ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
21 October 1996 *

In Case T-107/96 R,

Pantochim SA, a company incorporated under Belgian law, established at Feluy (Belgium), represented by Jacques H. J. Bourgeois, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Marc Loesch, 11 rue Goethe,

applicant,

v

Commission of the European Communities, represented by Gérard Rozet, Legal Adviser, acting as Agent, assisted by Hervé Lehman, of the Paris Bar, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of the Commission's Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for an interim order directing the Commission to require France, in a procedure pursuant to the first subparagraph of Article 93(2) of the EC Treaty, to grant the applicant provisional exemption from duty on biodiesel for a quantity of 20 000 tonnes a year,

* Language of the case: French.

THE PRESIDENT OF THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES

makes the following

Order

Facts

1 The applicant, Pantochim SA, whose registered office is at Feluy (Belgium), is a subsidiary of Società Italiana Serie Acetica Sintetica (hereinafter 'Sisas'), which is established in Milan (Italy). At Feluy Pantochim has a plant for producing diesel oil of vegetable origin, called Sisoil E. Sisoil E is a methyl ester of vegetable oil which may be used on its own or, mixed with classic diesel oils, as a fuel for internal combustion engines and for domestic heating.

The application for exemption from domestic consumption duty

2 Article 32 of the 1992 French Finance Law (Law 91-1322 of 30 December 1991, published in the *Journal Officiel de la République Française* of 31 December 1991, at p. 17229) exempts, until 31 December 1996, from domestic consumption duty esters of rape and sunflower oil used as substitutes for domestic fuel and diesel oil and ethyl alcohol produced from cereals, Jersualem artichokes, potatoes or beet and added to high-grade and regular-grade petrol, and the derivatives of such alcohol. A decree of 27 March 1992, implementing Article 32, lays down the criteria to be fulfilled for that exemption. In particular, it requires that the products concerned should be used in an experimental project and be produced in pilot plants (Articles 3 and 5). In order to become a pilot plant, each establishment or group of establishments must have ministerial approval (Article 6).

3 In November 1992 Sisas indicated to the French authorities that it was interested in obtaining approval for its Pantochim subsidiary and in particular for its Feluy refinery as a pilot plant. As yet, no approval has been granted to it.

4 In particular, by letter of 21 June 1996, addressed to the Pantochim board, the French Minister of Agriculture, Fisheries and Food pointed out that, according to an on-the-spot investigation, the Feluy refinery had a production capacity which was higher than the volume for which approval was sought. Since Council Directive 92/81/EEC of 19 October 1992 on the harmonization of the structures of excise duties on mineral oils (OJ 1992 L 316, p. 12) authorizes Member States to apply exemptions from excise duty or full or partial reductions of excise duty only in relation to pilot projects defined by the capacity of production plant, no approval could be granted for that refinery as a pilot plant. The minister also stated that, since a procedure for determining whether the French legislation was compatible with the common market was pending before the Commission, it was impossible for the French authorities to grant any new approval. He added that if the proposals submitted to the Commission were accepted, allowing the procedures in progress to be wound up satisfactorily, Pantochim could, like any other Community undertaking producing biofuels, apply for approval issued pursuant to a public procedure, on the basis of criteria and rules laid down in strict observance of the rules of competition which would be made known to the interested parties.

The administrative procedure concerning the French legislation exempting biofuels from domestic consumption duty

5 On 7 December 1994 the Commission initiated the procedure provided for in Article 93(2) of the EC Treaty in respect of the French legislation exempting biofuels from domestic consumption duty. The French authorities were notified of this step on 12 December 1994.

6 A Commission communication 'pursuant to Article 93(2) of the EC Treaty [...] concerning aid which France has decided to grant in the biofuels sector' was published in the *Official Journal of the European Communities* on 9 June 1995 (OJ 1995 C 143, p. 8).

