JUDGMENT OF THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)
17 February 1998 *

In Case T-107/96,

Pantochim SA, a company incorporated under Belgian law, established at Feluy (Belgium), represented by Jacques 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,

supported by

French Republic, represented initially by Catherine de Salins, Assistant Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Frédéric Pascal, Special Adviser in the same directorate, subsequently by Kareen Rispal-Bellanger, Assistant Director in the same directorate, and Frédéric Pascal, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

intervener,

* Language of the case: French.

APPLICATION for (i) a declaration that the Commission unlawfully failed to act in not deciding, under Article 93(2) of the Treaty, that France should modify the conditions for the grant of aid which it had accorded for biofuels and for (ii) an award of compensation for the damage allegedly caused to the applicant by that failure to act,

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

composed of: B. Vesterdorf, President, C. P. Briët, P. Lindh, A. Potocki, and J. D. Cooke, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 7 October 1997,

gives the following

Judgment

Facts

1 The applicant, Pantochim SA, whose registered office is at Feluy (Belgium), is a subsidiary of Società Italiana Serie Acetica Sintetica SpA (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.

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) exempted, until 31 December 1996, from domestic consumption duty esters of rape and sunflower oil and ethyl alcohol produced from cereals, Jerusalem artichokes, potatoes or beet and added to high-grade and regular-grade petrol, and the derivatives of such alcohol (hereinafter 'biofuels'). A decree of 27 March 1992, implementing Article 32, lays down the criteria to be fulfilled in order to obtain that exemption. In particular, it requires that the products concerned should be used in an experimental project and be produced in pilot plants.

3 Article 30 of the amending French Finance Law for 1993 (published in *Journal Officiel de la République Française* of 31 December 1993, p. 18526) also required that the products subject to the exemption should be obtained from agricultural raw materials 'produced on parcels of set-aside land not used for food growing, within the meaning of Commission Regulation (EEC) No 334/93 of 15 February 1993'.

4 Without a fiscal exemption of the kind described above, it would not be economically worthwhile to produce biofuels owing to the high costs of their production.

5 In November 1992, SISAS indicated to the French authorities that it was interested in obtaining approval for its Feluy refinery as a pilot plant and officially applied for that approval in March 1993. However, no such approval has yet been granted

to it by the French authorities. By letter of 14 June 1996, addressed to the Pantochim board, the French Minister for 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 harmonisation of the structures of excise duties on mineral oils (OJ 1992 L 316, p. 12) authorises Member States to apply exemptions from excise duty or full or partial reductions of excise duty only in relation to pilot projects defined by production plant capacity, 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 Community law was pending before the Commission (see below), it was impossible for the French authorities to grant any new approval.

6 On 7 December 1994 the Commission initiated the procedure provided for in Article 93(2) of the 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. 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 [was] 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 response from the Commission, SISAS, by letter of 29 March 1996, sent a letter to the Commission requesting it to act within a period of two months, in accordance with Article 175 of the Treaty, and repeating its requests contained in its letter of 29 June 1995. It also 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 [had] 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.

10 On 18 December 1996 the Commission adopted Decision 97/542/EC on tax exemptions for biofuels in France (OJ 1997 L 222, p. 26, hereinafter 'the Decision of 18 December 1996'), which was notified to the French authorities on 29 January 1997. It provides: 'The aid granted in France in the form of a tax exemption for biofuels of agricultural origin ... is illegal, having been granted in contravention of the procedural rules laid down in Article 93 (3) of the Treaty. This aid is incompatible with the common market within the meaning of Article 92 of the Treaty. France is required to discontinue the aid referred to in Article 2 within two months of notification of this Decision.'

11 In the body of the Decision of 18 December 1996 the Commission explained:

'The exclusion of certain basic products from the benefits of tax exemption is a strong argument for asserting that this measure constitutes aid within the meaning of Article 92(1) of the Treaty, since it distorts competition by giving an advantage to certain agricultural products, and may, for the same reasons, affect trade between the Member States. ... no explanation has been given to justify the need to limit the measure to crops produced on set-aside land' (Part IV, point 5).

