent in Netherlands currency of the increase in German excise duty. If as a result of such a reduction the level of the subsidies paid to operators located within 10 km of the border fell to below NLG 0.025 per litre, the temporary scheme would cease to operate altogether.

20. In order to comply with the criteria laid down in the notice, the temporary scheme sets an aid ceiling equal to EUR 100 000 over a period of three years (from 1 July 1997 to 30 June 2000 inclusive). The aid provided for under the scheme is aid *per applicant*. This term is defined as meaning any natural or legal person on whose behalf and at whose risk one or more service stations are operated, and the heirs and assignees of such persons. [20]

21. The idea was then mooted to amend the temporary scheme in order to fix the subsidy per service station rather than per applicant. The intention behind this proposal was to eliminate the imbalance that had been created between service stations in terms of the subsidy payable. Some applicants, who owned several service stations, were receiving only EUR 100 000 in total, whereas others, who owned only one, were receiving the same amount.

22. The Netherlands Government was unsure whether this proposal was compatible with the notice on account of the cumulation of subsidies payable to undertakings owning several service stations.

23. To make sure that the proposed amendment of the temporary scheme was in accordance with the notice, the Netherlands authorities informed the Commission of the proposal by letter of 14 August 1997 and specified:

'should the Commission take the view that the proposed scheme must nevertheless be notified under Article 93(3) of the EC Treaty, the Netherlands Government requests that this letter be treated as such notification'. [21]

19 — The temporary scheme originally provided for subsidies of NLG 0.08 and 0.04 respectively.

20 — See paragraph 18 of the application lodged by the Kingdom of the Netherlands.

21 — *Ibidem*, paragraph 17.

24. In accordance with Article 93(3) of the Treaty, the Commission conducted a preliminary examination of the temporary scheme and the proposed amendment thereof in order to satisfy itself that that scheme was not likely to favour aid cumulation of the kind prohibited under the terms of the notice. The Commission was concerned that the scheme might enable the big oil companies to benefit indirectly from aid granted to their tied distributors. It based these concerns on the inclusion of 'price management clauses' in exclusive purchasing agreements entered into between the oil companies and their distributors. The Commission defines such clauses as follows:

'The purpose of a PMS [price management system] clause is to protect the dealer's turnover against competing petrol outlets in the immediate vicinity of his service station. The clause usually stipulates that the oil company may bear part of the cost of the forecourt discount granted by the dealer in so far as domestic and/or international market conditions make a temporary or long-term adjustment of these discounts desirable or necessary. Consultations between the parties are often necessary before such reductions are introduced. The actual aid provided by the supplier is determined by means of a distribution table or participation arrangements. Its amount is normally indicated on the invoice.' [22]

22 — Paragraph 84 of the decision.

25. The Commission notes that the purpose of the aid provided by the Netherlands State to service stations located near the German border is to protect the turnover of the dealers concerned against competing petrol outlets in the immediate vicinity of their service stations. It considers that the operation of the temporary scheme makes the obligation imposed by the price management clauses redundant. For in the absence of circumstances to trigger that obligation, it would be very easy for the oil companies to avoid the burden of their undertaking. In other words, since the forecourt discounts granted by dealers to protect their market share would have been paid for by the aid received from the Netherlands State, the oil companies would have no cause to take action under a price management clause. Moreover, the Commission considers it possible that the notified scheme would have an effect on competition and trade between Member States (that is, that it would have a disruptive effect on the petrol sector in other Member States, in particular the Kingdom of Belgium and the Federal Republic of Germany).

26. In order to determine whether the aid could also have a cumulative effect, the Commission requested the Netherlands authorities for various information concerning:

— the ownership structure of the 633 service stations eligible for the aid;

— a list of the distribution agreements between the service stations and their suppliers and a figure for the total number of service stations in the Netherlands;

— the overall market share of the 633 service stations located in the vicinity of the Netherlands-German border.

27. Not satisfied with the replies given by the Netherlands authorities, in June 1998 the Commission decided to initiate the procedure provided for under Article 93(2) of the Treaty.[23] Upon the completion of that procedure, it adopted the decision declaring part of the disputed aid incompatible with the common market and part of it covered by the notice.

III — The decision, the application and the forms of order sought

A — *The contested decision*

28. According to the Commission, there were two grounds warranting the initiation of the Article 93(2) investigative procedure.

29. First, the Commission was concerned that the temporary scheme and the proposed amendment of that scheme would be unable to prevent situations of aid cumulation that are prohibited under the notice. It described the various situations of potential cumulation that had attracted its attention.

30. Secondly, the Commission considered the status to be accorded to the de minimis rule. In paragraph 22 of the decision, it reasoned as follows:

'... in particular circumstances, the de minimis rule may be interpreted as a rebuttable presumption, namely that, even though the amount of aid involved is small and therefore falls below the de minimis threshold, the rule does not apply if the aid has an effect on trade and competition between the Member States.'

31. The Commission decided against basing its assessment of the disputed measures

23 — OJ 1998 C 307, p. 10.

on the second ground. According to its reasoning:

'(68) ... such a rebuttable presumption would undermine the absolute character of the de minimis rule. The idea underpinning the rule is that, in so far as the aid ceiling is complied with, the aid is deemed not to have any appreciable effect on trade and competition and therefore does not fall within the scope of Article 87(1). To derogate from this principle on account of the special circumstances of the case would give rise to legal uncertainty as regards the scope and application of the de minimis rule in general.

(69) Accordingly, the Commission's assessment cannot be based on a possible abuse of the de minimis rule but must be made in the light of the first ground for initiating the procedure, namely the risk of aid cumulation under the de minimis rule, either because one owner possesses several service stations or because the supplier has de facto control over the dealer by virtue of an exclusive purchasing agreement.' [24]

24 — See the decision.

32. In the decision, the Commission classified the service stations concerned into six categories:

— a dealer-owned/dealer-operated ('Do/Do') category, where the dealer owns the service station, operates it at his own risk and is linked to the oil company by an exclusive purchasing agreement; [25]

— a company-owned/dealer-operated ('Co/Do') category, where the dealer rents the service station, operates it at his own risk and is linked to the oil company by an exclusive purchasing agreement; [26]

— a category comprising service stations in respect of which the Commission received no information or only partial information; [27]

— a company-owned/company-operated ('Co/Co') category, where the service station is operated by employees who

25 — The Commission assigned 108 service stations to this category.

26 — There are 75 such service stations.