7 In that administrative procedure Sisas submitted observations on 29 June 1995. It also requested the Commission, first, 'to find that, because those arrangements are contrary to Article 95 of the Treaty establishing the European Community, the aid granted by France for the production of biodiesel is not compatible with the common market within the meaning of Article 92 of that Treaty', secondly 'to decide that France must amend that aid by allowing biodiesel produced in other Member States and supplied in France to enjoy the same advantages' and thirdly, 'to take the necessary provisional measures by requesting France to approve Sisas' Feluy refinery as a "pilot plant" as soon as possible, provisionally for a quantity of 20 000 tonnes a year for 1995'.

8 Not having received any reply from the Commission, Sisas, by letter of 29 March 1996, sent a warning letter to the Commission. Repeating its requests contained in its letter of 29 June 1995, it asked the Commission, in accordance with Article 175 of the EC Treaty, to take a position within a period of two months. It stated that it reserved 'the right of its subsidiary, Pantochim SA, to claim from the French State and from the European Community reparation for the considerable economic damage which Pantochim has suffered as a result of its exclusion by law from the French market in duty-free biodiesel since 1993'.

9 By letter of 24 May 1996 addressed to the Sisas board, the Commission informed Sisas that its letter of 29 March 1996 had been recorded as a complaint aimed at the initiation of infringement proceedings pursuant to Article 169 of the EC Treaty.

Procedure

10 By application lodged at the Registry of the Court of First Instance on 12 July 1996 Pantochim brought an action for (i) a declaration under Article 175 of the Treaty that the Commission had failed to prohibit, in the procedure commenced under Article 93(2) of the Treaty concerning the reduction of duties on biofuels in France, the discriminatory grant of that tax reduction and (ii) an award of compensation under Articles 178 and 215 of the EC Treaty for the damage which it claims to have suffered as a result of the Commission's failure to act.

11 By separate document lodged at the Registry of the Court of First Instance on 19 July 1996 the applicant made this application under Article 186 of the EC Treaty for an interim order directing 'the Commission to require France, in the procedure under the first subparagraph of Article 93(2) of the EC Treaty, provisionally to grant [to it] the [...] biodiesel quota requested to be exempt from the excise duty applicable'.

12 The Commission submitted its written observations by document lodged at the Court Registry on 1 August 1996.

13 The parties presented oral argument on 7 October 1996.

Law

14 Under the combined provisions of Articles 185 and 186 of the Treaty and Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Regulation 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144, p. 21), the Court may, if it considers that circumstances so require, order that operation of the contested act be suspended or prescribe any necessary interim measures.

15 Article 104(2) of the Rules of Procedure of the Court of First Instance provides that applications for interim measures must state the circumstances giving rise to urgency and the pleas of fact and law establishing a *prima facie* case for the interim measures applied for. Such measures must be provisional in the sense that they must not prejudge the decision on the substance of the case (see the order of the President of the Court of First Instance of 8 October 1996 in Case T-84/96 R *Cipeke* v *Commission* [1996] ECR II-1313, paragraph 23).

Arguments of the parties

Admissibility of the main application

16 The Commission considers that this application must be declared inadmissible because the main application is itself inadmissible on the grounds that the applicant has not observed the procedure laid down in Article 175 of the Treaty and that this procedure is not available to it.

17 First, the Commission points out that, in providing that any person may apply to the Community court after the institution in question has been put on notice to act (second paragraph of Article 175 of the Treaty), the Community legislature intended that the warning letter be addressed by the same person as that bringing the proceedings for failure to act and that in case-law this obligation of prior application is regarded as an essential preliminary formality for the purposes of the admissibility of the action (Case 17/57 *Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority* [1959] ECR 1 and, more recently, the judgment of the Court of First Instance in Case T-28/90 *Asia Motor France* v *Commission* [1993] ECR II-2285). Since, in the present case, the warning letter was sent to the Commission by Sisas whilst the action for failure to act was brought by Pantochim, this application is therefore inadmissible.

