

## COMMISSION DECISION

of 26 September 2006

concerning the State aid granted by the Netherlands to Holland Malt BV

(notified under document number C(2006) 4196)

(Only the Dutch text is authentic)

(2007/59/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

## II. DESCRIPTION OF THE AID MEASURE

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

Having called on interested parties to submit their comments <sup>(1)</sup> pursuant to the provision(s) cited above and having regard to their comments,

Whereas:

## I. PROCEDURE

- (1) The measure was notified in accordance with Article 88 (3) of the EC Treaty by letter of 31 March 2004, registered on 6 April 2004.
- (2) By letters of 1 June 2004, 12 August 2004 and 16 February 2005, the Commission asked the Netherlands for further information. By letters dated 5 July 2004, 17 December 2004 and 15 March 2005, registered as received on 7 July 2004, 3 January 2005 and 23 March 2005 respectively, the Netherlands replied to the Commission's requests.
- (3) By letter dated 5 May 2005, the Commission informed the Netherlands of its decision to initiate the procedure laid down in Article 88(2) of the Treaty concerning this aid measure.
- (4) The Commission decision to initiate the procedure was published in the Official Journal of the European Communities <sup>(2)</sup>. The Commission requested the interested parties to submit their comments on the aid measure in question.
- (5) By letter dated 10 June 2005 the Netherlands submitted a series of comments.
- (6) The Commission received comments from interested parties. It forwarded them to the Netherlands, which was given the opportunity to react; the Netherlands' comments were received by the Commission by letter dated 14 October 2005.

- (7) The Netherlands has decided to grant a subsidy to Holland Malt BV under a regional investment scheme 'Regionale investeringsprojecten 2000' (hereinafter called the IPR scheme). The regional investment scheme was approved by the Commission in 2000 <sup>(3)</sup>; on 18 February 2002 an amendment to the scheme was also approved <sup>(4)</sup>, whereby the IPR scheme was applied to the sectors processing and selling agricultural products listed in Annex I to the Treaty.
- (8) The present case concerns a subsidy for an investment project of Holland Malt BV. Holland Malt BV, hereinafter referred to as 'Holland Malt', is a joint venture between the brewery Bavaria NV and Agrifirm, a cooperative association of cereal producers in North Netherlands and Germany. The subsidy is for building a malting plant in Eemshaven, in the municipality of Eemsmund. As a result of the investment, the various stages (storage and processing of malting barley and the production of and trade in malt) will be integrated in one chain.
- (9) The Netherlands Ministry of Economic Affairs has decided to subsidize 13,5 % gross (10 % net) of the eligible investments of EUR 55 million, with a maximum of EUR 7 425 000. Because it concerns a subsidy for an investment project by an undertaking in the sector processing and marketing agricultural products mentioned in Annex I of the Treaty, and the eligible costs of the project are over EUR 25 million, the aid must be specifically notified to the Commission under point 4.2.6 of the Community guidelines for state aid in the agriculture sector <sup>(5)</sup> (hereinafter referred to as 'the guidelines').
- (10) The decision by Holland Malt to invest was taken after the Dutch government had committed itself to granting a subsidy by letter dated 23 December 2003. The commitment was entered into subject to approval of the aid by the European Commission. The building activities of Holland Malt in Eemshaven started in February 2004. The plant became operational in April 2005.
- (11) In initiating the procedure under Article 88(2) of the Treaty, the Commission had regard to the following:

<sup>(3)</sup> Regionale investeringsprojecten 2000 (IPR 2000-2006), N 549/99. Approved on 17 August 2000 by letter SG (2000) D/106266.

<sup>(4)</sup> Wijziging Regionale investeringsprojecten 2000, N831/2001. Approved on 18 February 2002 by letter C(2002)233.

<sup>(5)</sup> OJ C 28, 1.2.00, p. 2.

<sup>(1)</sup> OJ C 154, 25.6.2005, p. 6.

<sup>(2)</sup> See footnote 1.

- (12) Having established that the measure at this stage would appear to be state aid within the meaning of Article 87(1) of the Treaty, the Commission investigated whether there were any derogations which meant that the measure could be considered compatible with the common market.
- (13) In view of the measure's characteristics, the only possible derogation is that in Article 87(3)(c) of the Treaty, under which aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest, may be considered compatible with the common market.
- (14) As the aid was linked to an investment in the processing and marketing of agricultural products, the Commission had to verify whether all requirements of point 4.2 of the guidelines were fulfilled. The Commission doubted the applicability of Article 87(3)(c) of the Treaty, for the following reasons:
- (15) Point 4.2.5 of the guidelines states that no aid may be granted for investments in connection with the processing and marketing of agricultural products unless sufficient evidence can be produced that normal market outlets for the products concerned can be found. On the basis of the information available to the Commission at the time of the opening of the procedure, it could not be excluded that the malt market showed overcapacity.
- (16) Holland Malt argued that it provided 'premium malt' of high quality for the production of 'premium beer' and that the market for this kind of malt and beer was still growing. However, at the time of the opening of the procedure, it was not clear whether 'premium malt' and 'premium beer' were not simply marketing concepts and therefore did not correspond to a specific separate product market for which overcapacity could be excluded.
- Holland Malt
- the Dutch province of Groningen.
- (18) The Finnish Maltsters' Association opposes the Netherlands' intention to grant a subsidy to Holland Malt B.V, saying that state subsidies for malting plant investments will have an anti-competitive impact. It mentions that the overcapacity in the malting industry in the Community is about one million tonnes, which would necessitate a closure of 10 % of the capacity during the coming years. As for Holland Malt's claim that it provides 'premium malt' for the production of 'premium beer', the Finnish Maltsters' Association mentions that existing malting houses in the Community can already serve the market with a wide range of malts including high quality 'premium malt'.
- (19) The Maltsters Association of Great Britain strongly believes that any state aid for malting must be expressly prohibited. It refers to a letter of 2004 from Euromalt, the European association representing the malting industry, to the Commission, in which the association expresses its concern that no new malting capacity should receive state funding due to the existing overcapacity of malt production in both the Community and the world market <sup>(6)</sup>. According to the association, the Member States have a malting capacity of 8,8 million tonnes, with demand at about 5,9 million tonnes. This leaves a potential Community export surplus of 2,9 million tonnes to serve a global market in which 4,3 million tonnes are traded annually. Community malt export licences were issued in the 2003/2004 marketing year for a total of 2,48 million tonnes. In the marketing year ending June 2005, this fell to 2,22 million tonnes, reflecting the difficult market situation and limited market opportunities for Community maltsters. The Maltsters' Association of Great Britain estimates that the surplus of malt in the Community is 500 000 tonnes, which is expected to grow to nearly one million tonnes due to a combination of new capacity still to come on stream and reduced export demand from Russia and Eastern Europe as those areas have become virtually self-sufficient. According to the Maltsters' Association of Great Britain, the effect of this overcapacity has been that, in the current market for malt, prices have fallen to a level where variable costs are no longer covered. The Maltsters Association of Great Britain furthermore contests the notion that the new Dutch capacity has been built to produce premium malt for premium markets. There has been significant consolidation in the brewing industry and the majority of maltsters' customers want only high-quality malt that meets their exacting (and often global) specifications and satisfies all food safety requirements. To divide the malt market into premium and non-premium sectors defies reality, according to the Maltsters Association of Great Britain.