27 — According to the Commission, there were 250 such service stations.

do not work at their own risk and are not free to choose their suppliers. The Commission subdivides this category into two subcategories: a 'pure' Co/Co subcategory, where the service station is owned by the oil company and operated by it,[28] and a '*de facto*' Co/Co subcategory, where the same dealer has applied for aid more than once and therefore appears several times in the list of eligible recipients;[29]

— a category comprising Do/Do service stations operating a price management system, under which the oil company pays for a part of any reduction by the dealer in forecourt prices;[30]

— and, finally, a category consisting of Co/Do service stations with a price management system.[31]

33. In the case of the first two categories, the Commission decided that there was no risk of cumulation and that the de minimis rule was applicable.[32]

34. In the case of the third category, the Commission decided that the possibility of prohibited aid cumulation could not be discounted: the aid granted to the service stations concerned was incompatible with the common market and with the functioning of the EEA Agreement, in so far as it exceeded EUR 100 000 per recipient over a three-year period.[33]

35. In the case of the fourth category, also, the Commission took the view that it was possible that companies owning and operating several service stations would receive aid which, when cumulation is taken into account, would exceed EUR 100 000 per recipient over a three-year period.[34]

36. In the case of the final two categories, the Commission took the view that there was a probable risk of cumulation of aid by the oil companies concerned: the supplier would reap the benefit of all or part of the aid accorded to the dealers since the latter would be unable to invoke the price management clause or able to do so only to a lesser degree.[35]

37. The Commission decided that the measures implemented by the Netherlands

28 — See paragraph 82 of the decision. According to the Commission, there are 28 service stations meeting this description.

29 — See paragraph 82 of the decision. The Commission identified 21 such service stations.

30 — There are 71 service stations in this category.

31 — The Commission counts 80 service stations in this final category.

32 — Article 1 of the decision. Thus 183 service stations escape sanction.

33 — Article 2 of the decision, first paragraph, subparagraph (a). A total of 250 service stations are concerned.

34 — Article 2 of the decision, first paragraph, subparagraph (b). The sanction applies in respect of 49 service stations.

35 — Article 2 of the decision, first paragraph, subparagraph (c). A total of 151 service stations are concerned.

Government and not covered by the de minimis rule constituted aid within the meaning of Article 92(1) of the Treaty [36] and that these aid measures did not come within the derogations provided for under Article 92(2) and (3). [37] Accordingly, it declared the aid incompatible with the common market [38] and ordered its recovery. [39]

B — *The application and the forms of order sought*

38. The application of the Netherlands Government was lodged at the Court Registry on 9 October 1999.

39. The Netherlands Government claims that the Court should:

'(1) annul Articles 2 and 3 of the Commission Decision of 20 July 1999, notified on 5 August 1999, on the State aid implemented by the Netherlands for 633 Netherlands service stations located near the German border (notified under document number C(1999) final);

(2) order the Commission to pay the costs.'

40. The Commission claims that the Court should:

'(1) dismiss the action for annulment;

(2) order the applicant to pay the costs.'

IV — Discussion

A — *The general pleas put forward by the Netherlands Government*

41. The Netherlands Government puts forward general pleas alleging infringement of the absolute nature of the de minimis rule laid down in the notice and the consequences flowing from that infringement. According to the Netherlands Government, that infringement had the consequence of setting at naught the general principles of legal certainty, equal treatment and protection of legitimate expectations.

36 — Paragraphs 88 to 93 of the decision.
37 — *Ibidem*, paragraphs 94 to 102.
38 — Article 2 of the decision.
39 — *Ibidem*, Article 3.

The plea alleging infringement of the absolute nature of the de minimis rule.

Arguments of the parties

42. The Netherlands Government contends that the Commission is bound by the notice on de minimis aid. This was borne out not only by the case-law of the Court but also by the contested decision itself. In that decision, the Commission had acknowledged that the de minimis rule was absolute — or irrebuttable. [40]

43. The Netherlands Government claims that by refusing to find the temporary scheme and the proposed amendment of that scheme compatible with the notice, the Commission had introduced an exception to the de minimis rule not provided for in the notice. According to the Netherlands Government, in so far as the aid paid to the border service stations does not exceed the threshold of EUR 100 000, the notice must apply. Under the notice, aid that falls within the de minimis rule did not need to be notified and did not fall within the scope of Article 92(1) of the Treaty because it had no effect on trade between Member States. Since the conditions for the application of the de minimis rule had been complied with by the Netherlands Government, the Commission could not, without infringing the irrebuttable (or absolute) nature of that rule, declare the Netherlands measures to be incompatible with the common market.

44. The Commission denies having infringed the irrebuttable nature of the presumption associated with the de minimis rule. It points out that the rule constitutes an exception to the general prohibition of State aid set out in Article 92(1) of the Treaty. Consequently, the exception can apply only where the strict conditions laid down by the notice have been complied with. But, the Commission contends, the condition of non-cumulation of aid was not complied with. The Commission was therefore fully entitled to find that the de minimis rule did not cover the provisions of the temporary scheme liable to cause the prohibited cumulative effects.

Assessment

45. As a preliminary matter, it should be noted that the action brought by the Netherlands Government for the annulment of the Commission's decision is essentially predicated on the binding character of the scope and effect of the de minimis rule as set out in the notice. The issue of the legality of the notice under the Treaty rules would not have been devoid of interest in the light of your recent case-law which appears to censure the purely

40 — Paragraphs 68 and 69 of the decision.

'quantitative' approach adopted by the notice.[41] However, since a point relating to the substantive legality of an act adopted by an institution cannot be raised by the Court of its own motion,[42] this issue will not be considered.

46. The outcome of the Netherlands Government's plea of infringement of the absolute nature of the de minimis rule depends on whether, in the circumstances, the Commission violated the irrebuttable or 'absolute' nature of that rule.

47. The Court has consistently held that the Commission is bound by the official position it adopts on the manner in which it intends to apply Article 92. According to the Court, the objective meaning and the binding effect of 'guidelines', 'disciplines', 'codes of conduct' or 'notices'[43] in the area of State aid flow from the obligation of due and regular cooperation set out in Article 93(1) of the Treaty.[44] This obligation of due cooperation requires the Commission and the Member States to keep under constant review all existing aid schemes. Under the principle of good administration, the Commission is thus given the power to adopt guidelines setting out how it proposes to exercise its discretionary power in monitoring State aid, having first heard the views of the parties concerned. The Member States can devise their aid policies in the light of the Commission's position and thereby preempt potential conflicts.[45]

48. As we have seen, the notice interprets one of the conditions for the application of Article 92(1) of the Treaty. It states that:

'Clearly, any financial assistance given by the State to one firm distorts or threatens to

41 — The Court has held that '... the relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that the aid, in so far as it satisfies the conditions laid down by Article 92(1) of the Treaty, may be incompatible with the common market' (Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 39). However, one cannot pass over in silence the uncertainties in the case-law of both the Court of Justice and the Court of First Instance with respect to the approach taken by the Commission in the notice (see Keppenne, J-P., *Guide des aides d'État en droit communautaire*, Bruylant, Brussels, 1999 (point 168 and the decided cases referred to under that point). Given the divergences in the case-law referred to, the illegality of the de minimis rule in the light of the provisions of Article 92(1) of the Treaty is therefore not manifest.