18 Moreover, even though Pantochim is a subsidiary of Sisas, the applicant must be regarded, in the Commission's view, as a legal person which is distinct from its parent company, since the procedural rules never take account, in determining the admissibility of an application, of economic links which may exist between legal persons.

19 Secondly, the Commission considers that Pantochim's action for failure to act is also inadmissible because it is not the addressee of the act, concerning the compatibility of French legislation with Community law, which, according to the applicant, the Commission is obliged to adopt. According to the third paragraph of Article 175 of the Treaty, a person may bring proceedings for failure to act only where it is the potential addressee of the legal measure which the institution summoned before the Court is under a duty to adopt (judgment of the Court of Justice in Case 246/81 *Lord Bethell* v *Commission* [1982] ECR 2277, paragraph 16, and order of the Court of First Instance in Case T-3/90 *Prodifarma* v *Commission* [1991] ECR II-1, paragraphs 35 and 37).

20 In particular, in a case such as this, which concerns a procedure in the matter of State aid, Article 93(2) of the Treaty allows undertakings interested in participating in the administrative procedure before the Commission only to submit their observations (Case 70/72 *Commission* v *Germany* [1973] ECR 813, paragraph 19). Since, first, the possibilities of bringing an action under Article 175 of the Treaty are more limited than those provided for by Article 173 and, secondly, the procedure in the matter of State aid is a special procedure, an interested third-party undertaking which has, as in the present case, submitted observations under Article 93(2) of the Treaty is not allowed to bring an action for failure to act in order to have the Commission's failure to adopt a decision censured.

21 Finally, even supposing that it were necessary to assess the admissibility of an action for failure to act in accordance with the conditions laid down in the fourth paragraph of Article 173 of the Treaty as regards the action for annulment, the main action brought by Pantochim must also be regarded as inadmissible. For, according to the case-law of the Court of First Instance, an undertaking cannot be regarded as individually concerned by a decision approving a general aid scheme such as that in question since under such a general system 'the existence of an actual beneficiary, and therefore the existence of an actual competing undertaking, presupposes the practical application of the aid scheme by the grant of individual aids' (Case T-398/94 *Kahn Scheepvaart* v *Commission* [1996] ECR II-479).

22 The applicant, relying on the judgment of the Court of Justice in Case 169/84 *Cofaz* v *Commission* [1986] ECR 391, paragraph 22, considers that the decision which the Commission failed to take affects it by reason of certain characteristics specific to it and factual circumstances which identify it in relation to any other person and therefore distinguish it individually, in the same way as an addressee. It claims that it is the only undertaking to have responded to the Commission's call for observations contained in the communication published in the Official Journal of 9 June 1995. It is also the only undertaking to suffer from the discriminatory arrangements whereby the exemption from duty on biofuels is granted in France, since it is the only producer, amongst Community producers, to be really competitive enough to supply biodiesel in France at a competitive price. Consequently, there can be no doubt that the Commission's inaction affects its 'legitimate interests' since the provisions enacted by France to exempt biofuels from domestic consumption duty substantially affect its position on the relevant market.

23 The applicant emphasizes that the obligation in question is not the Commission's obligation to commence a procedure under the second subparagraph of Article 93(2) of the Treaty but the obligation incumbent on that institution to bring that procedure, once it has been started, to a successful conclusion within a reasonable time, in accordance with the first subparagraph of Article 93(2) of the Treaty. In the present case, having regard to the fact that the warning letter was sent to it on 29 March 1996, the Commission had more than a reasonable period of time in which to bring that procedure to an end (order of the Court of Justice in Case 59/79 *Fédération Nationale des Producteurs de Vins de Table et Vin de Pays* v *Commission* [1979] ECR 2425), especially since it was aware that the French Government sets the duty-free quotas by marketing year and this normally runs from 1 July to 30 June of the following year.

Legality of the interim measure sought

24 The Commission also contests the legality of the measure sought on the ground that it is contrary to the principles laid down by Articles 92 and 93 of the Treaty.

