JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)
17 June 1999 *

In Case T-82/96,

Associação dos Refinadores de Açúcar Portugueses (ARAP), an association formed under Portuguese law, established in Lisbon,

Alcântara Refinarias — Açúcares SA, a company incorporated under Portuguese law, established in Santa Iria de Azóia, Portugal,

RAR Refinarias de Açúcar Reunidas SA, a company incorporated under Portuguese law, established in Oporto, Portugal,

represented by Gerard van der Wal, Advocaat with a right of audience before the Hoge Raad der Nederlanden, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

applicants,

v

Commission of the European Communities, represented by Nicholas Khan, Anders Christian Jessen and James Flett, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: English.

supported by

Portuguese Republic, represented by Susana Brasil de Brito, Principal Consultant in the Legal Centre attached to the office of the President of the Council of Ministers, and Luís Inez Fernandes, Director of the Legal Service of the Directorate General for Community Affairs, acting as Agents, with an address for service in Luxembourg at the Portuguese Embassy, 33 Allée Scheffer,

and

DAI — Sociedade de Desenvolvimento Agro-industrial SA, a company incorporated under Portuguese law, established in Monte da Barca, Portugal, represented by Luís Sáragga Leal, Dulce Franco and Ricardo Oliveira, of the Lisbon Bar, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

interveners,

APPLICATION for annulment of the Commission decision of 11 January 1996 not to raise objections to State Aid N11/95 in favour of DAI — Sociedade de Desenvolvimento Agro-industrial SA and of the Commission's letter to the applicants of 19 March 1996,

THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES
(Fourth Chamber, Extended Composition),

composed of: R.M. Moura Ramos, President, R. García-Valdecasas, V. Tiili, P. Lindh and P. Mengozzi, Judges,

Registrar: A. Mair, Administrator,

having regard to the written procedure and further to the hearing on 18 November 1998,

gives the following

Judgment

Facts and procedure

Background to the dispute

1 By letter of 11 January 1996 the Commission notified the Portuguese Government of its decision to raise no objection under Article 92 of the EC Treaty (now, after amendment, Article 87 EC) and Article 93 of the EC Treaty (now Article 88 EC) with regard to, *inter alia*, State aid N11/95 granted by Portugal to DAI — Sociedade de Desenvolvimento Agro-industrial SA ('DAI') for the establishment of a beet sugar refining plant at Coruche in the Tagus and Sorraia valley (hereinafter 'the decision of 11 January 1996', or 'the contested decision').

2 The investment project in question initially related to a maximum installed sugar-production capacity of 60 000 tonnes per year, corresponding to the white sugar quota allocated to mainland Portugal by Article 26 and Annex I, Chapter XIV(c), of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties ('the Act of Accession'), which amend Council Regulation (EEC) No 1785/81 of 30 June 1981 on the common organisation of the markets in the sugar sector (OJ 1981 L 177, p. 4). Under the Act of Accession, that quota is intended for undertakings established in mainland Portugal which are 'likely to start up sugarproduction'. It was raised to

70 000 tonnes by Council Regulation (EC) No 1599/96 of 30 July 1996 amending Regulation No 1785/81 (OJ 1996 L 206, p. 43).

3 The procedure for examination by the Commission of the abovementioned aid in favour of DAI was as follows: initially, the Portuguese authorities notified the aid with a view to obtaining financial assistance from the Structural Funds. That application for Community aid, submitted first to the European Regional Development Fund (ERDF), was amended for subsequent submission to the European Agricultural Guidance and Guarantee Fund (EAGGF), Guidance Section, since it had to be examined under the rules relating not to industry but to the agricultural sector.

4 The cane sugar refineries Alcântara Refinarias — Açúcares SA and RAR Refinarias de Açúcar Reunidas SA, which were then the only sugar producers established in mainland Portugal, and the association of which those two refineries were members, Associação dos Refinadores de Açúcar Portugueses (ARAP), lodged complaints against the abovementioned aid intended for DAI.

5 Following those complaints, the Portuguese authorities subsequently also notified that aid under Article 93(3) of the Treaty.

6 By letter of 19 March 1996 the Commission informed the three complainants of its decision of 11 January 1996 not to raise any objection with regard to that aid under Article 92 of the Treaty.

Legislative background

7 The abovementioned aid comes within the legal framework of the Community policy on State aid and assistance from the Structural Funds in the agricultural sector. According to the first paragraph of Article 42 of the EC Treaty (now the first paragraph of Article 36 EC), the provisions of the Treaty relating to State aid are to apply 'to production of and trade in agricultural products only to the extent determined by the Council..., account being taken of the objectives [of the common agricultural policy] set out in Article 39 of the EC Treaty'.

8 In that connection, Article 44 of Regulation No 1785/81 provides: 'Save as otherwise provided in this Regulation, Articles 92 to 94 of the Treaty shall apply to the production of, and trade in, the products listed in Article 1(1)', which include in particular beet sugar and cane sugar, and also sugar beet and sugar cane. Under Article 45 of that regulation, it is to 'be applied so that appropriate account is taken, at the same time, of the objectives set out in Articles 33 and 110 of the Treaty'.

9 Also, with regard to co-financing by the Community of certain investments by recourse to the Structural Funds with a view to strengthening economic and social cohesion in accordance with Article 130a of the EC Treaty (now, after amendment, Article 158 EC), Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 185, p. 9) entrusts the Structural Funds with, in particular, the tasks of promoting the development and structural adjustment of the regions whose development is lagging behind (Objective 1), speeding up the adjustment of agricultural structures (Objective 5(a)) and promoting the development of rural areas (Objective 5(b)). According to the Annex to that regulation, Portugal in its entirety is regarded as a region covered by Objective 1. Council Regulation (EEC) No 4256/88 of 19 December 1988 lays down provisions for implementing Regulation No 2052/88 as regards the European Agricultural Guidance and Guarantee Fund (EAGGF), Guidance Section (OJ 1988 L 374, p. 25), and was

amended by Council Regulation (EEC) No 2085/93 of 20 July 1993 (OJ 1993 L 193, p. 44).

10 Pursuant to Article 10 of Regulation No 4256/88 the Council laid down, by Council Regulation (EEC) No 866/90 of 29 March 1990 on improving the processing and marketing conditions for agricultural products (OJ 1990 L 91, p. 1), last amended by Council Regulation (EC) No 951/97 of 20 May 1997 on improving the processing and marketing conditions for agricultural products (OJ 1997 L 142, p. 22), the conditions and procedures for the contribution by the Guidance Section of the EAGGF to measures for improving the processing and marketing conditions for agricultural products with a view to attaining the objectives laid down by Regulation No 2052/88. Article 1(1) of Regulation No 866/90 introduces a common measure under Objective 5(a) of Regulation No 2052/88, which is also designed to help to achieve Objectives 1 and 5(b) set out in Article 1 of that regulation.

11 Article 2 of Regulation No 866/90 provides for the adoption by the Commission of criteria for choosing investments eligible for Community financing, referred to as 'selection criteria'. Article 8(1) provides that those selection criteria are to be used to determine which investments are to receive assistance from the Fund, laying down priorities and indicating those investments which must be excluded from Community financing. Under Article 8(2), 'The selection criteria shall be drawn up in accordance with the guidelines of the Community's policies, particularly the common agricultural policy'.