'As the tax exemption applied only to biofuels produced from certain basic products, the Commission takes the view that the measure discriminates against other biofuels made from other basic products (other types of product, or the same type grown on land other than set-aside land). Those other biofuels will be subject in France to the normal rate of excise. The aid measure, in the form of tax exemption, therefore constitutes an infringement of Article 95 of the Treaty since it is restricted to biofuels produced from a limited number of basic products ... and biofuels imported from other Member States and produced from other basic products will be subject to a higher tax' (Part V, point 4).

'... Therefore, any government aid in the field covered by Regulation (EEC) No 1765/92 would be equivalent to State interference in the complete and comprehensive system of the common organisations of markets.

This exemption, limited in certain cases, from 1994, to crops grown on set-aside land, thus constitutes an infringement of Regulation (EEC) No 1765/92' (Part VI, point 2).

'Consequently, indirect aid to the basic products contravenes the arrangements for common organisation of markets under Regulation (EEC) No 1765/92 and

Article 95 of the Treaty, ... and cannot therefore be eligible for any of the derogations provided for in Article 92(3) of the Treaty ...' (Part VI, point 4).

'... This leads to the conclusion that from the point of view of the broad structure of the system, the substantive effect of the aid bypassed the manufacturers, technically the direct recipients, and benefited the producers of the raw materials, who became the indirect recipients.

...

In view of the temporary nature of the advantage to the biofuel manufacturers and of the specific nature of the infringement at the level of farmers, who were the actual beneficiaries, it seems unnecessarily severe to require recovery of the amounts granted under this measure, which is basically in agreement with Community policy, and which (apart from the procedural aspects) is essentially unlawful only in terms of the excessively restrictive approach to the indirect recipients of aid' (Part VII, point 3).

12 Consequently, no obligation to recover the aid was imposed on the French Republic.

Procedure

13 It is in that context that, by an application lodged at the Registry of the Court on 12 July 1996, Pantochim brought this action.

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

15 By order of 21 October 1996 in Case T-107/96 R *Pantochim* v *Commission* [1996] ECR II-1361, the President of the Court of First Instance dismissed the application for interim measures lodged by Pantochim and reserved costs.

16 By application lodged at the Registry of the Court on 18 November 1996 the French Republic sought leave to intervene in support of the defendant. By order of 9 January 1997 the President of the Third Chamber, Extended Composition, of the Court granted the French Republic leave to intervene in the case.

17 Upon hearing the Report of the Judge-Rapporteur, the Court of First Instance (Third Chamber, Extended Composition) decided to open the oral procedure and, pursuant to Article 65 of the Rules of Procedure, requested production of certain documents. The Court also asked the parties to answer certain questions in writing, and orally at the hearing. The parties complied with those requests.

18 The parties presented oral argument and replied to the questions of the Court at the hearing on 7 October 1997.

Forms of order sought by the parties

19 The applicant claims that the Court should:

— declare that the Commission has infringed the Treaty by failing to decide, pursuant to the first subparagraph of Article 93(2) thereof, that France must alter the conditions governing the grant of aid for biofuel so that they comply with the rules of the Treaty;

— find the Community liable for the harm resulting from the Commission's failure to act and order the Commission to make good that harm, provisionally assessed at FF 50 508 729;

— order the Commission to pay the costs.

20 In its rejoinder, the Commission contends that the Court should:

— declare that the action for failure to act has lost its purpose owing to the adoption of the Decision of 18 December 1996;

— dismiss the claim for damages lodged by Pantochim;

— order the applicant to pay the costs.

21 The French Government submits that the Court should:

— declare the action for failure to act to have lost its purpose in so far as the Commission has adopted the Decision of 18 December 1996.

Failure to act

Arguments of the parties

22 The applicant states that, by letter of 29 March 1996, SISAS, pursuant to Article 175 of the Treaty, requested the Commission on behalf of Pantochim to adopt a position within two months and that after that period had expired, the Commission had still not adopted a position.

23 It charges the Commission with failing to adopt within a reasonable period, in accordance with the first subparagraph of Article 93(2) of the Treaty, a decision requiring France 'to alter the conditions governing the grant of aid for biofuel so that they comply with the rules of the Treaty'. The Commission could only prohibit conditions for the grant of the aid concerned if they were in clear breach of Article 95 of the Treaty.