42 — Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 67. See also Case C-210/98 P *Salzgitter* v *Commission* [2000] ECR I-5843, in particular paragraphs 56 and 57. In that case, Advocate General Jacobs suggested that the Court should not be precluded from raising of its own motion a manifest and grave substantive illegality, for example the infringement of certain rules of the Treaty such as Article 92 (points 137 to 143 of the Opinion). However, even if Advocate General Jacobs's suggestion were to be adopted by the Court at some future time, it is my view, as I have said (see footnote 41), that the illegality of the notice is not manifest. Accordingly, the possibility of the Court raising such an illegality of its own motion is to be rejected.

43 — The difference in terminology used by the Commission is immaterial for the purposes of the point being considered.

44 — See, in particular, Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraph 35, and Case C-311/94 *IJssel-Vliet* [1996] ECR I-5023, paragraph 42.

45 — See the Opinion of Advocate General Lenz in *IJssel-Vliet*.

distort, to a greater or lesser extent, competition between that firm and its competitors which have received no such aid; but not all aid has an appreciable effect on trade and competition between Member States. This is particularly true where the amount of aid involved is small ...'. [46]

'In 1992, ... the Commission introduced what is known as a de minimis rule: this sets a threshold figure below which Article 92(1) can be said not to apply, so that a measure need no longer be notified in advance to the Commission under Article 93(3)(1)'. [47]

49. The notice sets forth the principle that any small amount of aid does not have an appreciable effect on trade between Member States. It then defines a small amount of aid as aid which does not exceed a threshold of EUR 100 000.

50. The Commission thus establishes a clear and unconditional rule according to which it undertakes not to take any action where that threshold is complied with by the authorities granting the aid. According to the case-law cited earlier, [48] the Commission is bound by the rule it has thus laid down.

51. The Commission does not deny that the de minimis rule is absolute in nature. [49]

52. The Commission therefore no longer bases its decision on the ground that the de minimis rule operates as a rebuttable presumption, [50] but on the ground that the conditions for the application of the de minimis rule were infringed.

53. According to the Commission, the Netherlands Government is unable to rely on the de minimis rule in this instance, because its temporary scheme and the proposed amendment of that scheme infringed the condition of non-cumulation of aid granted to a single recipient.

54. The Commission observes that the de minimis rule constitutes an exception to the general Treaty rule on State aid. As such, it must be interpreted strictly and the conditions it lays down must be scrupulously complied with.

55. I subscribe fully to that analysis. It is clear that the de minimis rule sets up an exceptional arrangement under which Member States are authorised to grant aid

46 — First paragraph.
47 — *Ibidem*, second paragraph.
48 — See footnote 44.
49 — See point 31 of this Opinion.
50 — See point 30 of this Opinion.

without being required to notify it in advance to the Commission. That aid is presumed not to have any effect on trade between Member States *on condition* that it does not exceed the sum of EUR 100 000. But it is the settled case-law of the Court that all exceptions must be interpreted strictly. [51] Consequently, the conditions laid down by the notice must be scrupulously complied with.

56. The first requirement imposed on Member States is that the aid they grant must under no circumstances exceed EUR 100 000 over a three-year period beginning when the first de minimis aid is granted. [52]

57. The second requirement imposed on Member States is to facilitate the Commission in discharging its monitoring function. [53]

58. Lastly, the notice provides that application of the de minimis rule is conditional on compliance with the non-cumulation requirement. [54] The notice also imposes a duty on the Commission to monitor compliance with this requirement.

59. And it is in fact this non-cumulation requirement which the Commission alleges that the Netherlands Government has not complied with. [55] Therefore the Commission cannot be accused of having set new conditions for the application of the de minimis rule. Accordingly, the plea alleging infringement of the absolute nature of that rule must be rejected.

The plea alleging infringement of the principles of legal certainty, protection of legitimate expectations and equal treatment

60. The Netherlands Government claims that the Commission infringed the absolute nature of the de minimis rule by introducing an additional condition for its application. By so doing, it had violated fundamental principles of Community law, namely the principles of legal certainty, protection of legitimate expectations and equal treatment.

61. Given that I have taken the view that the plea alleging infringement of the abso-

51 — See, in particular, Case C-328/91 *Thomas and Others* [1993] ECR I-1247, paragraph 8 and Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 49. For a case in the specific area of State aid, see *Germany* v *Commission*, *supra*, in which the Court held that a derogation 'from the general principle, laid down in Article 92(1) of the Treaty, that State aid is incompatible with the common market, ... must be construed narrowly' (paragraph 49).

52 — See notice, first paragraph, second indent.

53 — *Ibidem*, final paragraph.

54 — Idem. See point 16 of this Opinion.

55 — See point 69 of the decision.

lute nature of the de minimis rule is unfounded, I propose that you reject the plea alleging infringement of the principles of legal certainty, protection of legitimate expectations and equal treatment as expressed in general terms by the Netherlands Government.

B — *The specific pleas put forward by the Netherlands Government*

62. More specifically, in six pleas at law, the Netherlands Government complains that the Commission:

— considered that the payment of de minimis aid by service station where a single applicant operated several service stations fell within the scope of Article 92(1) of the Treaty and not under the de minimis rule;

— drew a distinction between the 'pure' and 'de facto' categories of Co/Co service stations;

— inferred the existence of indirect aid to the oil companies to which service stations were tied by exclusive purchasing agreements containing a price management clause;

— considered that the payment of aid to service stations in respect of which it had been found that the Netherlands authorities had provided no information or only partial information fell within the scope of Article 92(1) of the Treaty and not under the de minimis rule;

— ignored, in its assessment of the compatibility of the disputed measures, the environmental protection objective pursued by the Netherlands Government;

— ordered recovery of the aid.

63. The Netherlands Government notes that, where it relies on the infringement of the de minimis rule in these six specific pleas, it does so in each instance in conjunction with the infringement of the principles of legal certainty, equal treatment and the protection of legitimate expectations.

The first plea in law

Arguments of the parties

64. By this first plea, the Netherlands Government complains that the Commission deemed that the proposed amendment of the temporary scheme was not covered by the de minimis rule because of the risk of cumulation of aid to the same recipient.

65. According to the Netherlands Government, the proposed amendment of the temporary scheme does not infringe the condition of non-cumulation of de minimis aid since, if the aid is paid per service station, the same service station cannot receive the de minimis aid more than once. The Netherlands Government maintains, moreover, that the effect on trade between Member States and on competition, for the purposes of Article 92(1) of the Treaty, does not depend on the legal structure of the undertakings concerned. In other words, from a strictly economic standpoint, it makes no difference whether the 633 subsidised service stations are invariably to be regarded as separate undertakings or whether, in certain cases, they form part of a larger economic entity.