12 Pursuant to Article 8(3) of Regulation No 866/90, the Commission adopted Decision 94/173/EC of 22 March 1994 on the selection criteria to be adopted for investments for improving the processing and marketing conditions for agricultural and forestry products and repealing Decision 90/342/EEC of 7 June 1990

(OJ 1994 L 79, p. 29). According to the preamble to that decision 'the selection criteria reflect the guidelines of the common agricultural policy' (seventh recital) and their application should 'take account of the duly justified specific needs of certain local productions' (fifth recital). The Annex to that decision, to which Article 1 refers, excludes 'all investments concerning sugar..., with the exception of those which provide for:

— ...

— utilisation of the quota provided for in the Act of Accession of Portugal (for mainland Portugal, 60 000 tonnes of sugar)'.

13 In addition, under Article 16(5) of Regulation No 866/90, 'Within the field of application of this Regulation, Member States may take aid measures which are subject to conditions or rules concerning granting which differ from those provided for in this Regulation, or, where the amounts of aid exceed the ceilings specified herein, on condition that such measures comply with Articles 92 to 94 of the EC Treaty'. When applying those provisions of the Treaty to State aid measures, the Commission is to apply by analogy *inter alia* the limitations of a sectoral nature relating to the co-financing of such investments by the Community, in accordance with the Guidelines for State aid in connection with investments in the processing and marketing of agricultural products, of 2 February 1996 (OJ 1996 C 29, p. 4). According to those guidelines, all State aid relating to the investments referred to in point 1.2 of the Annex to Decision 94/173, or in point 2 thereof if the particular conditions laid down therein are not fulfilled, is excluded.

The aid examined in the decision of 11 January 1996

14 The aid for DAI examined by the Commission in the decision of 11 January 1996 is of three kinds. A first grant of aid of PTE 1 275 290 000 takes the form of tax reliefs granted under the general aid scheme introduced in Portugal by Decree-Law 95/90 of 20 March 1990 amending the Estatuto dos Benefícios Fiscais (Tax benefits measure) and introducing a scheme specifically for large-scale investment projects. The scheme provides for special tax reliefs, limited to a period of 10 years, for companies making investments in excess of PTE 10 000 million. The maximum aid available is 10% of the net investments made or, in exceptional cases, 20%.

15 The scheme introduced by Decree-Law 95/90 was approved pursuant to Article 92 of the Treaty by Commission decision of 3 July 1991 (SG (91) D/ 13312) (hereinafter 'the decision of 3 July 1991' or 'the approval decision'), notified to the Portuguese Government on 15 July 1991, subject to the condition that the individual aid was in conformity with 'the rules and guidelines laid down by Community law in relation to certain industrial, agricultural and fisheries sectors'. The approval decision also requires the Portuguese Government to notify 'all projects enjoying reliefs of between 10 and 20% (ESL) and all those in sensitive sectors'. That general aid scheme remained in force until 31 December 1995. By decision notified to the Portuguese Government on 30 May 1996 the Commission approved extension of the scheme under the same conditions until 1999, but removed the obligation to give notice of projects in sensitive sectors, which is no longer mentioned.

16 In its decision of 11 January 1996 the Commission noted that the tax reliefs in favour of DAI did not exceed 10% of the investment and that its approval decision made the grant of the aid concerned subject to the Community rules applicable to the agricultural sector. After indicating that its examination of the project concerned, in so far as it related to investments, involved verification of compliance with the Community provisions on State aid in the agricultural sector,

it stated that the tax reliefs in question were not excluded by Decision 94/173, which lays down the selection criteria for investments eligible for co-financing under the Guidance Section of the EAGGF.

17 A second grant of aid of PTE 380 000 000 for vocational training for staff at the new refinery (at least 200 people) was regarded as compatible with the common market. The decision of 11 January 1996 indicated in that regard that, 'according to Commission practice, measures of this kind intended to impart new knowledge are authorised for up to 100% of the eligible expenses'. In this case, the aid would not exceed 68% of such expenses.

18 Finally, the Commission stated in the same decision that the third national aid measure in question, the grant of PTE 1 912 335 000 (that is, 15% of the eligible investments) by way of co-financing of investments eligible for Community aid in the amount of PTE 6 372 065 000 (that is, 49.97% of the eligible investments) under Regulation No 866/90, did not fall within the scope of Articles 92 and 93 of the Treaty and would be examined under that regulation.

Procedure and forms of order sought

19 By application received at the Registry of the Court of First Instance on 29 May 1996 the applicants brought the present action.

20 By applications received at the Registry of the Court of First Instance on 8 and 18 November 1996 respectively, the Portuguese Republic and DAI sought leave to intervene in support of the defendant. The President of the Fifth Chamber, Extended Composition, granted them leave to intervene by order of 18 March 1997. DAI and the Portuguese Republic submitted their statements in interven-

tion on 19 and 24 June 1997 respectively. The Commission and the applicants submitted their observations on those statements on 30 September and 1 December 1997 respectively.

21 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure without any preparatory inquiry. The parties presented oral argument and answered questions put to them orally by the Court at the hearing on 18 November 1998.

22 The applicants claim that the Court of First Instance should:

— declare their action admissible;

— annul the decisions of 11 January 1996 and 19 March 1996;

— order the Commission to pay the costs.

23 The defendant contends that the Court of First Instance should:

— reject as inadmissible the claim for annulment of the Commission's letter of 19 March 1996 and the claim for annulment of its decision of 11 January

1996 in so far as it concerns the aid granted in the form of tax reliefs, and dismiss the action as unfounded in all other respects;

— alternatively, dismiss the application in its entirety as unfounded;

— order the applicants to pay the costs.

24 The Portuguese Republic, intervening in support of the Commission, contends that the Court of First Instance should:

— dismiss the application as inadmissible;

— in the alternative, dismiss the application as unfounded.

25 DAI, intervening in support of the Commission, contends that the Court of First Instance should:

— dismiss the application as inadmissible in so far as it seeks annulment of the Commission's letter of 19 March 1996 and the decision of 11 January 1996 in so far as it concerns the aid granted in the form of tax reliefs;

— dismiss the remainder of the application as unfounded;

— alternatively, dismiss the application in its entirety as unfounded;

— order the applicants to pay the costs.

The claim for annulment of the 'decision' of 19 March 1996

Admissibility

1. *Arguments of the parties*

26 The Commission, supported by the Portuguese Republic and DAI, contends that the claim for annulment of its letter of 19 March 1996 is inadmissible. That letter merely informs the applicants of the decision of 11 January 1996 not to raise objections under Articles 92 and 93 of the Treaty to the planned aid for DAI.

27 The applicants consider that the action is admissible in its entirety. The letter of 19 march 1996 does not merely provide them with information but constitutes a definitive rejection of their complaint and of their express request for initiation of the procedure under Article 93(2) of the Treaty (see, *a contrario,* Case T-154/94 *CSF and CSME* v *Commission* [1996] ECR II-1377, paragraphs 49 and 50). It has definitive legal effects as far as they are concerned and is therefore in the nature of a decision (Joined Cases 166/86 and 220/86 *Irish Cement* v *Commission* [1988] ECR 6473, paragraph 11).