### III. COMMENTS FROM INTERESTED PARTIES

- (17) The Commission received comments from
- the Finnish Maltsters' Association
- the Maltsters's Association of Great Britain
- the German Maltsters' association
- the French Maltsters' Association
- the Danish Maltsters' Association
- an interested party which on grounds of potential damage requested that its identity be withheld
- the Dutch Agriculture and Horticulture Organisation (LTO Nederland)
- Agrifirm
- (20) The German Maltsters' Association is very concerned about the intention of the Netherlands to grant an investment subsidy for the establishment of a production plant for malt

<sup>(6)</sup> Letter dated 23 July 2004 on the granting of subsidies for the construction of malt houses.

in the province of Groningen. According to the German Maltsters' Association, exports from the Community to traditional sales areas such as the Mercosur countries and Russia/Ukraine will decline markedly due to the development of an own malting industry and protection against imports. In addition, overseas competitors such as Canada and Australia are doing extremely well because of their proximity to the still growing beer markets of the Far East and South-East Asia and because of their governments' liberal trade policies. Simultaneously, malt sales in the internal market are stagnating, leading to an EU over-capacity in the Community of around one million tonnes. The German Maltsters' association considers that the promotion of local malting barley production is not a proper argument. It points out that the entire Dutch production of malting barley is already bought by the malting industry and that the new production plant in Groningen will depend on barley imports.

(21) The French Maltsters' Association is against any state aid for new malting factories in the Community. It refers to the same letter from Euromalt as the Maltsters' Association of Great Britain and mentions the same production, import and export figures for malt. It also states that malt is currently being traded at prices at which variable costs are not covered. According to the French Maltsters' Association, justifying the state aid for the Dutch investment by referring to a separate market for high-quality malt is not correct, since the majority of brewers ask for such high quality malt. Finally the French Maltsters' Association is of the opinion that the Community malting industry would actually have to close obsolete malting plants to improve market conditions.

(22) The Danish Maltsters' Association objects to the planned subsidy for Holland Malt. According to the Association, the malting industry worldwide is based on free market conditions. It is characterised by private ownership, its development being driven by private investments made by companies in the malting sector. A subsidy of EUR 7,4 million out of a total investment of EUR 55 million would distort competition and give an unjustified comparative advantage for the company receiving such a subsidy, especially in the first years after commissioning. The Danish Maltsters' Association furthermore objects to the argument whereby 'premium malt' is distinguished from 'normal malt'. Malt is a generic product, with slight variations, but subject to quality standards imposed by the brewing industry. Lastly, the Danish Maltsters' Association does not see any local or regional reasons to subsidise the investment in the Eemsmond region, which is, in its view, a normal developed region in the Netherlands with an infrastructure that is closely associated with the barley and malt supply chain.

(23) The interested party which on grounds of potential damage requested that its identity be withheld objects to the subsidy for the following reasons. It considers a distinction between

premium and normal malt artificial, does not see any local or regional reasons to subsidise the investment and considers that the subsidy would distort competition on the malt market, which is characterised by private ownership and private investments.

(24) The Dutch Agriculture and Horticulture Organisation (LTO Nederland) is of the opinion that the Holland Malt malting plant in Eemshaven is of great importance for arable farming in that region. The location of the factory at a port and the production process aimed at the high-quality segment of the malt and beer market offer considerable socio-economic prospects for arable farming in the north-east Netherlands. It will stimulate the cultivation of cereals that can be used in this production process. The barley of the arable farmers forms part of a fully registered and certified integrated chain, leading to an end product of high-quality beer. The two most important crops being grown in this region are starch potatoes and sugar beet. However, efficiency improvements and reform of Community policy have meant that the area under these crops has become smaller. Barley for the malting factory would offer one of the few lucrative alternatives to growing these crops. For these reasons, arable farmers have promised a financial stake in Holland Malt.