66. The Netherlands Government therefore argues that the Commission was wrong to decide that the issue of compliance with the requirement of non-cumulation of aid was to be determined having regard to the actual recipient of the de minimis aid. By so deciding, it had acted contrary to the rules established by the notice and the principles of legal certainty, equal treatment and protection of legitimate expectations.

67. In any event, according to the Netherlands Government, the decision was in breach of the obligation to state reasons laid down by Article 190 of the Treaty in so far as it fails to provide any reasons, or at least any clear reasons, why the de minimis rule cannot be applied per service station where the service station is part of a larger economic entity.

68. The Commission submits that the Netherlands Government's position misconstrues the requirement of non-cumulation set out in the notice.

69. The Commission points out that the irrebuttable presumption that de minimis aid is compatible with Article 92(1) of the Treaty operates only if Member States comply with the strict requirements laid down by the notice. If these requirements are found to have been infringed, the

irrebuttable presumption does not apply and the effect of the aid measure concerned on trade and competition must be assessed in full.

70. According to the Commission, the de minimis rule is concerned ultimately with determining who the actual aid recipient is. The proposed amendment of the temporary scheme would not preclude situations of de minimis aid cumulation contrary to the notice. The same owner would be eligible to receive aid more than once in respect of the various service stations operated by him at his own risk.

71. The Commission therefore submits that it was correct in finding that the proposed amendment of the notified temporary scheme, which provided for aid to be granted in respect of the individual service station, could not come within the de minimis exception. It had thus complied with the principles of legal certainty, equal treatment and protection of legitimate expectations.

72. The Commission also denies any breach of the obligation to state reasons. It contends that the decision did in fact set out the grounds for its doubts as to whether the de minimis threshold was complied with.

Assessment

Infringement of the obligation to state reasons

73. As regards the obligation to state reasons, imposed by Article 190 of the Treaty, the Court has laid down the following principles. [56]

74. The statement of reasons must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community court to exercise its power of review. The requirement to state reasons must be evaluated according to the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 190 of the Treaty must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question.

56 — Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, paragraph 19, Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraphs 15 and 16, *Commission* v *Sytraval and Brink's France*, *supra*, paragraph 63, and Case C-265/97 P *VBA* v *Florimex and Others* [2000] ECR I-2061, paragraph 93.

75. The Netherlands Government complains that the Commission did not comply with the formal requirements to state reasons. According to the Netherlands Government, the decision did not enable it to ascertain the reasons why the Commission found the proposed amendment of the temporary scheme to be incompatible with the de minimis rule.

76. It can be seen from the disputed decision that the Commission did set out in a general way the factors it proposed to take into consideration in order to determine whether the conditions for the operation of the de minimis rule were satisfied by the temporary scheme and by the proposed amendment of that scheme.

77. Thus, at the end of paragraph 74 of the decision, the Commission states the following:

'However, the de minimis rule is concerned ultimately with determining who the actual aid recipient is and whether the de minimis threshold has been complied with for each recipient ...'.

78. In paragraph 82 of the decision, the Commission then states that it has identified cases of cumulation of de minimis aid contrary to the notice in circumstances where the same dealer applied for aid more than once and therefore appears several times in the list of eligible recipients.

79. The Commission thus explains clearly and unequivocally that whenever it identifies cases of aid cumulation, that is to say when a single applicant is in a position to receive de minimis aid more than once, it will deem that the notice does not apply.

80. Even if the Commission did not formally set out the reasons why the proposed amendment of the temporary scheme did not satisfy the de minimis conditions, paragraphs 74 and 82 of the decision enabled the Netherlands Government to ascertain the reasons of fact and of law on the basis of which the Commission found that the proposed amendment did not comply with the notice.

81. The whole point of the proposed amendment of the scheme is to enable owners of several service stations to receive aid in respect of each service station owned. They are then in a position to receive de minimis aid more than once, contrary to the non-cumulation condition. That situation necessarily comes within the point made in general terms by the Commission in paragraph 74 of the decision.

82. Accordingly, I take the view that the decision complies with the requirements of Article 190 of the Treaty since it contains material enabling the Netherlands Government to understand the reasons of fact and of law on which the Commission based its decision to the effect that the proposed amendment of the temporary scheme is not within the scope of the notice.

83. It follows from the foregoing that the first plea in law relied upon by the Netherlands Government is not well founded.

The error of assessment of the non-cumulation condition

84. The proposed amendment of the temporary scheme, it may be recalled, seeks to eliminate an imbalance that had emerged between service stations as regards the amount of subsidies paid out. It makes it the rule that aid is payable in respect of the individual service station. In other words, it makes it possible for the owners of several service stations to receive as many subsidies as the number of service stations they own. There is therefore a genuine risk of the de minimis threshold being exceeded by individual applicants, contrary to the notice.

85. In those circumstances, it must be concluded that the Commission did not exceed its discretion in finding that, because it entails an infringement of the non-cumulation requirement, the proposed amendment of the temporary scheme does not satisfy the conditions necessary for it to come within the scope of the notice.

86. It follows from the foregoing that the plea alleging infringement of the de minimis rule must be rejected.

Infringement of the principles of legal certainty, equal treatment and protection of legitimate expectations

87. Given that I have proposed that the plea alleging infringement of the condition of non-cumulation is not well founded, I cannot but propose that you reject the plea based on the infringement of the principles of legal certainty, equal treatment and protection of legitimate expectations relied upon by the Netherlands Government. [57]

The second plea in law

Arguments of the parties

88. By the second plea in law, the Netherlands Government contends that by making

57 — See point 66 of this Opinion.

a distinction between the categories of 'pure' [58] and 'de facto' [59] Co/Co service stations, the Commission is in breach of Article 92(1), the de minimis rule, the principles of legal certainty, equal treatment and protection of legitimate expectations, the requirement flowing from Article 189 of the Treaty for the terms of a decision to be specified with sufficient particularity and the obligation to state reasons imposed by Article 190 of the Treaty.

89. As its principal argument, the Netherlands Government submits, as it did in relation to the first plea in law, that the fact that several service stations receiving aid on an individual basis constitute a single undertaking or are the property of a single person ought to have no effect on the application of the de minimis rule. In both of those cases, an individual service station would never receive more than one aid payment. Instances of cumulation as prohibited by the notice would therefore not arise.

90. In the alternative, the Netherlands Government contends that, in paragraph 82(a) of the decision, the Commission identified 28 applicants as meeting the definition of 'pure Co/Co' service stations. However, it failed to specify the factual and legal basis for this finding. In particular, the Netherlands Government argues that in listing the service stations comprised in this category, the Commission also failed to identify the oil companies which it claimed each owned several service stations and received de minimis aid more than once.