2. *Findings of the Court*

28 Decisions adopted by the Commission in relation to State aid are addressed to the Member States concerned. That is also the case where such decisions concern State measures to which objection is taken in complaints on the ground that they constitute State aid contrary to the Treaty and the Commission refuses to initiate the procedure under Article 93(2) of the Treaty because it considers either that the measures complained of do not constitute State aid within the meaning of Article 92 of the EC Treaty or that they are compatible with the common market. Where the Commission adopts such a decision and, in accordance with its duty of sound administration, proceeds to inform the complainants thereof, it is the decision addressed to the Member State which must form the subject-matter of any action for annulment which the complainant may bring, and not the letter to that complainant (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 45).

29 In this case, the Commission confined itself, in its letter of 19 March 1996, to informing the applicants, which had lodged complaints against the aid measures at issue, of its decision of 11 January 1996, notified to the Portuguese Government on the same date, not to raise objections to that aid under Articles 92 and 93 of the Treaty.

30 That purely informative letter does not in any way constitute a decision and is not therefore a measure against which proceedings may be instituted under Article 173 of the EC Treaty (now, after amendment, Article 230 EC). In this case, protection of the applicants' rights is assured by the possibility — of which, moreover, they have availed themselves in this action — of bringing proceedings for annulment against the decision of 11 January 1996 addressed to the Member State concerned.

31 In those circumstances, the claim for annulment of the letter of 11 March 1996 must be dismissed as inadmissible.

The claim for annulment of the decision of 11 January 1996

Admissibility

1. *Arguments of the parties*

32 The Commission, supported by the Portuguese Government and DAI, contends that the application for annulment of the contested decision is partially inadmissible, in so far as it relates to the aid granted in the form of tax reliefs, since the applicants have no interest in bringing proceedings. It states that it was empowered only to verify, in that decision, the conformity of the tax reliefs at issue with its decision authorising the general aid scheme introduced by Decree-Law 95/90. However, the applicants do not allege any lack of conformity and have thus demonstrated no interest in having the contested decision annulled: even if the decision were annulled, those tax reliefs, granted under a general aid scheme approved by the decision of 3 July 1991, constitute existing aid which the Portuguese authorities would still be entitled to grant. In that connection, for the applicants to plead, as they purport to do in this case, that the approval decision is illegal amounts to an abuse of procedure.

33 The Portuguese Government also rejects the view that the applicants are directly and individually concerned by the contested decision within the meaning of the fourth paragraph of Article 173 of the Treaty. The three types of aid at issue have no repercussions on their position in the Portuguese sugar market.

34 The applicants, for their part, consider that Alcântara Refinarias — Açúcares SA and RAR Refinarias de Açúcar Reunidas SA are directly and individually concerned by the contested decision in so far as it affects them as competitors of

DAI which had lodged complaints about the aid granted to that company. The same applies to ARAP, which represents the interests of the Portuguese cane sugar industry and also lodged a complaint with the Commission.

2. *Findings of the Court*

35 The first objection of inadmissibility, alleging that the applicants have no interest in bringing proceedings for annulment of the contested decision because even if it were annulled the tax reliefs at issue, constituting as they do existing aid, would be maintained, cannot be upheld.

36 The fact that an individual grant of aid forming part of a general aid scheme duly approved by the Commission is regarded as existing aid whose payment has already been authorised does not deprive the applicants of an interest in bringing proceedings in this case. In particular, they have an interest in seeking annulment of the contested decision in so far as the Commission does not raise objections to the tax reliefs granted to DAI, precisely because that aid might not, in their view, be covered by the approval decision — which makes the grant of individual aid subject in particular to the rules and guidelines applicable to the relevant agricultural sector — since they are incompatible with the rules of the common agricultural policy. Indeed, were the Court of First Instance to annul the contested decision on that ground, it would in principle be incumbent on the Commission to require repayment of all the aid already granted to DAI. Similarly, if the approval decision were held to be unlawful, it would be incumbent on the defendant institution to treat the tax reliefs for DAI as new aid and to make a direct examination of their conformity with the Treaty (Case C-47/91 *Italy* v *Commission* [1994] ECR I-4635, paragraph 26). In that regard, the question of admissibility raised by the Commission regarding the objection that the approval decision is illegal cannot be examined at this stage. It is linked with the substance of the action for annulment and will be examined in relation thereto.

37 The applicants thus certainly have an interest in securing annulment of the contested decision in so far as it relates to the tax reliefs.

38 In connection with the second objection of inadmissibility, the Portuguese Government contends that the applicants are not directly and individually concerned within the meaning of the fourth paragraph of Article 173 of the Treaty. Although that plea was not made by the defendant, since the conditions for the admissibility of an application are mandatory the Court must examine them of its own motion (Case T-465/93 *Consorzio Gruppo di Azione Locale 'Murgia Messapica'* v *Commission* [1994] ECR II-361, paragraph 24).

39 It must be borne in mind that according to settled case-law (see in particular Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, paragraphs 20 to 24, and *Commission* v *Sytraval and Brink's France*, cited above, paragraphs 47 and 48), the right of competing undertakings to bring proceedings challenging a Commission decision finding, on conclusion of the preliminary examination procedure under Article 93(3) of the Treaty, that aid is compatible with the common market is incontestable. Since the Treaty requires the Commission to allow interested parties to submit their comments only in the preliminary examination phase under Article 93(2) of the Treaty, the latter may secure compliance with those procedural guarantees where the Commission decides not to initiate the procedure under Article 93(2) of the Treaty only if they are able to challenge that decision before the Court.

40 In this case, the general tax relief scheme at issue had been approved by the Commission without recourse to the procedure under Article 93(2) of the Treaty. Moreover, the contested decision was in any event the only means by which the applicants could appraise the extent to which their interests are affected. The applicants cannot therefore secure compliance with the procedural guarantees

afforded them by Article 93(2) of the Treaty as interested third parties unless they have an opportunity to challenge that decision before the Court.

41 The Commission's objection of inadmissibility must therefore be rejected.

Substance

42 In order to challenge the contested decision the applicants rely on separate pleas for each of the three types of aid granted.

A — *The tax reliefs*

43 In support of their claim for annulment of the contested decision on the ground that it raises no objections to the aid granted in the form of tax reliefs, the applicants put forward three pleas in law. First, they allege that the decision of 3 July 1991 is illegal under Article 184 of the EC Treaty (now Article 241 EC). Second, those tax reliefs in any event represent new aid which the Portuguese

Government was required to notify on the basis of Article 93(3) of the Treaty. Third, that aid is contrary to the common agricultural policy.

The first plea: illegality of the decision of 3 July 1991

Admissibility of the objection of illegality

— Arguments of the parties

44 According to the Commission, supported by the Portuguese Government and DAI, the applicants' objection that the decision of 3 July 1991 is illegal is inadmissible. That decision constitutes the legal basis not of the contested decision but of the national implementing measures adopted for the grant of the tax reliefs at issue. The applicants should have brought an action to challenge those measures before the national court, relying on Article 184 of the Treaty, in order to preclude implementation of the decision of 3 July 1991.