(25) Agrifirm fully supports the granting of a subsidy to Holland Malt. It is cooperating with the brewery Bavaria in the Holland Malt joint venture, which provides an integrated chain with regard to the cultivation, storage and processing of malting barley. According to Agrifirm, the Holland Malt production and storage facility provides unique opportunities. The cultivation of malting barley will offer better prospects for farmers in the region. By focusing on the production of malting barley that meets the needs for premium malt, farmers in the region can profit from the growth prospects afforded by the market for premium beer. Building the plant in Eemshaven will, given the logistic advantages, create new industrial activity in North Netherlands. The decision of the Dutch government to grant a subsidy provides a basis for feasible exploitation in the first critical years of the project.

(26) According to Holland Malt, it is possible to argue that there is a separate market for premium beer and premium malt. In the premium malt market, outlets for Holland Malt's HTST ('high temperature, short time') malt can easily be found. HTST malt increases stability of taste, flavour and sparkle and therefore the shelf life of beer. Holland Malt refers to a letter from the University of Weihenstephan, Munich, which confirms that the patented technology leads to a type of malt that can clearly be distinguished from regular malt<sup>(7)</sup>. In addition, a premium beer brewer, in an annex to the letter from Holland Malt, also recognises the unique features of HTST malt. HTST malt will, moreover, be priced in a higher price range than regular malt produced by other malt houses. As a result of its unique physical characteristics, its perceivable quality and its higher price

<sup>(7)</sup> Letter from Dr. Krottenthaler of the University of Weihenstephan, May 2005.

range, it is very likely according to Holland Malt, that there will be no or limited substitutability between HTST malt and regular malt. HTST malt is expected to create a demand and a market of its own. According to Holland Malt, it cannot simply be assumed therefore that its investment will result in a capacity increase of 55 000 tonnes on the market for regular malt.

- (27) Holland Malt also notes that, despite the overcapacity in the global market, the investment in Holland Malt will not necessarily lead to more capacity. Holland Malt, being located at a deep sea port, will find normal outlets in the market for export malt. While the growth prospects of the inland European malting industry may deteriorate on account of falling demand for malt in Western Europe, the export trade in malt offers substantial growth prospects. According to Holland Malt, this is confirmed by three reports from 2005<sup>(8)</sup>. These show that emerging markets in Asia, Latin America, Africa and Eastern Europe place the highest requirements on malt and that the European malt industry has a competitive advantage because of the high quality of its malt. Holland Malt notes that it has no difficulties in finding normal outlets for its malt and refers to the fact that its order books were full for 2005, while for the second year in a row it would sell more malt than it produced. It also notes that its closed capacity at Wageningen and Lieshout was catering for the declining malt market in Western Europe, whereas the new capacity at Eemshaven will be targeted at a growing export market. As a result, the net increase in capacity on the malt market will be smaller than is stated in the Commission's letter of 5 May 2005. Holland Malt contends that the investment in the facility at Eemshaven will affect trade with third countries rather than trade between Member States, as the export of malt is a separate market segment from that in which inland malt suppliers operate. Holland Malt emphasises that the situation on the world malt market did not prevent the Commission from authorising investment aid for a malting plant in Lithuania.

- (28) Holland Malt states that the investment will have a positive impact on the rural development of the North Netherlands region and Germany. It will create an alternative form of crop-growing for a large number of arable farmers (about 1 800). Farmers will grow high quality malting barley for a growing market that, unlike feed barley, will not end up in the Community intervention scheme. In addition, the cultivation of malting barley is less harmful for the environment than that of feed barley. Holland Malt notes that its integrated malt production and barley storage facility makes a definite contribution to food safety.

<sup>(8)</sup> RM International, Malt Market Report, 22 April 2005; Rabobank, The malt industry, a changing industry structure, driven by emerging beer markets, March 2005; H.M. Gauger, Market report, May 2005. H.M. Gauger is a malt broker/consultant who issues a monthly malt market report containing data on the production of, and trade in malt.

- (29) The province of Groningen supports the state aid for the Holland Malt investment. It refers to the positive effect on employment in the region. It also underlines the innovative technology used in the project and the boost it will give to the development of Eemshaven, *inter alia* through the creation of an agri-business park. The province also mentions the stimulus it will provide to farmers facing difficulties in traditional, locally grown crops like starch potatoes. Changing to the cultivation of malting barley will give them better prospects.

#### IV. COMMENTS FROM THE NETHERLANDS

- (30) The Netherlands responded to the opening of the procedure by letter of 10 June 2005. It reacted to the comments from third parties by letter of 14 October 2005, having requested an extension of the period for replying.
- (31) In the first letter, the Netherlands states that although the growth prospects for the inland European malting industry may deteriorate given the decreasing demand for malt in Western Europe, the export trade in malt offers substantial growth prospects. Holland Malt can profit from its location at a deep sea port. In this sense it is fair to talk of a divided malt market. The investment in Holland Malt will not affect the already shrinking market of local, inland malt houses in Western Europe. The Netherlands states that the quantity of malt for which export certificates were issued in the Community in 2004/05 was the same as in 2003/04 and requests the Commission to take account of the most recent data on export certificates. Furthermore, the Netherlands considers that a special market segment exists for the high-quality malt of Holland Malt. Reference is made to the letter from the University of Weihenstephan confirming the distinctive characteristics of HTST malt.
- (32) In its response to the comments from third parties, the Netherlands affirms that in the coming years the world market for malt will grow. Reference is made to a seminar on malting barley on 4-5 October 2005, at which the International Grains Council<sup>(9)</sup> forecast that global malting capacity will have risen by 10 % in 2010. At this seminar, Rabobank announced that global beer consumption was growing by 2 % a year, mainly caused by increasing beer consumption in emerging markets like South America, Africa, Russia, South-East Asia and China. Modern malting facilities located at deep sea ports and able to produce in bulk will be able to profit from this development. The Netherlands refers to a letter from Euromalt of August 2005<sup>(10)</sup>, in which it is stated that small, old and inadequate capacity must be closed. The same letter mentions an overcapacity in the Community malting

<sup>(9)</sup> An intergovernmental organisation in the cereal trading sector.