91. The failure to comply with the obligation to state reasons made it impossible for the Netherlands Government to implement the decision in full. It was unable to ascertain the amounts it would have to recover and from whom they would have to be recovered.

92. The Netherlands Government expresses the same complaints in relation to the 21 applicants identified as meeting the definition of 'de facto Co/Co' service stations. By failing to specify which of these applicants were identical and the factual and legal grounds on which it based its finding, the Commission was in breach of the obligations laid down in Articles 189 and 190 of the Treaty.

93. The Commission repeats its observations in relation to the first plea in law. It points out that when the same owner owns several service stations and receives de minimis aid in respect of each, the thresh-

58 — It may be recalled that the 'pure' Co/Co category comprises service stations owned and operated by the same oil company (see point 32 of this Opinion).

59 — The 'de facto' Co/Co category comprises dealers each operating several service stations, who apply for aid more than once and therefore appear several times in the list of eligible recipients. These dealers are not the owners of the service stations they operate. Their aid applications do not mention the name of the oil company that is the owner of the service stations they operate (see point 32 of this Opinion).

old of EUR 100 000 is exceeded. The situation was therefore no longer within the scope of the notice but within that of Article 92(1) of the Treaty.

94. It also points out that because of the absence of a response by the Netherlands Government to repeated requests and an order made by it in relation to the ownership structures of the service stations in particular, it could base its decision only on the information it had in its possession. It had clearly stated that the information supplied, despite being insufficient in some respects and entirely lacking in others (paragraphs 76 to 81 of the decision), had enabled it to carry out the classification set out in paragraph 82 of the decision.

95. The Commission considers that it complied with the obligation to state reasons having regard to the circumstances of the case.

Assessment

96. I have already explained the reasons why I consider that the notice does not apply to situations where the same applicant can obtain de minimis aid several times. [60] I will not repeat these.

97. As to the Netherlands Government's argument that insufficient reasons are given for the decision, [61] two comments are called for.

98. *First*, the Commission has stated, without contradiction by the Netherlands Government, that it did not receive the full information it required in order to identify precisely which service stations belonged to each of the three categories Do/Do, Co/Do and Co/Co. In paragraph 64 of the decision, the Commission explains that the Netherlands authorities simply forwarded the completed questionnaires returned by the service stations without any substantiation of the information set out on those forms. It points out, in particular, that the service stations classified themselves as falling into one of the three categories without providing any supporting evidence. The Commission notes, again without this being denied by the Netherlands authorities, that the Netherlands Government drew up its list on the basis of the replies received from the applicants without further substantiation. It states that it, on the other hand, drew up its classification on the basis of the agreements between the oil companies and their distributors, which were supplied to it by the Netherlands Government, and on the basis of its own statistical data.

99. It must also be observed that, in reply to the Commission's claim that it had stated the reasons for the decision in the

60 — See points 84 and 85 of this Opinion.

61 — *Ibidem*, points 90 to 92.

light of the inadequate information that it had been given, the Netherlands Government explained its failure by a general consideration. According to the Netherlands Government, the obligation of Member States to supply information is necessarily less extensive in relation to the de minimis aid provided for under the notice than under the provisions of Articles 92 and 93 of the Treaty. It argues that the notice was adopted with a view to administrative simplification both for Member States and for the Commission. It would therefore be contrary to this objective of administrative simplification to increase the information burden on Member States. Since the temporary scheme and the proposed amendment of that scheme are based specifically on the notice, the Netherlands Government considers that, in relation to the operation of the de minimis rule, the extent of its information obligation is less than under the ordinary rules governing State aid. Consequently, it contends that it was entitled to assume, with complete confidence, that the aid granted to the applicants did not need to be notified.

100. Like the Commission, I take the view that that duty to cooperate applies with even greater intensity where the de minimis rule is concerned. It must be remembered that the de minimis rule represents an exception to the normal State aid regime. The operation of that rule exempts aid granted by a Member State from the notification requirement and hence from the Commission's power of review under Article 93(1) and (3) of the Treaty. It also authorises Member States to pay out such aid without notifying the Commission in advance. But, as we have seen, it is the settled case-law of the Court that all exceptions to a general rule must be strictly construed. Were I to adopt the analysis of the Netherlands Government, I would have to conclude that the principle of strict interpretation of exceptions to a rule must be set aside in the case of just such an exception. The principle of strict construction of exceptions to a rule would therefore not be observed if the analysis of the Netherlands Government were adopted.

101. The notice requires the Commission to see to it that the strict conditions for the operation of the de minimis rule are complied with. To allow a Member State that had invoked the de minimis rule not to comply fully and scrupulously with its information obligation would make the Commission's task of review difficult if not impossible to carry out.

102. As a consequence, I take the view that, under Article 5 of the EC Treaty (now Article 10 EC), Member States are bound by a duty of cooperation in relation to the implementation of the notice. [62] That duty of cooperation requires Member States to provide the Commission with all the infor-

62 — By analogy, see Case T-67/94 *Ladbroke Racing* v *Commission* [1998] ECR II-1, paragraph 189, and the judgments cited in that paragraph.

mation necessary for it to carry out its task and, specifically, to enable it to assess the compatibility of the aid in question. [63] A Member State which fails to fulfil its duty of cooperation during the administrative procedure cannot subsequently complain that the Commission has made an error of assessment or has given insufficient reasons for its decision. [64]

103. In so far as the Netherlands Government has not fulfilled its duty of cooperation during the administrative procedure, it cannot subsequently complain that the Commission has made an error of assessment or has given insufficient reasons for its decision.

104. *Secondly*, it appears that the Netherlands Government does not deny that the border service stations which applied for the de minimis aid include service stations in the Co/Co category, belonging to both the 'pure' Co/Co and 'de facto' Co/Co subcategories.

105. Its complaints relate solely to the vagueness of the decision which meant it was unable to ascertain the exact identity of the service stations belonging to these two subcategories and the amount of aid that would have to be recovered from them.

106. It should be recalled that the legality of Commission decisions cannot be called into question on the basis of arguments relating to the manner in which the decision is to be implemented such as the claim that implementation is impossible because of difficulties in identifying the addressees of the order of recovery.

107. The Court has consistently held that, in such circumstances, a Member State 'which encounters unforeseen difficulties in implementing an order for recovery, [could] have submitted those problems for consideration by the Commission. In such a case the Commission and the Member State concerned must, in accordance with the duty of genuine cooperation stated in particular in Article 5 of the Treaty, work together in good faith with a view to overcoming the difficulties whilst fully observing the Treaty provisions, in particular the provisions on aid'. [65]

108. Consequently, if the Netherlands Government was having difficulties with

63 — By analogy, see Case C-364/90 *Italy* v *Commission* [1993] ECR I-2098, paragraph 20.