45 The applicants submit that their objection, to the effect that the approval decision on which the contested decision was, in their view, based is inapplicable, is admissible under Article 184 of the Treaty.

— Findings of the Court

46 It is settled case-law that the right under Article 184 of the Treaty to raise an objection of illegality 'gives expression to the general principle conferring on any party to proceedings the right to challenge, for the purpose of obtaining the annulment of a decision of direct and individual concern to that party, the validity of previous acts of the institutions which form the legal basis of the decision which is being attacked, if that party was not entitled under Article 173 of the Treaty to bring a direct action challenging those acts by which it was thus affected without having been in a position to ask that they be declared void' (Case 92/78 *Simmenthal* v *Commission* [1979] ECR 777, paragraph 39).

47 The general principle thus expounded by the Court applies equally in circumstances in which an individual decision is directly based on a measure of general scope which may be the subject of an action for annulment by natural or legal persons with standing to institute proceedings against such a measure, in particular where only the individual decision enables them to determine precisely to what extent their particular interests are affected (see in particular Joined Cases 44/74, 46/74 and 49/74 *Acton and Others* v *Commission* [1975] ECR 383, paragraph 7, Case 164/87 *Simonella* v *Commission* [1988] ECR 3807, paragraph 16, and Case T-60/92 *Noonan* v *Commission* [1993] ECR II-911, paragraph 23).

48 In this case, contrary to the Commission's contention, there is a direct legal link between the decision of 3 July 1991 and the contested decision in so far as the latter is based, as regards the tax reliefs, on the decision of 3 July 1991 approving the general scheme of tax reliefs. The individual grants of aid, regarded as existing aid, can only be checked by the Commission in the light of the conditions which it set out in the decision approving the general scheme (*Italy* v

Commission, cited above, paragraph 24, and Case C-278/95 P *Siemens* v *Commission* [1997] ECR I-2507, paragraph 31).

49 In those circumstances — regardless of whether the applicants could have been recognised as having standing to contest the decision of 3 July 1991 — effective judicial protection of their rights is in any event assured only if they have an opportunity to raise an objection alleging the irregularity of that decision in proceedings challenging the Commission decision relating to the individual aid, which alone allows them to determine precisely the extent to which their individual interests are affected.

50 It follows that the objection of inadmissibility raised against the plea alleging that the approval decision is unlawful must in any event be rejected.

The merits of the objection of illegality

51 The first plea, alleging that the decision of 3 July 1991 is illegal, comprises three parts. First, the Commission failed to take account of the sectoral consequences of the general aid scheme when adopting the approval decision, which is incompatible with the common agricultural policy. Second, the procedure for the adoption of that approval decision lacked transparency in that the Commission

did not initiate the procedure provided for by Article 93(2) of the Treaty. Third, that procedure was defective.

(a) The alleged failure to verify the sectoral consequences of the general aid scheme at issue

Arguments of the parties

52 The applicants observe that the exceptions provided for in Article 92(3)(a) and (c) of the Treaty must be interpreted restrictively. In particular, in sensitive sectors, such as agriculture or those in which there is excess capacity, the Commission is under a duty when approving general aid schemes to impose on the Member States concerned appropriate conditions making it possible, whenever those schemes are applied in a specific instance, to verify in particular that the sectoral consequences of the planned aid are not contrary to the common interest (Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraph 20). It follows that a general scheme of national aid cannot be approved without the express condition being imposed that any application of it to the agricultural sector must in all cases be preceded by notification of it to the Commission under Article 93(3) of the Treaty.

53 In this case the applicants consider the decision of 3 July 1991 to be incompatible with the common agricultural policy in so far as it does not impose an obligation to notify the individual aids, whereas the Community rules governing the sugar sector do not in their view allow State aid to be granted to Portuguese beet sugar

producers. The condition concerning compliance with the Community rules laid down in the approval decision is too imprecise in that respect.

54 For its part, the Commission submits that, in the approval decision, it imposed the kind of condition called for by the applicants as a safeguard against the sectoral consequences of the general aid scheme: it was unnecessary to define all those conditions precisely in the decision itself since they are set out in detail in the Community rules governing the agricultural sector. The approval decision makes application of the general aid scheme in question subject to compliance with those rules, as is expressly stated in the contested decision.

Findings of the Court

55 In this case, the applicants have not demonstrated that compliance with the rules applicable to the sugar sector was not ensured by the conditions laid down in the approval decision. In fact, the Commission's decision expressly made the grant of individual tax reliefs subject to observance of the Community rules relating in particular to the agricultural sectors. The applicants have not produced in that regard any specific evidence to support the view that that condition is not sufficient to exclude from the authorised general scheme aid which is incompatible with the common agricultural policy. Moreover, they do not mention any rule relating to the common organisation of the sugar markets which required the imposition, at the time of approval of the general aid scheme in question, of an obligation to notify individual grants of aids in the sugar sector.

56 Furthermore, the aid granted in the sugar sector under the general scheme of tax reliefs at issue does not thereby escape Commission control. Although it is incumbent primarily on the Member State concerned, when planning granting a tax relief under the general aid scheme approved by the Commission, to ensure compliance with the Community rules, the fact remains that the Commission may

at any time verify the compatibility of such individual aid with the approval decision and in particular with the rules applicable to the agricultural sector concerned. In the interests of sound administration of the fundamental rules of the Treaty relating to State aid, it is incumbent on the Commission to undertake such a verification in particular where, as in this case, it has received a complaint against such aid.

57 On all those grounds, the first part of the first plea, alleging failure to examine the sectoral consequences of the general aid scheme at issue, cannot be upheld.

(b) The alleged lack of transparency in the procedure for approval of the general aid scheme

Arguments of the parties

58 The applicants criticise the Commission for not making public the notification of Decree-Law 95/90 and its approval decision until after the event. The legitimate interests of third parties in a sensitive sector like that of sugar were thus not respected, in so far as the Commission approved the general aid scheme under Article 93(3) of the Treaty without initiating the procedure under paragraph 2 of that article, which alone upholds the right of interested parties to be heard and provides for an analysis of the market to evaluate the potential effects of the aid in question.

59 The Commission rejects that argument, contending that the obligation to initiate the procedure under Article 93(2) of the Treaty depends on the difficulty of

appraising the compatibility of the aid scheme in question and not, as submitted by the applicants, the importance of the sector concerned.

60 DAI supports that argument. It adds that no rule states, for the protection of third-party interests, at precisely what moment the notification of State aid under Article 93(3) of the Treaty must be published by the Commission.

Findings of the Court

61 The lack of any publicity concerning the notification by the Member State concerned and the Commission's examination of a grant of aid under Article 93(3) of the Treaty, together with its decision not to initiate the procedure under Article 93(2) of the Treaty involving third parties, cannot be assimilated to a lack of transparency in the system for examining State aid established by Articles 92 and 93 of the Treaty. It is true that the summary examination of State aid forming part of the preliminary stage under Article 93(3) of the Treaty does not enable the Commission to take account of the interests of third parties. However, the procedure incorporates sufficient guarantees and is therefore fully justified by the need to avoid delay where it is clear that the measure notified by the Member State concerned or complained about by a third party does not constitute State aid or constitutes aid compatible with the common market. The rights of third parties are protected by the possibility of their instituting proceedings, if appropriate, against the Commission's decision not to initiate the procedure under Article 93(2) of the Treaty (*Cook* v *Commission*, cited above, paragraphs 22 to 24, and Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraphs 16 to 18).