<sup>(10)</sup> Euromalt: 'The EU malting industry', August 2005

industry of at least 500 000 — 700 000 tonnes. The Netherlands, however, claims that this figure is based on a production of 24 hours a day, 7 days a week, 365 days a year. Periods of standstill are not taken into account, which makes it uncertain whether overcapacity actually exists. The Netherlands furthermore refers to a report<sup>(11)</sup> by the research bureau Frontier Economics on Holland Malt (on the geographic market and innovation aspects). The report's conclusion is as follows: 'there is no indication that the subsidy granted to Holland Malt will lead to a displacement of malt sales by other European producers over and above that which would occur in any event. There is no indication therefore that the provision of the subsidy would exacerbate any overcapacity among European producers of standard malt'. The Netherlands requests the Commission to take account of the existence of a separate market for HTST malt, a type of high-quality malt which counteracts the 'ageing' of beer. In addition, it mentions a further closure of 12 000 tonnes of malting capacity, bringing the total closure of existing capacity to 77 000 tonnes. The extra capacity is merely 0,5 % of the total Community production capacity, which would not distort the Community malt market. Finally, the Netherlands states that the subsidy it plans to give is only meant to compensate the location disadvantage of Eemshaven and to offer a level playing field to Holland Malt (without the subsidy, a comparable investment would have been made in a production plant in the deep sea port of Terneuzen).

## V. ASSESSMENT OF THE AID

### Market organisations

- (33) The measure concerns aid to an undertaking that is active in barley processing. Under Article 23 of Council Regulation (EC) No 1784/2003 of 29 September 2006 on the common organisation of the market in cereals<sup>(12)</sup>, Articles 87, 88 and 89 of the Treaty are to apply to the products covered by the Regulation. The sector concerned by the aid scheme in question is therefore subject to the Community rules on state aid.

### Prohibition of state aid under Article 87(1) of the Treaty

- (34) Under Article 87(1) of the Treaty 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 is, insofar as it affects trade between Member States, incompatible with the common market.

- (35) The measure consists of a direct subsidy for investment. It is selective in the sense that it favours one single undertaking, i.e. Holland Malt.
- (36) According to the case law of the Court of Justice, improvement in the competitive position of an undertaking resulting from a state aid generally points to a distortion of competition compared with other competing undertakings not receiving such assistance<sup>(13)</sup>.
- (37) A measure affects trade between Member States adversely if it hampers imports from other Member States or facilitates exports to other Member States. The deciding factor is whether there is a risk that intra-Community trade will develop differently or is liable to develop differently as a result of the measure in question.
- (38) The product to which the aid in question relates (malt) is subject to significant intra-Community trade. In 2004, some 1,3 million tonnes of malt were traded within the Community. This represented some 15 % of total 2004 Community malt production<sup>(14)</sup>. The sector is thus exposed to competition. Therefore, there is a risk that intra-Community trade will develop differently as a result of the measure.
- (39) The measure in question thus constitutes aid within the meaning of Article 87(1) of the Treaty.

### Article 87(2) of the Treaty: exceptions

- (40) Exceptions to the prohibition in Article 87(1) are established in paragraphs 2 and 3 of that Article.
- (41) The exceptions listed in Article 87(2) are not applicable, given the nature of the aid measure and its objectives. Nor has the Netherlands claimed that Article 87(2) is applicable.

### Article 87(3) of the Treaty: exceptions at the Commission's appreciation

- (42) Article 87(3) specifies other forms of aid, which may be regarded as compatible with the common market. Their compatibility with the Treaty has to be studied from the point of view of the Community, not solely that of a given Member State. To ensure the proper operation of the common market, the exceptions provided for in Article 87(3) must be interpreted in a strict manner.

<sup>(11)</sup> Frontier Economics: 'Holland Malt', October 2005.

<sup>(12)</sup> OJ L 270, 21.10.2003, p. 78. Regulation as amended by Commission Regulation (EC) No 1154/2005 (OJ L 187, 19.7.2005, p. 11).

<sup>(13)</sup> Case C-370/79 *Philip Morris* [1980] ECR 2671, paragraphs 11 and 12.

<sup>(14)</sup> Source: H.M. Gauger Statistical Digest 2004-2005.

- (43) As regards Article 87(3)(a), it is pointed out that the beneficiary of the aid is not located in a region where the economic situation can be described as extremely unfavourable in accordance with the Guidelines on national regional aid<sup>(15)</sup> (having a per capita gross domestic product, measured in purchasing power standards, of less than 75 % of the Community average). Therefore, Article 87 (3) (a) of the Treaty cannot justify an aid for the production, processing or marketing of products in Annex I to the Treaty.
- (44) As regards Article 87(3)(b), it is noted that the measure concerned is not intended to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State.
- (45) Nor is the aid intended or suitable for achieving the objectives referred to in Article 87(3)(d).

#### Article 87(3)(c) of the Treaty

- (46) Aid to facilitate the development of certain economic activities or of certain economic areas may be considered to be compatible with the common market under Article 87 (3)(c) of the Treaty, where such aid does not adversely affect trading conditions to an extent contrary to the common interest.
- (47) Since Holland Malt is not a small or medium-sized enterprise as defined by the Commission<sup>(16)</sup>, Regulation (EC) No 1/2004 of 23 December 2003 on the application of Articles 87 and 88 of the EC Treaty to State aid to small and medium-sized enterprises active in the production, processing and marketing of agricultural products<sup>(17)</sup> does not apply. Whether investment aid for the processing of agricultural products is compatible with Article 87(3)(c) is assessed therefore on the basis of point 4.2 of the guidelines.