64 — *Ibidem*, paragraph 22. See also the Opinion of Advocate General Tesauro in '*Tubemeuse*' (Case C-142/97 *Belgium* v *Commission* [1990] ECR I-959): 'the extent of the reasoning required of the Commission can only be proportional to the information received from the Member States' (point 13, last paragraph).

65 — See, in particular, Case C-303/88 *Italy* v *Commission* [1991] ECR I-1433, paragraph 58.

the implementation of the decision, it was incumbent upon it to inform the Commission, which was bound to help it to overcome those difficulties in accordance with the duty of cooperation set out in Article 5 of the Treaty.

109. It follows from the foregoing that the second plea raised by the Netherlands Government is not well founded and must be rejected accordingly.

The third plea in law

110. By its third plea in law, the Netherlands Government claims that by inferring the existence of indirect aid to the oil companies with which service stations had exclusive purchasing agreements containing a price management clause, the Commission had infringed Article 92(1) of the Treaty, the de minimis rule, the principles of legal certainty, equal treatment and protection of legitimate expectations, and the obligation to state reasons imposed by Article 190 of the Treaty.

111. According to the Netherlands Government, indirect aid is not covered by Article 92(1) of the Treaty unless its recipient can be identified directly or immediately from the scope or purpose of the national measure concerned.

112. It argues that the Commission is attaching to a private contractual arrangement between an oil company and its client a significance which it possesses neither in law nor in fact.

113. It makes the point that in the majority of cases these clauses are variable in terms of content and do not impose an unconditional obligation on the oil companies to contribute to reductions in forecourt prices. In most instances, the right to instigate such reductions and implement the clauses lies with the oil companies, who would agree to operate them only if their market share was under threat. However, the price differentials with Germany would have had no impact on the respective competitive positions of the oil companies in the Netherlands market, since all would have been affected to the same degree.

114. In any event, the Netherlands Government maintains that it could not foresee that the oil companies would benefit indirectly by virtue of the price management clauses, which are confidential, from the aid granted under the temporary scheme. An indirect and contingent advantage of this kind accruing to oil companies could not be regarded as State aid. The advantage arises only as a result of contractual arrangements to which the national authorities are not in any way a party and which they do not even know exist. They

could not be expected always to check, in the course of every action they undertake, for such indirect and to them invisible effects, still less to preclude the possibility of such effects arising in all circumstances.

Assessment

115. Article 92(1) of the Treaty provides 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 the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.

116. In particular, measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect are considered to constitute aid. [66]

117. Furthermore, the Court has consistently held that the Commission must observe the Treaty rules and ascertain the actual effects of measures, the aim and form of the aid being irrelevant in this regard. [67]

118. The identification of the recipients of State aid is crucially important. On this depends, in the event the aid has to be recovered, from whom recovery is to be made. It also provides the basis for assessing whether the aid affects competition or trade and whether it is compatible with the common market.

119. The Court has stated that the recipients of aid are those who actually benefit from it. [68]

120. The Commission claims that the oil companies are the indirect recipients of the de minimis aid provided by the Netherlands Government to service stations located near the German border. It argues that this aid from the Netherlands State allowed the oil companies to avoid operating the price management clauses in their agreements with their distributors. According to the decision,

66 — See, in particular, *Germany* v *Commission*, *supra*, paragraph 25, and the other cases referred to in that paragraph.

67 — See, in particular, Case 310/85 *Deufil* v *Commission* [1987] ECR 901, paragraph 8, Case C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraphs 19 and 20, and *Ladbroke Racing* v *Commission*, *supra*, paragraph 79.

68 — See *Italy* v *Commission*, *supra*, paragraph 57.

'(84) The purpose of a PMS clause is to protect the dealer's turnover against competing petrol outlets in the immediate vicinity of his service station. The clause usually stipulates that the oil company may bear part of the cost of the forecourt discount granted by the dealer in so far as domestic and/or international market conditions make a temporary or long-term adjustment of these discounts desirable or necessary. Consultations between the parties are often necessary before such reductions are introduced. The actual aid provided by the supplier is determined by means of a distribution table or participation arrangements. Its amount is normally indicated on the invoice.'

121. According to the Commission, the aid provided by the Netherlands State to service stations located near the German border is aimed at protecting the turnover of those operating them against competing petrol outlets in the immediate vicinity of their service stations. It considers that the application of the temporary scheme makes the obligation contained in the price management clauses redundant. For in the absence of circumstances to trigger that obligation, the oil companies would avoid the burden of their undertaking. In other words, since the forecourt discounts granted by dealers to protect their market share would have been paid for by the aid received from the Netherlands State, the oil companies would have no cause to take action under a price management clause if so requested by their dealers. [69]

122. This argument is convincing. I take the view that the indirect benefit accruing to the oil companies flows directly from the aid provided by the Netherlands State. [70]

123. A comparison between the provisions of the temporary scheme and the price management clauses shows that they are identical — they operate in the same circumstances, are of the same nature and produce the same effects. The operation of the temporary scheme renders the operation of the contractual obligation de facto redundant. If both arrangements were applied concurrently they would duplicate each other.

124. With regard to the circumstances in which the temporary scheme operates, the purpose of the aid paid by the Netherlands Government is to prevent service stations located near the German border losing business as a result of the higher petrol prices brought about by the increase in excise duty in the Netherlands. The differential between the rates of excise duty

69 — See points 24 and 25 of this Opinion.

70 — Contrary to what is required by the Court (see, in particular, *Germany* v *Commission*, *supra*, paragraph 26).

resulting from that increase and the rates of excise duty in force in Germany prompted a fear that those service stations' customers would take their business to competing service stations located across the border on account of the more competitive prices in Germany.

125. The obligation arising under price management clauses pursues exactly the same purpose and applies in the same circumstances. These clauses are designed to protect dealers' turnover against competing petrol outlets in the immediate vicinity of their service stations when domestic or international market conditions make a temporary or long-term adjustment of these discounts desirable or necessary. [71]

126. Furthermore, aid provided under the temporary scheme produces the same effects as payments made pursuant to a price management clause.

127. Under the terms of the temporary scheme, a subsidy is paid to Netherlands petrol distributors in accordance with a scale based on proximity to their German competitors. The scheme provides that in the event of an increase in German excise rates, in other words if international market conditions no longer justify the payment of aid, the level of subsidy will be reduced accordingly.

128. The arrangement under the price management clauses is identical. Those clauses stipulate that 'the oil company may bear part of the cost of the forecourt discount granted by the dealer in so far as domestic and/or international market conditions make a temporary or long-term adjustment of these discounts desirable or necessary'. [72] It is further stipulated that 'the actual aid provided by the supplier is determined by means of a distribution table or participation arrangements'. [73] The distribution table or participation arrangements thus resemble a pre-established scale that applies when the conditions for the operation of the clause are met.