62 In this case, the legitimate interests of the applicants are in any event protected in particular by the right, of which they have availed themselves in the present

action challenging the decision of 11 January 1996, to claim, in relation to the tax reliefs granted to DAI, that the approval decision is inoperative by virtue of Article 184 of the Treaty (see paragraphs 43 to 50 above).

63 In those circumstances, there is no basis for the allegation of failure to observe the rights of third parties in the procedure for the adoption of the decision of 3 July 1991. The second part of the first plea, alleging lack of transparency in that procedure, cannot therefore be upheld.

(c) The alleged impropriety of the internal procedure for the adoption of the decision of 3 July 1991

Arguments of the parties

64 The applicants query the conformity with the Commission's Rules of Procedure of the procedure for the adoption of the decision of 3 July 1991. In order to verify whether the authentic version of the abovementioned decision, in the Portuguese language, was in fact placed before the College of the Members of the Commission for adoption and authentication, it is necessary to compare the text of document SEC (91) 1266, mentioned in the minutes of the Commission meeting of 3 July 1991, with the letter of 15 July 1991, mentioned above, addressed to the Portuguese Government.

65 According to the Commission, the minutes of its meeting of 3 July 1991 show that the approval decision was adopted by the Members of the Commission and

was duly authenticated by the President and the Secretary General, as required by its Rules of Procedure.

Findings of the Court

66 The applicants have not produced any significant evidence capable of raising serious doubts as to the legality of the procedure for adoption of the approval decision. On the contrary, it is clear from the minutes of the Commission's meeting of 3 July 1991, produced by the Commission, that the approval decision was in fact adopted by the Members of the Commission and authenticated by the President and the Secretariat General.

67 In that context, having regard to the presumption of validity attaching to Community acts and in the absence of the slightest evidence produced by the applicants that the procedure for the adoption of the approval decision was irregular, the third part of the first plea must be rejected, and it is unnecessary to accede to the applicants' request that a comparison of the documents be made (see Case T-9/89 *Hüls* v *Commission* [1992] ECR II-499, paragraph 384, and Case T-156/94 *Siderúrgica Aristrain Madrid* v *Commission* [1999] ECR II-645, paragraph 217).

68 It follows that the first plea must be rejected.

The second plea: breach of the alleged obligation to examine the individual grants of aid to DAI

Arguments of the parties

69 The applicants criticise the Commission for declining in this case to examine the tax reliefs for DAI in the light of Articles 92 and 93 of the Treaty. The Court of Justice did not hold, in *Italy* v *Commission*, cited above, that the specific measures implementing a general aid scheme do not have to be notified to the Commission or that it is not necessary to examine them individually once the general scheme has been approved. The requirement of notification is lifted only where 'the factors to be taken into consideration by the Commission in assessing [the implementing measures] are the same as those which it applied on examining the general scheme' (paragraph 21 of the judgment). The Member States are therefore required to notify grants of aid envisaged in pursuance of such a general aid scheme if they do not constitute a straightforward or foreseeable application of that scheme and to the extent that the grants of aid need to be appraised in the light of factors other than the general scheme itself, in particular where they are liable to exacerbate existing defects in the market, such as surplus capacity. In this case, the approval of Decree-Law 95/90 does not authorise Portugal to apply it in the sugar sector where the aid affects the delicate balance which the common agricultural policy endeavours to establish.

70 The Commission contests that interpretation of the judgment in *Italy* v *Commission*. The distinction drawn by the applicants would lead to considerable legal uncertainty.

71 The interveners endorse that view. DAI also states that the applicants' thesis disregards the underlying logic of the approval of a general aid scheme by the Commission. Such approval is intended to reconcile coherent monitoring of State aid — which must not exceed the limits set by the general scheme or infringe specific rules of Community law — with the need to relieve the Commission of

some of its administrative burdens, whilst offering undertakings the requisite legal certainty.

Findings of the Court

72 In *Italy* v *Commission* the Court of Justice held that once a general aid scheme has been approved by the Commission, the individual implementing measures do not need to be notified to it unless reservations to that effect were expressed in the approval decision. Indeed, direct examination of each individual aid in the light of Article 92 of the Treaty would enable the Commission to go back on its approval decision and would be contrary to the principles of protection of legitimate expectations and legal certainty.

73 The distinction contended for by the applicants is incompatible with the abovementioned principles. An individual aid granted in implementation of a general aid scheme cannot in principle be regarded as an unforeseeable application of that scheme. In the first place, it would be contrary to the principles of protection of legitimate expectations and legal certainty to require notification of individual measures with a view to their being re-examined by the Commission under Article 92 of the Treaty on the basis of factors which it had already taken into account when approving the general scheme. Secondly, if the situation changes after the general aid scheme concerned has been approved, that fact will be taken into consideration by the Commission, in compliance, of course, with the principle of legal certainty, as part of its constant monitoring of existing aid schemes under Article 93(1) of the Treaty (see for example Case C-44/93 *Namur-Les Assurances du Crédit* v *OND* [1994] ECR I-3829, paragraph 34). As regards the circumstances relied on by the applicant relating to the particular situation of certain agricultural sectors, with, for example, surplus production, it must be borne in mind that the Commission's approval of a

general aid scheme does not in any circumstances remove the individual aid measures adopted under that scheme from the scope of all the specific rules governing the sector concerned. As has already been held (see paragraphs 55 and 56), compliance with those rules is not subject in this case to the requirement of prior notification of the planned individual measures.

74 In this case, if, when examining the general aid scheme established by Decree-Law 95/90, the Commission had considered that the grant of such aid in certain specific sectors necessitated a direct examination under Article 92 of the Treaty, it would have been able and obliged to impose the requirement, in the approval decision, that individual grants of aid in that sector be notified. However, the decision of 3 July 1991 imposes no obligation to notify individual grants of aid in the sugar sector. It only makes the authorisation of the tax reliefs at issue subject to two precise conditions: the tax reliefs must not exceed 10% of the investments made and must be compatible with the Community provisions applicable to the agricultural sector concerned. It follows that the Commission was not entitled to examine the tax reliefs granted to DAI directly in relation to Article 92 of the Treaty provided that they were in conformity with the two abovementioned conditions, as it found them to be in the contested decision.

75 It follows that the second plea in law must be rejected.

The third plea: incompatibility of the tax reliefs at issue with the common agricultural policy

Arguments of the parties

76 According to the applicants, the implementation of the common agricultural policy takes precedence over the application of Articles 92 and 93 of the Treaty

and Article 94 of the EC Treaty (now Article 89 EC) and over action undertaken in the context of the Structural Funds. The Court of Justice upheld that primacy of the objectives of the common agricultural policy over the Treaty rules on State aid in its judgment in Case C-311/94 *Ijssel Vliet* v *Minister van Economische Zaken* [1996] ECR I-5023, paragraphs 31 to 33.