#### Eligible expenses and aid rate

- (48) According to point 4.2.3 of the guidelines, eligible expenses may include construction, acquisition or improvement of immovable property, new machinery and equipment, including computer software. The aid rate may not exceed 50 % of eligible investments in Objective 1 regions and 40 % in other regions.
- (49) These conditions are met, as aid would be given for the construction of buildings, the purchase of plots for these buildings and machinery. In addition, the Netherlands has limited the notified aid to a maximum of 13,5 % of the eligible costs.

<sup>(15)</sup> OJ C 74, 10.3.1998, p. 9.

<sup>(16)</sup> Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).

<sup>(17)</sup> OJ L 1, 3.1.2004, p. 1.

#### Economic viability and Community minimum standards

- (50) Point 4.2.3 of the guidelines states that aid for investments may only be granted to firms the economic viability of which can be demonstrated by an assessment of the prospects of the enterprise. The enterprise must comply with minimum Community standards regarding the environment, hygiene and animal welfare.
- (51) These conditions are satisfied. The Netherlands has given sufficient guarantees concerning the economic viability of both Bavaria NV and Agrifirm, which together form Holland Malt. In addition, it has been adequately shown that the malting plant complies with minimum Community standards regarding the environment, hygiene and animal welfare as laid down in the Dutch rural development programme.

#### Market outlets

- (52) Point 4.2.5 of the guidelines provides that no aid may be granted for investments in products for which normal market outlets cannot be found. This must be assessed at the appropriate level in relation to the products concerned, the types of investments, and existing and expected capacities. To this end, any restrictions on production or limitations of Community support under the common market organisation must be taken into account.
- (53) The procedure provided for under Article 88(2) of the Treaty was initiated, since, on the basis of the information available to the Commission at the time, could not be ruled out that the malt market showed overcapacity.
- (54) The Netherlands' and Holland Malt's comments on the opening of the procedure essentially concern three points. First, the issue of overcapacity on the malt market is challenged (the Netherlands and Holland Malt do not dispute, however, that the project creates additional capacity on the malt market). Second, it is stated that the investment in the Eemshaven plant will affect trade with third countries more than trade between Member States, since the export of malt constitutes a market segment separate from that in which inland malt suppliers operate. Third, different markets are assumed to exist for regular and premium malt.

#### Overcapacity on the malt market

- (55) The Commission has examined the situation concerning the production of and trade in malt at both world and Community levels. As Eurostat statistics on malt are incomplete due to missing or confidential data on the production and exports of several countries, the Commission has used the data of Euromalt, the International Grains Council and H.M. Gauger's report on the barley-malt market report.

- (56) As regards the situation on the world market, the Euromalt data indicate that the current world supply capacity of malting plants substantially exceeds demand and will do so for some years to come. The letter from Euromalt of August 2005 <sup>(18)</sup> contains the following table on world malt capacity.

#### Worldwide Malt Capacity

(1000 tonnes)

	2004	Surplus	2006 (estimate)	Surplus
EU-15	7 500		7 600	
EU-10	1 200		1 150	
Total EU-25	8 700	2 500	8 750	2 700
Russia	850	-550	1 550	100
Ukraine	230	-50	330	120
Belarus	70	-6	70	-10
Central and Eastern Europe	460	-60	470	-60
Total Europe	10 130	1 834	11 170	2 850
NAFTA	3 600		3 900	
South America	1 220		1 370	
Oceania	770		950	
Middle East and Central Asia	200		200	
Africa	380		380	
China	3 000		3 300	
Far East	300		340	
Total	9 470	- 1 300	1 440	-900
World total	19 780	534	21 610	1 950

- (57) As can be seen from the table, in 2004 world malt production capacity exceeded demand by approximately half a million tonnes. Estimates for 2006 point to an increase in this overcapacity to approximately 2 million tonnes.

- (58) Euromalt in its letter mentions that world beer production is forecast to continue growing at an average minimum rate of between 1 % and 2 % a year. This average growth is a result of two-digit growth in some 'new' beer regions (South America, Africa, Russia, South-East Asia and China) and a decline in the 'old' regions (Western Europe and North America). At the same time however, the efficiency of the new brewery investments in the growth regions and the trend towards 'lighter' beers has resulted in a drastic decline in the use of malt per litre of beer. Euromalt therefore concludes that the rising demand for beer is not matched by an increase in worldwide malt demand for

some years to come. In fact, the beer consumption growth pattern, and its predicted continuation, have overencouraged the building of additional malting capacity in the world, the result being that current world capacity on the supply side substantially exceeds demand, and will do so for some years to come. According to Euromalt, continuous investment in maltings is required, but Europe does not need additional new capacity while export markets decline.

- (59) The current situation of overcapacity worldwide seems to be confirmed by declining global trade figures for malt, as presented by the International Grains Council at the Malting Barley Seminar on 4 and 5 October 2005 in Brussels <sup>(19)</sup>. According to the International Grains Council,

<sup>(19)</sup> Presentation by John Tjaardstra on trends in the production and consumption of beer, malting barley and malt.

<sup>(18)</sup> See footnote 10.

global trade in malt declined for two years in a row from 5,621 million tonnes in 2002/2003 to 5,275 million tonnes in 2004/2005 (the latter figure is an estimate). For 2005/2006, the International Grains Council expects a further fall in the quantity of malt traded. This downward trend is also reflected in lower export certificates booked by EU malt exporters in 2004/2005 (2 219 661 tonnes) as compared with 2003/2004 (2 477 849 tonnes), with expectations for 2005/2006 being slightly lower than the figure for 2004/2005 <sup>(20)</sup>. RM International's report on the malt market <sup>(21)</sup> would also seem to indicate global overcapacity: given the higher standard capacity for new malting plants and that world beer production has increased less quickly in recent years, new malt output would be absorbed less quickly by demand.