25 First of all, according to the Commission, if granted, the measure sought would, notwithstanding its terms, be addressed to France. But since France is not party to the proceedings, the interim order sought by Pantochim would infringe the procedural rule that, before a protective measure is taken pursuant to Articles 92 and 93 of the Treaty, the Member State concerned must be put in a position to give its views on the planned measure (judgment of the Court of Justice in Case C-301/87 *France* v *Commission* [1990] ECR I-307, paragraph 19).

26 Secondly, the Commission contends that in no case can it require a Member State, in the procedure conducted pursuant to the first paragraph of Article 93(2) of the Treaty, to amend, on an interim basis, aid granted; it can only require payment of the aid to be suspended and ask for the documents, information and data necessary for examining its compatibility with the common market to be forwarded to it (judgments of the Court of Justice in Case C-301/87 *France* v *Commission*, cited above, and in Case C-39/94 *SFEI* v *Commission* [1996] ECR I-3547, paragraph 45).

27 Thirdly and in any event, should the aid prove to be incompatible with the common market, it would be contrary to the principles laid down by Articles 92 and 93 of the Treaty for an undertaking not benefiting from it to acquire entitlement to it.

28 Finally, the Commission refers to case-law (in particular, the order of the President of the Court of Justice in Case 142/87 R *Belgium* v *Commission* [1987] ECR 2589) to the effect that the existence of national remedies enabling the damage to be avoided is a ground for dismissing an application for interim measures. In the present case, the applicant could challenge the ministerial decision to reject its request for approval before the French administrative courts. In so far as the aid in question was, according to the Commission, not notified, the applicant could have also asked the national court, on the basis of Article 93(3) of the Treaty, to order payments of the aid to be suspended, or even recovered (judgments of the Court

of Justice in Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumons* v *French State* [1991] ECR I-5505 and in Case C-39/94 *SFEI* v *Commission*, cited above).

29 The applicant submits that the relevant provisions in this case are, contrary to the Commission's contention, not those contained in Article 93(2) of the Treaty but those contained in Article 93(3). So, the definition of the Commission's powers in the matter of interim measures, as this appears from the case-law cited by the Commission, according to which it has the power only to require that payment of aid be suspended and to request the information necessary for examining whether the aid is compatible with the common market, is not applicable in the present case.

30 In the applicant's view, there is therefore no provision denying the Commission the power to direct the French authorities to amend the conditions for the grant of the aid in question.

31 Furthermore and in any event, the bringing of an action before the French courts challenging the French authorities' refusal to grant it approval cannot affect the legality of the interim measure sought. Moreover, since the role of national courts is simply to ensure that Member States observe their obligations in the event of a failure to notify aid and since, in the present case, according to the applicant, the aid scheme has been notified to the Commission, the national court's involvement has no bearing on the assessment of the admissibility and of the merits of the application for interim measures.

Findings of the President

32 This interim application is for an order directing the Commission to require the French authorities to grant to the applicant a provisional exemption from domestic consumption duty for a quantity of 20 000 tonnes of biodiesel a year, in accordance with Article 32 of the 1992 French Finance Law.

33 The relationship between the measure sought and the Commission's powers in the administrative procedure still in progress must be examined first.

34 It is apparent from the communication concerning the initiation of that administrative procedure that it was initiated by the Commission pursuant to Article 93(2) of the Treaty and that its purpose is to examine the compatibility with the common market of the French legislation in the biofuels sector. According to the Commission, that legislation provides for 'direct aid for biofuels of agricultural origin (esters of rape and sunflower oil and bioethanol produced from cereals, Jerusalem artichokes, potatoes and beet) and indirect aid to certain basic products' (point 2 of the communication). Apparently, the French authorities have introduced this alleged aid scheme without notifying the plan to the Commission and have already exempted from domestic consumption duty certain undertakings which continue to benefit from this measure.