77 In this case, any aid for the setting up of a beet sugar refinery is contrary to the objectives of the common agricultural policy in the sugar sector. No exception under Article 92(3) of the Treaty can therefore be applied to it.

78 The allocation of a sugar quota to mainland Portugal by the Treaty of Accession does not justify support for the setting up of a beet sugar refinery in that country using State aid and/or Community co-financing. The applicants maintain, relying on Article 184 of the Treaty, that the abovementioned Decision 94/173 is illegal in that it does not exclude the possibility of such support and cannot be used as a valid legal basis for the contested decision. No principle or rule of Community law legitimises the part of Decision 94/173 which provides that investments relating to the production or refining of beet sugar in mainland Portugal, intended to make use of the quota of 60 000 tonnes of white sugar allocated by the Act of Accession, may benefit from Community co-financing.

79 Such support has adverse effects on the conditions prevailing in the sugar markets and on the situation of third parties, namely producers of beet sugar in the other Member States or Portuguese refiners of cane sugar. The production of beet sugar in Portugal would lead to a surplus of 83 000 tonnes over consumption in that country which, contrary to the Commission's contentions, is not in deficit as regards sugar. It would thus considerably increase the EAGGF's financial burden by leading to intervention purchases of 60 000 tonnes of beet sugar and export refunds for cane sugar from African, Caribbean and Pacific countries, refined and sold by the applicant companies on the world market. Moreover, it would

aggravate structural over-production in the Community, where surplus sugar production exceeded 5 300 000 tonnes in the year 1995 to 1996. Finally, the beet sugar industry set up in Portugal using the aid at issue might prove not to be viable. Portugal has also obtained an increase of its annual quota from 60 000 to 70 000 tonnes in order to ensure the viability of the beet sugar refinery under construction.

80 The Commission states in reply that a sugar quota of 60 000 tonnes was allocated to mainland Portugal in the Act of Accession to enable farmers in a region offering few alternatives in terms of agricultural production to grow sugar beet. As mainland Portugal did not at that time have any sugar production capable of serving as a reference, the quota of 60 000 tonnes of white sugar was regarded as the minimum necessary to allow profitable operation of a sugar refinery using sugar beet grown in the region. There was never any doubt as to the need for regional processing facilities to be installed owing to the substantial costs of transporting sugar beet as compared with production costs. Moreover, in the context of the common organisation of the sugar market, the quotas allocated to the Member States are intended for the sugar-producing undertakings established within their territory. Owing to the delay in setting up a refinery in Portugal, a transitional measure authorised a sugar plant in Spain to refine sugar beet harvested in Portugal, the sugar produced being 'considered as having been produced by the Portuguese undertaking in question' (Article 24(1a) of Regulation No 1785/81, as amended by Council Regulation (EEC) No 1107/88 of 25 April 1988 (OJ 1988 L 110, p. 20). That measure made it possible to commence beet sugar production in Portugal in 1986 but only on a small scale. It was in order to give the necessary impetus to the construction of a profitable sugar beet refinery in that country, and thereby encourage Portuguese farmers to embark on beet sugar production, that the sugar quota allocated to mainland Portugal was raised to 70 000 tonnes by the abovementioned Regulation No 1599/96 of 30 July 1996 (see the proposal for a Council Regulation amending Regulation No 1785/81 (OJ 1996 C 28, p. 6)).

81 The Portuguese Government states that Portugal's inability to use the sugar quota allocated to it by the Act of Accession owing to the inadequacy of its agricultural structures in the beet sugar sector renders the Treaty of Accession ineffective in

that regard and deprives the Portuguese economy of the benefit of the advantages inherent in the market policy to which that economy contributes by bearing a share of the Community charges, in particular through the Guarantee Section of the EAGGF. That situation, which is inequitable, is even more anomalous because Portugal is treated in its entirety by Regulation No 2052/88 as a target region for the economic and social cohesion policy.

82 DAI supports that argument. It contends that the applicants have provided no evidence to show that the beet sugar industry which is to utilise the quota allocated to Portugal is not viable, would need fresh aid and would increase the financial burden of the EAGGF.

83 Furthermore, in pursuing the various aims laid down in Article 39 of the Treaty, the Community institutions may consider it appropriate to allow one or other of them temporary priority in order to satisfy the economic conditions in view of which their decisions are made (Joined Cases 279/84, 280/84, 285/84 and 286/84 *Rau and Others* v *Commission* [1987] ECR 1069, paragraph 21).

Findings of the Court

84 In the contested decision, the Commission had the power and the duty to examine only the propriety of the tax reliefs granted in this case to DAI having regard to the conditions it imposed in its approval decision and, in particular, to the rules applicable to the sugar sector.

85 In this case, the applicants allege that the tax reliefs granted to DAI are incompatible with the aims of the common agricultural policy in the sugar sector.

Essentially, the creation of a beet sugar production industry in Portugal would aggravate Community over-capacity in that sector and would give rise to considerable costs for the intervention scheme.

86 It must be borne in mind at the outset that a common market organisation pursues a set of distinct aims, reflecting the various objectives of the common agricultural policy, as defined by Article 39(1) of the Treaty. It seeks in particular to ensure optimum employment of farmers and ensure a fair standard of living for them, to stabilise markets and to assure the availability of supplies to consumers at reasonable prices. Moreover, Article 39(2) of the Treaty provides that, in working out the common agricultural policy, account is to be taken of the particular nature of agricultural activity, which results from the social structure of agriculture and from structural and natural disparities between the various agricultural regions, the need to effect the appropriate adjustments by degrees and the fact that in the Member States agriculture constitutes a sector closely linked with the economy as a whole.

87 Furthermore, as DAI emphasised, the Community institutions have a permanent duty to reconcile any conflict between those individual aims. For the purposes of that duty to reconcile, they may allow one of them temporary priority in order to satisfy the demands of the economic or other conditions in view of which their decisions are made (*Rau* v *Commission*, cited above, paragraph 21).

88 In this case, it is necessary to verify whether the tax reliefs at issue, which are intended to facilitate the development of certain economic regions in accordance with Article 92(3)(c) of the EC Treaty, are compatible with the aims pursued by the rules applicable to the sugar production and processing sector.

89 An analysis of those rules shows that the tax reliefs in favour of DAI, intended to promote the setting up of a beet sugar refinery in mainland Portugal, conform with the aims pursued and the rules laid down, in connection with the common agricultural policy, by Regulation No 1785/81. It is precisely that regulation which sets, in Article 24(2) as amended by the Treaty of Accession, a quota of 60 000 tonnes — later raised to 70 000 tonnes — for mainland Portugal, after specifying in Article 24(1) that Portugal will allocate part of that quota 'to each undertaking situated in that region which is likely to start up sugar production'. Moreover, Article 44 clearly allows State aid for, among other things, the production of beet sugar to be authorised under Articles 92 to 94 of the Treaty.