24 It considers, finally, that apart from any other possibly illegal aspects of the aid concerned, its claim for an order requiring the discriminatory conditions for the grant of aid to be eliminated was justified in that it was 'perfectly separable from the aid scheme'. In sheltering behind the other potential illegalities, the Commission failed to 'give first aid on the ground that it first had to carry out a thorough diagnosis'. Any decision requiring the French Government to abolish the aid in question would not, in any case, restore normal competition.

25 The Commission, in its rejoinder, and the French Government, in its written observations, submit that, owing to the adoption of the Decision of 18 December 1996, the action for failure to act has lost its purpose so that there is no further need for the Court to adjudicate.

26 In its reply to the letter from the Court requesting it to adopt a position on that submission, the applicant, pointing out that its action for failure to act is for a 'declaration that the Commission ... has infringed the ... Treaty by failing to decide, pursuant to the first subparagraph of Article 93(2) thereof, that France must alter the conditions governing the grant of aid for biofuels so that they comply with the rules of the Treaty', argues essentially that, although finding in its decision that the aid measure in the form of an exemption constitutes an infringement of Article 95 of the Treaty, the Commission has not adopted the decision for which the failure to act is being prosecuted. Rather than requiring the French Republic to comply with Article 95 of the Treaty when granting aid, the Commission found that the aid in question fulfilled the conditions laid down in Article 92(1) of the Treaty without being eligible for any of the derogations provided for in paragraphs 2 and 3 of those articles and consequently declared it incompatible with the common market.

27 It also observes that the French Republic, whilst still maintaining the aid scheme found to be unlawful by the Commission, has still not granted it the benefit of the aid.

Findings of the Court

28 It must be observed first of all, that, according to settled case-law, the remedy provided for in Article 175 of the Treaty is founded on the premiss that unlawful inaction on the part of an institution enables an action to be brought before the Community judicature in order to obtain a declaration that the failure to act is contrary to the Treaty, in so far as it has not been repaired by the institution concerned. The effect of that declaration, under Article 176 of the Treaty, is that the defendant institution is required to take the necessary measures to comply with the judgment of the Community judicature, without prejudice to any actions to establish non-contractual liability to which the aforesaid declaration may give rise (judgment of the Court of Justice in Joined Cases C-15/91 and C-108/91 *Buckl and Others* v *Commission* [1992] ECR I-6061, paragraph 14; judgment of the Court of First Instance in Case T-28/90 *Asia Motor France and Others* v *Commission* [1992] ECR II-2285, paragraph 36).

29 Where the act whose omission is the subject of proceedings was adopted after they were brought but before pronouncement of judgment, a declaration of this Court finding the initial failure to act to be unlawful can no longer lead to the consequences envisaged by Article 176 (judgment in Case T-212/95 *Oficemen* v *Commission* [1997] ECR II-1161, paragraphs 65 to 68). It follows that, in such a case, just as in the case where the defendant institution has responded to a request to act within the two-month period, the action has lost its purpose.

30 It is also clear from settled case-law that Article 175 refers to a failure to act in the sense of failure to take a decision or to define a position, and not the adoption of a measure different from that desired or considered necessary by the persons concerned (Case 8/71 *Deutscher Komponistenverband* v *Commission* [1971] ECR 705, paragraph 2, and Joined Cases 166/86 and 220/86 *Irish Cement* v *Commission* [1988] ECR 6473, paragraph 17). In the present case, it is undeniable that the adoption of the Decision of 18 December 1996 constitutes a definition of position on the Commission's part, within the meaning of Article 175 of the Treaty in response to the request to act addressed to the Commission on 29 March 1996.

31 Consequently, the fact that the decision adopted by the Commission on 18 December 1996 only declares that the aid concerned is unlawful and incompatible with the common market within the meaning of Article 92 of the Treaty and requires the French Republic to abolish the aid concerned without, however, requiring it to alter the conditions for the grant of the aid so as to render it compatible with the rules of the Treaty makes no difference in this regard.

32 The Court therefore concludes that there is no need to adjudicate on the application for a declaration of failure to act.