35 As the Commission has pointed out, it is settled case-law that when, in a procedure under Article 93(2) of the Treaty, it finds that aid has been introduced without being notified to it in advance, as Article 93(3) of the Treaty requires, the only interim measure it can take is to direct the Member State concerned to suspend payment of the aid immediately and to provide it, within a period of time determined by it, with all the documents, information and data necessary for examining

whether the aid is compatible with the common market (see, most recently, the judgment in Case C-39/94 *SFEI* v *Commission*, cited above, paragraph 45).

36 However, the interim measure which the applicant seeks from the Court, namely an order directing the Commission to require France to grant to the applicant a provisional, limited exemption from domestic consumption duty, is clearly beyond the powers conferred upon the Commission in relation to the administrative procedure provided for by Article 93(2) of the Treaty.

37 Such a measure would also be contrary to the Community rules governing State aid (Articles 92 and 93 of the Treaty).

38 It follows from the principles underlying the system of rules governing State aid laid down by the Treaty that the scope of interim measures which may be adopted in such an administrative procedure is limited. Article 92(1) of the Treaty lays down a general prohibition of 'aid granted by a Member State or through State resources in any form whatsoever'. That prohibition, as the Court has emphasized in previous cases, is neither absolute nor unconditional since, in particular, Article 92(2) grants the Commission a wide discretion to allow aid, in derogation from the general prohibition laid down in Article 92(1).

39 Article 93 of the Treaty provides for a special procedure enabling the Commission to monitor and keep State aid under constant review. In particular, it prohibits, in paragraph (3), the implementation of proposed aid measures with a view to ensuring that an aid scheme does not take effect until the Commission has had a reasonable period of time in which to examine the planned aid in detail, and, where necessary, to initiate the procedure provided for in Article 93(2) and, if that procedure is initiated, until the Commission has adopted a final decision on the compatibility of the planned aid with the common market.

40 As the Court of Justice has explained, in order for that system to be effective, the Commission must be able to adopt measures to preserve the status quo. The purpose of those measures is, however, only to counteract any breach of the rules of Article 93(3) of the Treaty and, in particular, breach of the prohibition of payment of aid, which applies in principle until the Commission adopts its final decision on its compatibility with the common market (judgments in Case C-301/87 *France* v *Commission*, cited above, paragraphs 15 to 18, and in Case C-39/94 *SFEI* v *Commission*, cited above, paragraphs 35 to 38).

41 It follows that, in such a procedure, any interim measure not having such an aim has no foundation within that system and must be regarded as unlawful.

42 It must, accordingly, be concluded that the measure sought by the applicant in these interim proceedings — an order directing the Commission to require the French authorities to grant Pantochim a provisional, limited exemption from domestic consumption duty, as provided for by Article 32 of the 1992 Finance Law — is not allowed by the Community rules governing State aid.

43 Moreover, it must be observed that the interim measure sought in the present case would have the same content and the same effects as the measure which the Commission has, according to the applicant, failed to adopt. It would, however, not be consistent with the principles governing the distribution of powers between the various Community institutions, as intended by the authors of the Treaty, for the Community judicature to be able to require the Commission to accede to the request for interim measures submitted to it (order of the President of the Court of First Instance in Case T-131/89 R *Cosimex* v *Commission* [1990] ECR II-1, paragraphs 11 and 12).

44 In these interim proceedings the applicant is likewise asking the Court to assume the role of the Commission in assessing the alleged aid and judging whether it may need to be extended to the applicant before the Commission has taken any decision in the matter. Moreover, in making such an interim order the Court would not be addressing it to the defendant institution but to the Member State concerned.

45 It follows from the foregoing considerations that the conditions for the granting of the interim relief applied for are not met and that, therefore, the application must be dismissed without its being necessary to consider the merits of the other pleas raised by the parties.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application for interim measures is dismissed.

2. Costs are reserved.

Luxembourg, 21 October 1996.

H. Jung — A. Saggio

Registrar — President