90 Moreover, the tax reliefs at issue are compatible with the Community policy on public intervention in favour of structural actions in the field of agriculture. In that connection, Article 16(5) of Regulation No 866/90 provides expressly that Member States may, in addition to the measures specifically provided for in that regulation, grant aid for processing and marketing agricultural products under the conditions laid down in Articles 92 to 94 of the Treaty. In addition, the aid for setting up a sugar refinery at issue in this case also conforms with the criteria for selecting investments eligible for financial support from the Guidance Section of the EAGGF. Decision 94/173, which lays down those criteria, expressly excludes in point 2.8 of the Annex all investments in the sugar sector except those intended to allow use of the quota provided for by the Act of Accession of Portugal. Contrary to the applicants' claims (see paragraph 77 above), that exception provided for by Decision 94/173 is accounted for by the allocation, by Regulation No 1785/81, of a quota for mainland Portugal specifically in order to enable undertakings established there to 'start up sugar production'. The aid at issue in this case thus conforms with the sectoral limitations relating to the co-financing of investments in the sugar processing and marketing sector, which are applicable by analogy to State aid for investments in that sector, in accordance with the Guidelines for State aid in connection with investments in the processing and marketing of agricultural products, dated 2 February 1996, mentioned above (paragraph 13).

91 In that context, the applicants' arguments concerning aggravation of the over-production of sugar in the Community and an increase in the charges borne by the Guidance Section of the EAGGF, are not such as to call in question the compatibility of aid for the setting up of a beet sugar refinery in Portugal with the common agricultural policy in the sugar sector. Since, as held in the foregoing paragraphs, that aid is designed to permit use of the quota of 70 000 tonnes of sugar expressly allocated to mainland Portugal so that the undertakings can 'start up' production there, by Regulation No 1785/81 which established a common market organisation in that sector, it cannot be denied that it contributes to attainment of the aims pursued in the context of the common agricultural policy. Moreover, the 70 000 tonne production capacity of the new beet sugar refinery to be set up in Portugal could in any event lead only to a relatively small increase in the sugar surplus in the Community, which attained some 5 300 000 tonnes in the year 1995 to 1996 according to the figures cited by the applicants.

92 Finally, the file contains no persuasive evidence casting doubt on the viability of the beet sugar refinery receiving the aid at issue. In that regard the applicants merely refer in very general terms to the absence of outlets and uncertainties in price developments and express doubts as to the success of sugar-beet growing in mainland Portugal owing to climatic conditions and Portuguese farmers' lack of experience in that field. They have produced no precise and concrete evidence in support of those assertions.

93 It follows from all those considerations that the applicants have not shown that the tax reliefs granted to DAI are incompatible with the aims of the common agricultural policy, as implemented by the relevant rules.

94 The third plea cannot therefore be upheld.

95 It follows that the claim for annulment of the contested decision, in so far as it is concerned with aid granted in the form of tax reliefs, must be rejected as unfounded.

B — *Aid for vocational training*

Arguments of the parties

96 The applicants rely on the sole plea of infringement of Article 92(3)(c) of the Treaty. The aid for vocational training at issue is caught by the prohibition in Article 92(1) of the Treaty and cannot qualify for the exception provided for in Article 92(3)(c) owing to the adverse consequences of all the State aid in favour of DAI on competition and the common agricultural policy. Those consequences, which adversely affect the interests of the Community and of third parties, should be appraised in relation to all the support granted, which amounts to 61.65% of the total investment, according to the figures supplied by the Commission.

97 The Commission is of the opinion that each type of aid must be appraised individually. In this case, the aid for vocational training is intended to finance about 68% of the cost of the vocational training given to DAI staff and fulfils the conditions laid down by Article 92(3)(c) of the Treaty. In the agricultural sector, the Commission systematically authorises aid of that kind fostering employment, representing up to 100% of the expenditure, owing to the particular features of that sector and the diversity of the systems of vocational training in the various Member States, the costs borne by the employer in one country being funded by the State in another.

Findings of the Court

98 The three types of aid examined in the contested decision, namely the tax reliefs, aid for vocational training and investment aid under Regulation No 866/90, are covered by different sets of legal provisions and must therefore be examined individually in the light of those rules and the aims which they pursue, subject, if appropriate, to verification of their compatibility with the specific rules applicable in the sugar processing and marketing sector. The aid for vocational training must therefore be considered separately in the light of Article 92(3)(c) of the Treaty.

99 In that connection, it is settled case-law that, as regards the application of Article 92 of the Treaty, the Commission enjoys a wide discretion, the exercise of which involves assessments of an economic and social nature which must be made within a Community context. In its review of legality, the Court must therefore restrict itself to determining whether the Commission has exceeded the scope of its discretion by a manifest error of assessment or by misuse of powers (*Matra* v *Commission,* cited above, paragraphs 24 and 25).

100 In this case it should be noted that the purpose of the aid for vocational training at issue was to facilitate the creation of a new beet sugar refining industry in mainland Portugal with a view to fostering the activity of farmers in a region offering few alternatives in terms of agricultural production. In that context, the applicants have put forward no argument sufficient to call into question the notion that the vocational training aid at issue will contribute to the development of certain economic activities without adversely affecting trading conditions to an extent contrary to the common interest.

101 It follows that the claim for annulment of the contested decision to the extent to which it relates to vocational training aid must be rejected as unfounded.

C — *Investment aid under Regulation No 866/90*

102 The applicants put forward two pleas in law in support of the claim for annulment of the contested decision in so far as it relates to investment aid under Regulation No 866/90. First, they submit that grants of State aid fulfilling the conditions laid down by that regulation to qualify for Community co-financing are nevertheless subject to the application of Articles 92 and 93 the Treaty. Second, they claim that Regulation No 866/90 excludes co-financing of the aid at issue in this case.

The first plea: infringement of Articles 92 and 93 of the Treaty

Arguments of the parties

103 The applicants maintain that, in the sugar sector, only aid permitted under Articles 92 and 93 of the Treaty is eligible for Community co-financing under Regulation No 866/90.

104 In implementation of Article 42 of the Treaty, Article 44 of Regulation No 1785/81 provides that Articles 92 to 94 of the Treaty are to apply to production and marketing of the products listed in Article 1(1) of that regulation, which include in particular beet sugar and cane sugar. As those provisions of the Treaty were made applicable to a specific agricultural product, it would be contrary to the objectives of Article 3 of the EC Treaty (now, after amendment, Article 3 EC) not to apply them to that sector, having regard to economic or Community policy developments, on the basis of Article 42 of the Treaty.

105 In any event, Regulation No 866/90 does not specifically repeal the above-mentioned provisions of Regulation No 1785/81. In those circumstances, in so far as that regulation is of general scope, Article 16(5) thereof cannot be interpreted as excluding the application of Articles 92 and 93 of the Treaty to State aid eligible for co-financing under Regulation No 866/90, since that would render the Treaty provisions ineffective in the entire agricultural sector. Article 16(5) merely confirms the clear applicability of the general rules laid down by Articles 92 and 93 of the Treaty to aid measures not fulfilling the conditions for Community co-financing.

106 Similarly, the applicants dispute the distinction drawn by the Commission between aid directly linked with sugar production falling within the scope of Regulation No 1785/81 and structural measures in the field of sugar processing and marketing, which should be assessed only on the basis of Regulation No 866/90. According to the applicants, Regulation No 1785/81 provides fair guarantees both for processors (beet or cane sugar refiners) and for producers. All the measures adopted in the beet sugar processing sector are thus covered solely by the exhaustive rules laid down by that regulation.