(60) The Netherlands in its letter of 14 October 2005 states that world demand for malt is expected to rise by 10 % by 2010. Reference is made to the presentation by the International Grains Council at the Malting Barley Seminar in Brussels on 4 and 5 October 2005. It was also stated at this presentation, however, that as regards forecasts for 2010, global malting capacity was expected to rise by 10 %. It would not seem appropriate to use global malting capacity as an indicator of demand, as the Netherlands appears to do.

(61) In the years ahead, the development of the global malt market would seem to be subject to two important developments. First, there is the increase in beer consumption in the 'new' beer regions. It remains to be seen however, to what extent the Community malting industry will be able to take advantage of this growth.

(62) The growth of beer production in China has not led to a substantial increase in malt imports. According to the Rabobank report on the global malt industry <sup>(22)</sup>, the imported volume of malt did not rise, even after the import tariff was significantly reduced in 2002, because China's huge processing industry favours the import of malting-barley.

(63) Rising beer consumption and production in South-East Asia has been made possible to a large extent through higher malt imports from Australia due to the proximity of, and free-trade agreements, with that country.

(64) Community maltings located at deep sea ports, such as Holland Malt, would seem to be in a good position to satisfy the growing demand for malt in South America and Africa. As regards South America, however, the new malting capacity currently being built in Argentina could partially absorb the rising demand for malt. In addition, Mercosur's expansion, with Venezuela and possibly other South American countries joining will probably lead to a higher intra-South American trade in malt.

<sup>(20)</sup> Report No 5 of H.M. Gauger, 2.6.2006. In this report an expected total export figure for 2005/2006 is assumed of 2 140 million tonnes.

<sup>(21)</sup> See footnote 8.

<sup>(22)</sup> See footnote 8.

(65) Developments in Russia are a second important factor for the global malt market. Russia has a total malting capacity of 1 million tonnes, with a further 450 000 tonnes under construction. As the availability of good malting barley catches up with this capacity expansion, Russia will become self sufficient and probably a malt exporter.

(66) In view of the above, the Commission has no evidence that the current overcapacity in the global malt market will disappear in the next few years. As far as worldwide trade in malt until 2010 is concerned, the International Grains Council seems to predict a relatively stable volume with the 'decline in Russia being offset by South American growth', as mentioned in the presentation at the Malting Barley Seminar in October 2005.

(67) As regards malt production capacity and trade in the Community, it should be noted that Holland Malt's plant at Eemshaven became operational in April 2005. Euromalt in its letter of August 2005 mentions that, despite closures of several malting factories due to low profitability, the Community still has a surplus capacity in malt of at least 500 000-700 000 tonnes (capacity in the Community being 8 800 000 tonnes, consumption 5 900 000 tonnes and exports 2 250 000 tonnes).

(68) According to Euromalt, the profitability of the Community malting industry in 2005/2006 will be at its lowest, with many companies making a loss and covering only part of their costs. Probably as a result of this low profitability, the largest German malt producer, Weissheimer in Andernach, filed for bankruptcy in spring 2006. In addition, other malt production plants have shut permanently, including four in the United Kingdom, two in Germany and one in France. These are older units of large companies. Other malt producers have decided to shut part of their capacity temporarily. In other cases, old malt production capacity has been replaced by new. The resultant total malt capacity in the Community in July 2006 is put by H.M. Gauger at 8 800 000 tonnes <sup>(23)</sup>, the estimates of consumption in, and exports from, the Community being comparable with those in Euromalt's letter of August 2005. This would still leave an overcapacity of around 600 000 tonnes.

(69) The Netherlands, in its letter of October 2005, claims that the figure of 500 000 — 700 000 tonnes mentioned by Euromalt as being the overcapacity of the Community malting industry is based on so-called 'nameplate' capacities, i.e. production 24 hours a day, 7 days a week, 365 days a year. Periods when plants are at a standstill owing to maintenance, technical failures and overhaul are not taken into account, which makes it uncertain whether overcapacity actually exists.

<sup>(23)</sup> H.M. Gauger, July 2006 — State of the European Malt Industry.



- (70) The Commission has looked at actual capacity and production figures for the Community malt industry for the last few years. It has taken the following table from H.M. Gauger's statistical digest 2004/2005, which uses national statistics, Euromalt and Eurostat as sources.

**Total malt capacity and production in the Community**

	Capacity (in tonnes)	Production (in tonnes)
2002	8 613 304	8 455 119
2003	8 632 525	8 595 156
2004	8 818 633	8 644 575

- (71) The figures in the table point to a utilisation of at least 98 % of total capacity during the years 2002-2004. The figures in the report by Frontier Economics <sup>(24)</sup> indicate a comparable level of utilisation. In 2005, the utilisation rate was lower, with malt production in the Community at 8,4 million tonnes and capacity at 8,8 million tonnes. For marketing year 2006/2007, total production is expected to be 8,0 million tonnes and capacity 8,8 million tonnes <sup>(25)</sup>. These lower rates of utilisation appear, however, to reflect the reaction of malting plants to low profitability, i.e. their decision to produce less malt and temporarily to shut production capacity. For marketing year 2006/2007, part of the explanation is also provided by the poor harvest of malting barley. The figures for 2002 to 2004 show that it is technically possible to use at least 98 % of the total production capacity. This high percentage for the actual utilisation of total capacity does not seem to be a reason to doubt the existence of overcapacity in the Community malting industry.