The claim for damages

Arguments of the parties

33 The applicant considers, essentially, that in omitting to take a decision in the procedure initiated under Article 93(2) of the Treaty and in failing to require the French Republic to alter the conditions governing the grant of the exemption concerned, the Commission was guilty of unlawful inaction rendering the Community liable. In failing for such a long time to adopt a decision, the Commission denied it the act which it needed in order for it to be able to assert a right to damages against the French administration in relation to the past and failed to prevent it from suffering future, but certain, damage resulting from its exclusion from the French market in the new marketing year.

34 It considers that, in the present case, the Commission should have taken action to end the discriminatory conditions governing the grant of the exemption and that 'faced with an accusation of failing to assist a person in danger, the defendant cannot escape its civil liability arising from this omission by claiming that the damage was caused by the person causing the danger'. It also points out that the Commission has not directed France to suspend payment of the aid.

35 It also states that the broad discretion which Article 92(3) of the Treaty confers on the Commission cannot go so far as to allow a clear breach of the basic rules of the Treaty.

36 As regards the damage suffered, the applicant claims that it is double in that it has suffered losses and loss of future profit. In November 1992 it had applied to

supply the French market by taking advantage of the abovementioned exemption and the French administration was on the point of fixing, for the following year, which was to begin on 1 July 1996, the total quantity of biofuel to be exempt from duty and dividing quotas between beneficiaries. It calculates that, as a result, it has incurred losses consisting of the 'contribution' margin and loss of profit, for the years 1993 to 1997, which it provisionally estimates at FF 50 508 729.

37 It accepts that at the present stage it is difficult to estimate precisely the damage caused by the Commission's inaction in that determination of the damage in the past 'depends on an evaluation of damages which a French court would award if the Commission had decided ... that the conduct of the French administration towards the applicant [was] unlawful'.

38 The applicant considers that the causal link between the damage and the Commission's inaction is evident from its probable inability to assert its right to damages against the French administration and from the lack of constraint on the French Republic to adopt different conduct for the marketing year starting on 1 July 1996.

39 The Commission contends first of all that, since it cannot be accused of a failure to act, no unlawful conduct can be imputed to it and that, even if it were to be found guilty of inaction, the applicant has not demonstrated that it constituted a breach of a high-ranking rule of law for the protection of individuals or a serious and

manifest disregard of the limits on the exercise of its powers (judgment of the Court of First Instance in Case T-120/89 *Stahlwerke Peine-Salzgitter* v *Commission* [1991] ECR II-279, paragraph 74).

40 It points out in this regard that Article 92(3) of the Treaty confers on it a broad discretion to decide whether or not to allow aid schemes or to impose alterations (judgment of the Court of Justice in Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 36).

41 It also points out that it is not sufficient for failure to act to be found in order for the Community to incur liability *ipso facto*, as is clear from the judgment of the Court of First Instance in Case T-387/94 *Asia Motor France and Others* v *Commission* [1996] ECR II-961, paragraphs 107 and 108.

42 The Commission goes on to argue that, as far as the damage suffered is concerned, the request to act and any failure to act is, in any event, likely to affect only the year 1996 to 1997 and not the years prior to the letter requesting action. To that extent, the damage would depend on the attitude of the French administration during that period.

43 In any event, damage arising from the impossibility of receiving unlawful aid could not afford entitlement to compensation.

44 Finally, the Commission points out that, as far as a causal link is concerned, the second paragraph of Article 215 of the Treaty concerns only damage imputable to Community institutions or their servants, to the exclusion of any liability of the Member States (judgments of the Court of Justice in Case 101/78 *Granaria* [1979] ECR 623 and Case 109/83 *Eurico* v *Commission* [1984] ECR 3581).

45 In this regard, it disputes the fact that its alleged failure to act is an obstacle to assertion of a right to damages against the French administration since the applicant had the possibility of asserting its rights before a national court by invoking the direct effect of Article 93(3) of the Treaty on the ground that the aid scheme concerned had not been notified (judgment in *SFEI*, cited above) or the direct effect of Article 95 of the Treaty, which prohibits discriminatory taxation.

46 It considers that it is clear from paragraph 36 of the Order of the President of the Court of First Instance of 21 October 1996, cited above, that the Commission could not 'render first aid' in the way desired by the applicant. It considers that it could adopt a provisional decision suspending the aid but that this was not what was requested by Pantochim.