107 According to the Commission, the aid at issue is not directly linked with the production of sugar beet. It is not therefore covered by the rules on the common organisation of the market in sugar set up by Regulation No 1785/81. It constitutes structural aid intended to facilitate investments to promote processing and marketing of beet sugar and as a result should be appraised solely in relation to Regulation No 866/90 and the selection criteria set out in Decision 94/173.

108 It is apparent from Article 16(5) of Regulation No 866/90 that Articles 92 to 94 of the Treaty apply only if the aid measures depart from the conditions or detailed arrangements laid down in that regulation or if the amount of the aid exceeds the ceilings which it lays down.

109 The Portuguese Government maintains that the involvement of the Member State concerned in structural action benefiting from the support of the Guidance Section of the EAGGF constitutes Community aid and not State aid within the meaning of Articles 92 and 93 of the Treaty. It does not therefore come within the scope of those provisions of Regulation No 1785/81 which provide for the applicability of the provisions on State aid.

110 DAI contends that Article 16(5) of Regulation No 866/90 is based on Article 42 of the Treaty and excludes the application of Articles 92 to 94 of the Treaty to State aid for investments eligible for Community co-financing.

Findings of the Court

111 The argument on which the applicants rely essentially to show that the Commission should, in the contested decision, have checked whether the investment aid in question might qualify for exception under Article 92(3) of the Treaty is based on Article 44 of Regulation No 1785/81, which provides, on the basis of Article 42 of the Treaty, that Articles 92 to 94 of the Treaty apply to production of and trade in agricultural products only to the extent determined by the Council.

112 Article 44 of Regulation No 1785/81 makes aid measures linked to the functioning of the common organisation of the market in sugar subject to the application of Articles 92 to 94 of the Treaty but does not include in such measures actions of a structural nature conducted under the auspices of the Guidance Section of the EAGGF, which do not fall within the scope of Regulation No 1785/81 but within that of Regulation No 866/90. The latter regulation, like Regulation No 1785/81, is based on Article 42 of the Treaty, referred to above, and Article 43 of the EC Treaty (now, after amendment, Article 37 EC), relating to the drawing up and implementation of the common agricultural policy, lays down the provisions applicable to State aid in its field of application.

113 In particular, Regulation No 866/90 does not exclude the possibility of Member States granting, regardless of any Community contribution, certain national investment aid which comes within its field of application. It makes expressly subject to Articles 92 to 94 of the Treaty the grant of such aid, which is not eligible for Community co-financing since it does not meet either the criteria which that regulation defines, or those referred to by Decision 94/173.

114 In that context, in the absence of any similar provision in Regulation No 866/90 expressly providing for the application of Articles 92 to 94 of the Treaty to aid eligible for Community co-financing under the Guidance Section of the EAGGF, such aid must be assessed in the specific context of the common action undertaken in accordance with that regulation and cannot be the subject of examination under Articles 92 and 93 of the Treaty.

115 Moreover, even if Article 44 of Regulation No 1785/81 could be interpreted as specifically providing for the application of Articles 92 to 94 of the Treaty to every aid measure concerning sugar production and marketing, it must, in any event, be applied having regard to the aims of the common agricultural policy, whose precedence over the application of the Treaty provisions relating to competition is enshrined in the Treaty itself, in Article 42 (see *Ijssel Vliet*, cited above, paragraphs 31 to 33).

116 The application of Articles 92 and 93 of the Treaty to aid eligible for Community co-financing in the context of Regulation No 866/90 would be liable to frustrate the pursuit of certain aims of the common agricultural policy by means of specific structural action undertaken in conformity with the criteria laid down in Decision 94/173, which establishes priorities for co-financing of investments covered by that regulation.

117 In that regard, Regulation No 866/90 itself ensures the consistency of investment aid, co-financed by the Community and the Member State concerned pursuant to that regulation, with the common agricultural policy, in particular in the specific sector of sugar, by providing for the adoption of selection criteria (fifth recital and Article 8) and the establishment of sectoral plans (Articles 2 and 7) intended *inter alia* to guarantee such consistency. In this case, the selection criteria defined by Decision 94/173 pursuant to Article 8(3) of Regulation No 866/90 exclude all investments in the sugar sector with the exception, in particular, of those which provide for use of the quota allocated to mainland Portugal by Regulation No 1785/81, as amended by the Act of Accession.

118 It follows that the application of Articles 92 and 93 of the Treaty to investment aid eligible for Community co-financing under Regulation No 866/90 would be incompatible with the precedence over the rules on competition accorded by the Treaty to the common agricultural policy.

119 On all those grounds, aid eligible for Community co-financing under Regulation No 866/90 is not subject to the application of Articles 92 and 93 of the Treaty.

120 The first plea, alleging infringement of those articles, cannot therefore be upheld.

The second plea: incompatibility of the aid at issue with Regulation No 866/90

Arguments of the parties

121 In support of their second plea, which they put forward in the alternative, the applicants maintain that co-financing aid for the Portuguese beet sugar sector is incompatible with the requirement that Community action be consistent with the common agricultural policy, to which importance is attached in the preamble to Regulation No 866/90 (fifth recital) and which is imposed by Articles 1(2)(b), 2 and 8(2) of that regulation.

122 In particular, the investment aid at issue cannot be based on Decision 94/173. The latter is unlawful in so far as it does not comply with the conditions for co-financing imposed by Regulation No 866/90, which does not authorise the co-financing of aid which is incompatible with the common agricultural policy.

123 The Commission denies that the aid at issue fails to comply with the conditions and procedures laid down by Regulation No 866/90. That aid is intended solely to enable the Portuguese authorities to facilitate the setting up of a sugar processing plant in order to ensure the take-up of sugar beet harvested in the region with a view to using the white sugar quota allocated to mainland Portugal.

Findings of the Court

124 This plea is based essentially on the argument that the investment aid at issue is excluded by Regulation No 866/90 because it is incompatible with the common agricultural policy and cannot be based on Decision 94/173, which is itself incompatible with that policy. It need merely be pointed out in that regard, as has already been held (see paragraphs 89 and 90 above), that aid granted with a view to utilising the quota allocated to mainland Portugal is not incompatible with the aims of the common agricultural policy. The second plea cannot therefore be upheld.

125 It follows that the present action for annulment must be dismissed as unfounded in its entirety.

Costs

126 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, they must be ordered to pay their own costs, together with those of the defendant and DAI, which have applied for them.

127 Pursuant to the first paragraph of Article 87(4) of the Rules of Procedure, the Portuguese Republic must bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)

hereby:

1. **Dismisses the application;**

2. **Orders the applicants to bear their own costs and to pay those of the defendant and the intervener DAI — Sociedade de Desenvolvimento Agro-industrial SA;**

3. **Orders the Portuguese Republic to bear its own costs.**

Moura Ramos García-Valdecasas Tiili

Lindh Mengozzi

Delivered in open court in Luxembourg on 17 June 1999.

H. Jung R.M. Moura Ramos

Registrar President