129. It goes without saying that aid provided or not provided by the Netherlands State to service stations with price management clauses has significant economic consequences for the oil companies. The payment of aid in such cases relieves the oil company of its obligation to share the cost of the forecourt discount given by its dealer. The position is shown clearly by taking an *a contrario* approach. If the Netherlands State were to provide no aid to service stations having agreed such

71 — See paragraph 84 of the decision.

72 — Idem.

73 — Idem.

clauses with the oil companies, the latter would be obliged by the domestic and international market situation to act upon their obligations under the price management clause. Otherwise, in the absence of State aid, their distributors would not have the ability to offer reductions in forecourt prices with a view to retaining their customers. The fear of seeing customers taking their business to competitors in the immediate vicinity offering more attractive prices would then be entirely genuine and serious. Such competitors might include, in particular, the operators of service stations in Germany, where rates of excise duty are lower than in the Netherlands, or Netherlands service stations benefiting from the provisions of the temporary scheme. In those circumstances, it seems to me highly likely that the oil companies would exercise the price management clause at the request of their distributors so as to avoid losing market share. Where de minimis aid measures are implemented in the case of service stations bound by exclusive purchasing agreements containing price management clauses, I therefore take the view that the oil companies are the real, albeit indirect, recipients of the aid. Hence the possibility of aid cumulation exists.

130. On the basis of the foregoing, it is my opinion that there is a causal link between the aid granted through State resources and the enrichment of the oil companies.

131. In those circumstances, the Commission did not exceed the limits of its discretion by inferring the existence of indirect aid to the oil companies with which the service stations have exclusive purchasing agreements containing price management clauses on the sole basis of the existence of those clauses.

132. It follows from the foregoing that the third plea raised by the Netherlands Government is not well founded. It must be rejected accordingly.

The fourth plea in law

133. By its fourth plea in law, the Netherlands Government claims that, by treating the payment of aid to service stations in respect of which the Netherlands authorities had provided no information or only partial information as falling within the scope of Article 92(1) of the Treaty rather than within that of the notice, the Commission was in breach of Article 92(1) of the Treaty, the de minimis rule, the principles of legal certainty, equal treatment and protection of legitimate expectations, the obligation flowing from Article 189 of the Treaty for the terms of a decision to be specified with sufficient particularity and the obligation to state reasons imposed by Article 190 of the Treaty.

134. In general, the Netherlands Government contends, as its principal argument, that the absence of the information required by the Commission does not justify the latter's fear of cumulation of aid in respect of the service stations concerned. The Netherlands Government points out, as it did in relation to the first plea in law, that in either of the possible scenarios — those of an applicant owning either one service station or several — the service station receiving the aid could not in any circumstances receive that aid more than once. As the non-cumulation condition had been met, the Commission ought to have found that Article 92(1) of the Treaty was not applicable.

135. According to the Netherlands Government, the Commission made an error of assessment by considering that the information supplied to it must be deemed insufficient merely because it did not include copies of the exclusive purchasing agreements. A review of those agreements was of no relevance for the purposes of assessing a subsidy paid to the operators of service stations in the light of the criteria of the notice. The same point applied, having regard to the foregoing observations, to the Commission's claim that it needed the exclusive purchasing agreements for the purpose of determining whether there was indirect aid to the oil companies.

136. According to the Netherlands Government, the Commission's claim that no information was supplied is incorrect in relation to service stations 297, 372 and 433.

137. The Commission maintains that it received no information in relation to service stations 297, 372 and 433. It claims, moreover, that if the decision contains inaccuracies these are attributable to the inaccuracy or insufficiency of the information supplied by the Netherlands Government.

138. According to the Commission, it is not for Member States to decide whether or not requested information is material as this is a matter within the Commission's discretion. In any event, the Commission submits, the terms of the exclusive purchasing agreements were relevant for the purpose of determining whether their operation could give rise to cumulation.

Assessment

139. As we have seen, the Court has consistently held that the legality of a decision concerning State aid is to be assessed in the light of the information available to the Commission when the

decision was adopted. [74] A Member State cannot rely on information it failed to provide to the Commission during the administrative procedure in order to challenge the legality of a decision concerning State aid. [75] This is clearly the case where the State concerned has refused to reply to a specific request for information on the part of the Commission. [76]

140. The decision notes that the Commission was provided with no information at all on 59 service stations and with insufficient information on 191 service stations. [77]

141. The Commission spells out what it means by 'insufficient information'. In paragraph 64 it says:

'... the information is insufficient in cases where a service station merely completed the Senter questionnaire without providing copies of its exclusive purchasing agreement, with the result that its reply was not substantiated. For instance, some service stations classified themselves as falling into one of the three categories (Do/Do, Co/Do or Co/Co) without providing any supporting evidence, while others claimed to be independent but failed to substantiate this'.

142. The text of this paragraph shows that the Commission did set out the reasons why the information provided was insufficient. Contrary to the claims of the Netherlands Government, the Commission does not use this term — insufficient information — only for those replies that do not include a copy of the exclusive agreements but for all replies which are not substantiated or supported by evidence. An instance of this is where service stations themselves decide, without offering any substantiation, on their classification in one or other of the categories identified by the Commission. [78]

143. It transpires that the Netherlands Government does not deny not having replied to the Commission's requests other than in respect of three service stations. Its criticisms relate essentially to the relevance of the Commission's requests.

144. In the case of the three service stations for which the Commission claims to have

74 — Case 234/84 *Belgium* v *Commission* [1986] ECR 2263, paragraph 16, and *France* v *Commission*, *supra*, paragraph 33.

75 — Joined Cases C-278/92, C-279/92 and C-280/92 *Spain* v *Commission* [1994] ECR I-4103, paragraph 31.

76 — *France* v *Commission*, *supra*, paragraphs 36 and 37.

77 — Paragraph 64, subparagraphs (a) and (b), of the decision.

78 — The Commission appears to accept that evidence other than the exclusive purchasing agreements, such as a copy of a company's articles of association, would have constituted substantiation.

received no information, the error of assessment alleged against the Commission has not been proved.

145. Furthermore, the information sought by the Commission is relevant. That information is necessary in order to establish whether dealers/distributors belong to the Do/Do, Co/Do or Co/Co categories. [79] That classification is not academic since it forms the basis for determining the actual recipient of the aid and checking that there are no cases of aid cumulation contrary to the notice. It is important, for example, that the Commission satisfy itself that applicants for de minimis aid operate the service stations for which aid has been applied at their own risk and are not employees of an oil company. Likewise, the non-cumulation condition makes it necessary to check that the exclusive purchasing agreements do not contain price management clauses.

146. Finally, as we have seen, the notice requires the Commission to verify compliance with the conditions imposed for its application, in particular the condition that there can be no cumulation of aid. As a consequence, the Commission would be failing in its duty under the notice if it were to accept replies unsubstantiated by supporting evidence.

79 — See point 32 of this Opinion.