47 It concludes that it did not have to address the question whether the conduct of the French administration towards Pantochim was unlawful and that its only task was to decide whether the aid scheme concerned was, as a whole, compatible or not with the common market.

Findings of the Court

48 According to well-established case-law, the Community can incur non-contractual liability only on fulfilment of a number of conditions as regards the unlawfulness

of the action alleged against the Community institution, actual damage and the existence of a causal link between the wrongful act and the damage complained of (judgment of the Court of First Instance in Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others* v *Commission* [1995] ECR II-2941, paragraph 80).

49 The Court considers that it is clear from a reading of the application, the request to act as clarified by the letter from the applicant's parent company of 29 June 1995 (see paragraphs 7 and 8 of this judgment), the various written pleadings of the applicant and its statements at the hearing that this application for damages essentially seeks a declaration that the Commission refrained, in breach of the Treaty, from deciding provisionally or definitively, in accordance with the first subparagraph of Article 93(2) of the Treaty, that the French Republic should alter the aid by allowing biodiesel produced in other Member States and supplied in France to attract the same advantages as those granted to companies established in France that are active in the same sector and that the applicant should obtain from the competent French authorities tax exemption for biodiesel supplied in France and, consequently, hold the Community liable for the damage resulting from the Commission's failure to act.

50 The measures required by the applicant go beyond those which the Commission is empowered to adopt.

51 It is clear, *first*, from the case-law of the Court of Justice and the Court of First Instance that when, in a procedure under Article 93(2) of the Treaty, the Commission 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 — even if only partially, in accordance with the judgment of the Court of Justice in

Case 74/76 *Iannelli & Volpi* [1977] ECR 557, paragraphs 14 to 17 — and to provide it, within a period of time determined by the Commission, with all the documents, information and data necessary for examining whether the aid is compatible with the common market (see the judgment in Case C-39/94 *SFEI* v *Commission*, cited above, paragraph 45, and the order in *Pantochim* v *Commission*, cited above, paragraphs 35 and 36). However, the interim measure which the applicant seeks from the Commission, which in effect requires it to direct France to exempt the applicant from domestic consumption tax, is clearly beyond the powers conferred upon the defendant institution in the administrative procedure provided for by Article 93(2) of the Treaty.

52 *Secondly*, it is clear from the wording of Article 93(2) of the Treaty that, confronted with incompatible aid, the Commission must direct the Member State concerned to 'abolish or alter' the aid within a period of time to be determined by the Commission. However, the two measures which the applicant seeks from the Commission, as explained above, lie outside the powers conferred on the Commission with a view to terminating the administrative procedure provided for by Article 93(2) of the Treaty, in so far as such a request, seeking to obtain aid, goes beyond ordering abolition or alteration of aid, as allowed by Article 93(2) of the Treaty.

53 Consequently, the Commission cannot be accused of unlawful conduct in refusing, by its Decision of 18 December 1996, to adopt the measures demanded by the applicant.

54 It follows from the foregoing that the first condition to be fulfilled in order for the Community to incur non-contractual liability, namely the existence of unlawful conduct on the Commission's part, is not fulfilled in this case.

55 Consequently, the action for damages must be dismissed.

Costs

56 Under Article 87(6) of the Rules of Procedure, where a case does not proceed to judgment, costs are in the discretion of the Court. 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.

57 In the present case, the Court finds that, since grant of the measure demanded of the Commission by the applicant has been found, in the examination of the action for damages, to be legally impossible, the action for failure to act brought by the applicant could not have been successful in any event. The applicant must therefore be ordered to pay all the costs, including those relating to the interim proceedings.

58 Under Article 87(4) of the Rules of Procedure, the Government of the French Republic is to bear its own costs.

On those grounds,

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

hereby:

1. **Declares that there is no need to adjudicate on the application for a declaration of failure to act;**

2. **Dismisses the action for damages as unfounded;**

3. **Orders the applicant to pay the costs, including those relating to the interim proceedings;**

4. **Orders the Government of the French Republic to bear its own costs.**

Vesterdorf Briët Lindh

Potocki Cooke

Delivered in open court in Luxembourg on 17 February 1998.

H. Jung B. Vesterdorf

Registrar President