- (72) As for the future, as mentioned in the Euromalt letter of August 2005, 'small, old and inefficient capacity must be closed. This will be a slow process because of the very structure of the industry in certain Member States'. The process would appear to have accelerated in 2006. By mid-2006, production of malt in the Community appears to have been brought into equilibrium again with actual demand, as malt producers have learned to limit their production to possible sales volumes <sup>(26)</sup>. However, even after the above-mentioned permanent closure of old malt production facilities, total malt production capacity in the Community still exceeds actual demand by some 600 000 tonnes. In addition, demand in the Community is not expected to increase due to stagnating beer consumption, while Community exports will face a global trade situation which is expected to remain relatively stable for the next few years. The Commission does not have clear evidence, therefore, that the current situation of overcapacity will change soon.

<sup>(24)</sup> See footnote 11.

<sup>(25)</sup> H.M. Gauger Market report No 4, 2 May 2006.

<sup>(26)</sup> H.M. Gauger, July 2006 — State of the European Malt Industry.

### Consequences for trade between Member States

- (73) The Netherlands and Holland Malt take the view that the investment in the Eemshaven plant will affect trade with third countries rather than trade between Member States, since the export of malt is a separate market segment from that in which inland malt suppliers operate.

- (74) The Commission recognises that part of the malting capacity in the Community consists of inland, small family/privately-owned companies that produce mainly for domestic markets. However, part of their production can also be for export, in which case they would face competition from other malt companies in the Community mainly focused on exports (such as Holland Malt).

- (75) In addition, there are large groups in the Community malt industry which sell their malt both inside and outside the Community. Holland Malt falls into this category, being located at a deep sea port from which it can serve both the Community and non-Community markets. Community malt companies primarily focused on exports to other markets could therefore face competition from Holland Malt. The same applies to Community malt companies concentrating on selling in the internal market, since Holland Malt still expects to sell a considerable volume of malt to European countries. In its business plan of August 2003, Holland Malt mentioned that it expected to sell 71 540 tonnes to European destinations in 2005 (compared to expected sales of 28 100 tonnes to Asia, 40 600 tonnes to Latin America and 29 000 tonnes to Russia).

- (76) Situations may well occur in which malt companies concentrating primarily on exports to third countries (such as Holland Malt) may not be able to find buyers for the output intended for those destinations, in which case they might seek to sell it inside the Community. The opposite may also occur. The Commission therefore does not consider the segments inside and outside the Community to be completely separate. Linkages exist, with developments outside the Community having an effect on developments inside, and vice versa.

- (77) Given the above, the Commission does not share the conclusion of the report by Frontier Economics that there is no indication that the subsidy granted to Holland Malt will lead to a displacement of malt sales by other European producers over and above those which would occur in any event. The Commission cannot rule out such displacements in the sale of malt by other Community malt producers to customers within and outside the Community. It concludes, therefore, that the aid may well have an impact on trade and competition between the Member States.

### A market for premium malt

- (78) The Commission has taken note of the information sent by the Netherlands and Holland Malt (including the letters from third parties) on the development of HTST malt <sup>(27)</sup>. The Netherlands, Holland Malt and the interested parties describe HTST malt as having different characteristics from regular malt, which give the beer more taste and flavour, longer-lasting sparkle and an increased shelf life.
- (79) The Netherlands and Holland Malt state that HTST malt can be considered to be a premium malt. They also maintain that as a result of its unique physical characteristics, its perceived quality and its higher price range, it is very likely that there will be no or limited substitutability between HTST malt and regular malt. HTST malt is expected to create a demand and a market of its own.
- (80) The Commission acknowledges that HTST may well have particular characteristics and be of a high quality. It has to be established, however, whether or not a separate market exists for premium malt (which HSTS malt would serve) alongside a market for regular malt. The Court of First Instance has specified that in order to be considered the subject of a sufficiently distinct market,

'it must be possible to distinguish the service or the good in question by virtue of particular characteristics that so differentiate it from other services or other goods that it is only to a small degree interchangeable with those alternatives and affected by competition from them. In that context, the degree of interchangeability between products must be assessed in terms of their objective characteristics, as well as the structure of supply and demand on the market, and competitive conditions.' <sup>(28)</sup>

- (81) As regards the structure of supply and demand on the market and competitive conditions, the Commission has received comments from several parties (mostly national maltsters' associations) indicating that a clear distinction between regular and premium malt cannot be made. According to these, malt is, if anything, a product of a generic nature, with small variations in characteristics and subject to quality standards imposed by the brewing industry. The majority of maltsters' customers seem only to want high-quality malt that meets their specifications and satisfies all food safety requirements.
- (82) The degree of interchangeability between different malts from different malting companies would therefore not seem to be small, since all these companies have to produce malt of high quality to be able to satisfy their customers' demand.

<sup>(27)</sup> Statement by Bühler on Holland Malt's technologies, not dated. Letter from the University of Freising — Weißenstephan, Munich, May 2005

Letter from an interested party which contains business secrets and will therefore be treated as confidential.

<sup>(28)</sup> Case T-229/94 *Deutsche Bahn* [1997] ECR II-1689, paragraph 10.

- (83) This would seem to be confirmed by evidence that premium beer is not necessarily produced with another quality of malt than regular beer. According to the Netherlands, Holland Malt will produce its HTST malt primarily for the 'premium' segment of the beer market. The Netherlands states that for the production of these premium beers, raw materials of a high quality are required with characteristics that improve the flavour of these beers. Holland Malt in its letter mentions the 'Just Drinks.com 2004 report' <sup>(29)</sup>, in which — according to Holland Malt — 'major brewers state that premium beers are an inherently better liquid with a fuller, more distinctive taste'.

- (84) According to the Commission, however, this sentence in the report refers to consumers' perception of premium beer, and not to a statement of major brewers. On page 59 of the report it is stated that 'Scottish & Newcastle on the other hand pointed to consumers' perception of higher quality and the status that is conferred by purchasing a premium brand. The key factors are: perception of higher quality — premium beers are an inherently better liquid with a fuller, more distinctive taste'.