147. Given those circumstances, the fact is that the Netherlands Government has not adduced evidence capable of sustaining the claim that the Commission exceeded the limits of its discretion by declaring incompatible with the de minimis rule aid to service stations in respect of which the Netherlands authorities did not provide any information or provided only partial information.

148. It follows from the foregoing that the Commission did not make a manifest error of assessment by declaring that aid granted to service stations in respect of it received no information or only insufficient information does not fall within the scope of the de minimis rule. The fourth plea raised by the Netherlands Government is therefore not well founded and must be rejected.

The fifth plea in law

149. The Netherlands Government claims that, by ignoring the environmental protection objective in its assessment of the compatibility of the disputed measures, the Commission infringed Article 92(3) of the Treaty and the obligation to state reasons.

Assessment

150. It is settled case-law that the Commission cannot be impugned for not have taken into consideration material not available to it at the time it carried out its task. In this case, the Netherlands Government claims that the disputed measures were motivated by environmental concerns and that the decision fails to take account of that fact.

151. It must be observed that the Netherlands Government has adduced absolutely no proof or prima facie evidence in support of the claim that the national legislation concerned was prompted by environmental considerations. On the contrary, during the administrative procedure, the Netherlands Government submitted that the temporary scheme was based on economic grounds. [80]

152. In any case, unsubstantiated statements would not be sufficient to sustain such claims. The Netherlands Government does not specify the ecological considerations on which the scheme was based. [81]

153. Since the Netherlands Government failed to provide that information to the Commission and thereby failed in its duty of cooperation during the administrative phase, it cannot subsequently complain that the Commission made an error of assessment or gave insufficient reasons for its decision. [82]

154. In those circumstances, I propose that the Court find that the Netherlands Government has not adduced evidence sufficient to sustain the claim that the Commission exceeded the limits of its discretion by failing to consider the environmental objective which the competent Netherlands authorities claimed to have been pursuing.

155. It follows from the foregoing that the Commission did not make an error of assessment. The fifth plea raised by the Netherlands Government is therefore not well founded and must be rejected.

The sixth plea in law

156. By the sixth plea, the Netherlands Government claims that the obligation to require repayment of the aid is incom-

80 — See paragraphs 9 and 10 of the decision.

81 — Thus we do not know whether these ecological considerations relate to the 'polluter pays' principle, the 'precautionary' principle or the 'prevention' principle. Or whether the specific objective was to avoid waste of non-renewable natural resources ...

82 — See footnotes 63 and 64 above.

patible with Article 92(1) of the Treaty, the de minimis rule, the principles of legal certainty and equal treatment, the obligation flowing from Article 189 of the Treaty for the terms of a decision to be specified with sufficient particularity and the obligation to state reasons imposed by Article 190.

157. According to the Netherlands Government, the decision does not enable it to identify with certainty either the amounts to be recovered or the parties from whom recovery is to be made.

158. The Netherlands Government further contends that the Commission had been informed since 18 August 1997 — the date on which the letter of conditional notification was lodged — of the existence of the temporary scheme and of the payment under that scheme of de minimis aid to service stations eligible under the relevant national provisions. It therefore maintains that, by failing to express unequivocally its opposition to the implementation of the temporary scheme, the Commission infringed the principle of cooperation in good faith by which it is bound under Article 5 of the Treaty.

Assessment

159. As we have seen, it is settled case-law that the legality of a decision concerning State aid is to be assessed in the light of the information available to the Commission when the decision was adopted. A Member State cannot rely on evidence it failed to provide to the Commission during the administrative procedure in order to challenge the legality of a decision concerning State aid. This is clearly the case where the State concerned has refused to reply to a specific request for information on the part of the Commission.

160. Furthermore, it is settled case-law that the legality of decisions of the Commission cannot be called into question on the basis of arguments relating to the manner of implementation of the decision such as a claim that it cannot be implemented because of difficulties with identifying the addressees of the order of recovery.

161. It is also settled case-law that when State aid is declared incompatible with the Treaty the recovery of that aid must be ordered. [83]

162. The claims concerning the vagueness of the decision and the resulting inability of the Netherlands authorities to identify with certainty the amounts to be recovered and

83 — See, for example, *Ladbroke Racing* v *Commission*, *supra*, paragraphs 187 and 189.

the parties from whom recovery is to be made have therefore no bearing on the legality of the decision.

163. As we have seen, [84] under the principle of cooperation in good faith set out in Article 5 of the Treaty, the Netherlands Government and the Commission are under a duty to cooperate in good faith. If the Netherlands Government is having difficulties with the implementation of the decision, it is incumbent upon it to inform the Commission which is bound to help it to overcome those difficulties under Article 5 of the Treaty.

164. The file shows that on 22 September 1997, that is one month after the conditional notification, the Commission requested the competent authorities for additional information in order to enable it to assess whether the temporary scheme and the proposed amendment of that scheme were in accordance with the requirements of the notice. [85] Following several reminders by the Commission and requests for extensions of time on the part of the Netherlands Government, the Commission decided, given the absence of satisfactory replies, to initiate the Article 93(2) procedure. [86]

165. Since the Netherlands Government was responsible for the delay in initiating the investigative procedure, it cannot now complain that the Commission failed to act more promptly.

166. The fact is that the Commission's decision to initiate the investigative procedure was prompted by its doubts as to the compatibility of the temporary scheme with the Treaty and with the de minimis rule. [87] The Commission cannot be impugned for not having adopted a firm position before the completion of the investigative procedure. On the contrary, by proceeding as it did, the Commission complied with the administrative procedure in relation to State aid and acted in a prudent and proper manner.

167. It should also be pointed out that the Commission expressed its doubts as to the compatibility of the temporary scheme with the Treaty and with the notice in a clear and unequivocal manner as soon as it was in possession of sufficient information to enable it to form a view. The argument in relation to the infringement of the principles of legal certainty and the protection of legitimate expectations is therefore not well founded.

168. I am accordingly of the opinion that the Netherlands Government has not

84 — See point 102 of this Opinion.

85 — Paragraph 1 of the decision.

86 — *Ibidem*, paragraph 2.

87 — *Ibidem*, paragraphs 20 to 23.

adduced grounds for believing that the Commission exceeded its discretion by deciding that the Netherlands Government must require repayment of the aid on account of its incompatibility with Article 92(1) and the de minimis rule.

169. It follows from the foregoing that the Commission did not make a manifest error of assessment. The sixth plea raised by the Netherlands Government is not well founded and must therefore be rejected.

V — Costs

170. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for. Since the Commission has applied for costs and the Kingdom of the Netherlands has been unsuccessful, the latter must be ordered to pay the costs.

Conclusion

171. In the light of all of the foregoing, I propose that the Court should:

(1) dismiss the action brought by the Kingdom of the Netherlands;

(2) order the applicant to pay the costs.