- (85) In fact, the executive summary of the report as submitted by Holland Malt itself starts by saying that 'interviews by just-drinks.com with a number of major international players in the global brewing industry revealed that premium beer is basically a marketing concept'. The report also mentions that a standard beer can become a premium beer in a given region or a particular country within a region and that the major international brewers adopt different marketing strategies for different markets. Brands recognised as premium in some regions are not necessarily recognised as such in others. The report furthermore states that 'the reader must be aware that demand for premium beer looked at in terms of comparisons between years and trends over a number of years, is variable due to changes in consumer perceptions and not in product specification. As Interbrew points out, it is consumers who decide what is premium, not the industry'.

- (86) The fact that product specification is not an important factor in determining which beers are considered premium beers indicates that different malts, provided they meet (minimum) quality standards imposed by the brewing industry, are easily interchangeable. This interchangeability of malt is also referred to in the Hugh Baird/Scottish and Newcastle merger case <sup>(30)</sup>. Concerning the relevant product market, the notifying parties (Hugh Baird and Scottish and Newcastle) state that it is at least as broad as the malt market. The decision mentions that 'although the

<sup>(29)</sup> www.just-drinks.com, 'A global market review of premium beer — with forecasts to 2010'.

<sup>(30)</sup> Case No IV/M.1372, 18.12.1998.

malt market may arguably be subdivided, e.g. into brewing malt and distilling malt, the parties do not believe that this is appropriate because of the high degree of supply-side substitutability'.

- (87) In addition, the Commission has not been able to detect a separate market for premium malt in studying the statistical sources for malt production. On the contrary, all these sources (Eurostat, Euromalt, International Grains Council) only provide data on the general malt market. The Netherlands and Holland Malt themselves have not provided data on existing capacities for, or the production of, premium malt. On the contrary, in the argument about overcapacity, they have referred to figures for malt (as a product), without making a distinction between regular and premium malt.
- (88) The Commission considers, therefore, that a clear dividing line between the two categories (regular and premium malt) cannot be drawn. There may perhaps be differences in quality, but they do not appear to be of such a nature that the interchangeability of types of malt or competition between maltsters is appreciably limited thereby.
- (89) Based on the above findings on overcapacity in the malt market, possible effects on trade between Member States of the aid measure in question and the lack of a clearly distinctive separate market for premium malt, the Commission considers the aid not to comply with point 4.2.5 of the guidelines, which provides that no aid may be granted for investments in products for which normal market outlets cannot be found.

#### Aid to a malting plant in Lithuania

- (90) Holland Malt points out that the situation on the global malt market did not prevent the Commission from authorising investment aid for a malting plant in Lithuania.
- (91) The Commission would like to stress that it has not authorised state aid for an investment in a malting plant in Lithuania after that country's accession to the Community on 1 May 2004. Before that date, no state aid rules applied in Lithuania for agricultural products. In any event, failings by other Member States to meet their obligations under Articles 87 and 88 of the Treaty are irrelevant to whether the Member State against which the procedure in Article 88 (2) of the Treaty has been initiated has granted (unlawful) aid <sup>(31)</sup>.
- (92) The Commission also wishes to state in this respect that it initiated the formal investigation procedure laid down in Article 88(2) of the Treaty after Spain had notified its intention to grant aid to a malt factory named Maltacarión S.A. <sup>(32)</sup>. The procedure was initiated on the same grounds as in the present case, i.e. that it cannot be ruled out that the malt market shows overcapacity. After the procedure

had been initiated, Spain withdrew its notification of the aid in question.

#### Regional aspects

- (93) The Commission acknowledges and does not dispute the important regional development aspects of the aid for Holland Malt, as explained by the Netherlands and various interested parties. In this sense, the project would fit well with the IPR scheme.
- (94) The project must, however, meet all the requirements for investment aid for the processing and selling of agricultural products as laid down by the guidelines. As it does not fulfil at least one important condition, the Commission cannot authorise the state aid for the project, despite its positive regional development aspects.

#### VI. CONCLUSION

- (95) For the above-mentioned reasons, the Commission considers the aid to Holland Malt to be incompatible with Articles 87 and 88 of the Treaty. The aid measure does not comply with point 4.2.5 of the guidelines, which provides that no aid may be granted for investments in products for which normal market outlets cannot be found.
- (96) In its letter dated 17 December 2004, the Netherlands declared that the aid was promised subject to approval by the Commission. If, despite this condition, any aid has actually been disbursed, it will have to be recovered,

HAS ADOPTED THIS DECISION:

##### Article 1

The state aid which the Netherlands has granted to Holland Malt BV in the form of a subsidy of EUR 7 425 000, subject to authorisation by the Commission, is incompatible with the common market.

##### Article 2

The Netherlands shall withdraw the state aid referred to in Article 1.

##### Article 3

1. The Netherlands shall take all necessary measures to recover from the recipient the aid referred to in Article 1 and unlawfully made available to the recipient.

2. Recovery shall be effected without delay and in accordance with the procedures of national law, provided that they allow the immediate and effective execution of this Decision. The aid to be recovered shall include interest from the date on which it was made available to the recipient until its actual recovery. Interest

<sup>(31)</sup> See, for example, Case T-214/95 *Het Vlaamse Gewestties* [1998] ECR II-717, paragraph 54.

<sup>(32)</sup> Case C 48, 21.12.05 (not yet published in the Official Journal).

shall be calculated on the basis of the reference rate used for calculating the net grant equivalent under the regional aid rules.

*Article 4*

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

*Article 5*

This decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 26 September 2006.

*For the Commission*  
Mariann FISCHER BOEL  
*Member of the Commission*

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