JUDGMENT OF THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)

27 September 2000 *

In Case T-184/97,

BP Chemicals Ltd, established in London (United Kingdom), represented by J. Flynn, Barrister, and J.A. Rodriguez, Solicitor, with an address for service in Luxembourg at the Chambers of Loesch and Wolter, 11 Rue Goethe,

applicant,

v

Commission of the European Communities, represented by N. Khan, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

French Republic, represented by K. Rispal-Bellanger, Head of Subdirectorate in the International, Economic and Community Law Directorate of the Ministry of

* Language of the case: English.

Foreign Affairs, and C. Vasak, Secrétaire-Adjoint in the same directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

intervener,

APPLICATION for the annulment of Commission Decision SG(97) D/3266 of 9 April 1997 concerning an aid scheme for biofuels in France,

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

composed of: A. Potocki, President, K. Lenaerts, J. Azizi, M. Jaeger and A.W.H. Meij, Judges,

Registrar: B. Pastor, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 September 1999,

gives the following

Judgment

Legislative background

1 The sixth recital in the preamble to 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) states that 'it is appropriate to permit Member States to apply on an optional basis certain... exemptions or reduced rates within their own territory where this does not give rise to distortions of competition'.

2 Under Article 1(1) of that directive, 'Member States shall impose a harmonised excise duty on mineral oils in accordance with this Directive'. Thus, pursuant to Article 3, '[i]n each Member State, mineral oils shall be subject to a specific excise duty calculated per 1 000 litres of product at a temperature of 15 °C'.

3 Article 8(2) of Directive 92/81, as amended by Council Directive 94/74/EC of 22 December 1994 (OJ 1994 L 365, p. 46) provides:

'without prejudice to other Community provisions, Member States may apply total or partial exemptions or reductions in the rate of duty to mineral oils used

under fiscal control:... (d) in the field of pilot projects for the technological development of more environmentally-friendly products and in particular in relation to fuels from renewable resources ...'.

4 Finally, Article 8(4) empowers the Council, acting unanimously, to authorise any Member State to introduce exemptions other than those expressly provided for in Directive 92/81.

Facts

5 The applicant, BP Chemicals Ltd, is the main European producer of synthetic ethanol. However, it is not engaged in the production of ethanol of agricultural origin. It is a wholly owned subsidiary of BP Amoco plc (formerly The British Petroleum Company plc).

The aid schemes at issue

6 The French Republic, by the Finance Law for 1992 (Law No 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 customs duty esters of rape and sunflower oil used as substitutes for domestic heating oil and diesel 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.

- On 25 July 1994 the applicant made a complaint to the Commission regarding that aid scheme.

8 By a communication published in the *Official Journal* on 9 June 1995 (OJ 1995 C 143, p. 8), the Commission informed the interested parties of its decision to initiate the procedure provided for in Article 93(2) of the EC Treaty (now Article 88(2) EC)) regarding that aid scheme implemented by the French authorities and asked those wishing to do so to submit their comments.

9 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 provides, *inter alia*:

'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.'

10 The Commission's principal objections to that scheme were concerned with the restricted nature of the agricultural products from which the biofuels could be manufactured and the requirement that it must be grown on set-aside land.

11 In November 1996 the French authorities notified an amended biofuel aid scheme (hereinafter 'the contested scheme') to the Commission.

12 By decision of 9 April 1997 the Commission declared the contested scheme compatible with the common market under Article 93(3) of the Treaty (hereinafter 'the contested decision').

13 That decision was adopted without any communication being published in the *Official Journal* to allow interested third partes to submit their comments. The applicant obtained a copy of that decision on 11 June 1997. The decision was not published in the *Official Journal.*

14 The Commission stated in the text of the contested decision:

'(Page 2) France envisages granting a reduction in the Domestic Tax On Petroleum Products (TIPP) for certain products obtained from vegetable raw materials intended to be incorporated in fuels or combustibles....

The marketing of the products in question will qualify for total or partial exemption from TIPP, subject to an annual appropriation, in order to compensate in part for the excess production cost of such products as compared with fossil fuels...

There will be one exemption rate for esters and one for ETBEs...

(Page 3) The benefit of that exemption from TIPP will be granted to the biofuel production units (sites) approved by your authorities following an invitation to tender published in the *Official Journal of the European Communities*. That approval will authorise the units in question to market in France a specified volume of biofuels which will enjoy the tax exemption provided for by the annual Finance Law...

(Page 7) The biofuels sector involves trade and therefore competition between the Member States. Clearly, biofuels are in competition with most fuels and combustibles of fossil origin.

In particular, ETBEs compete with methyl-tertio-butyl ester (MTBE) obtained from methanol which is normally produced from natural gas, which makes it possible to achieve production costs which are about half of those for ETBEs. Those two products are perfectly substitutable and are used to increase the octane content of lead-free petrol...

As a preliminary point, it must be borne in mind that, according to your authorities, the measures which they have so far taken to promote biofuels have been limited to studying the technical feasibility of producing them in pilot units and incorporating them in fuels and combustibles marketed in their territory. At present, it is necessary to demonstrate the economic feasibility of the biofuels sector and to achieve improvements in the economic performance thereof...

Since biofuels compete with fuels and combustibles of fossil origin as additives and substitutes and are the subject of intra-Community trade, the aid in question is liable to affect such trade and to distort competition...

(Page 9) Since the intended mechanism has the effect of developing a sector of activity which it is sought to promote in the Community, it is appropriate to make sure that that mechanism does not adversely affect trade to an extent contrary to the common interest. In that connection, the derogation provided for by Article [92(3)(c)] can apply only if the mechanism in question lays down objective criteria in the conditions of eligibility for interested undertakings... and there is no discrimination in the choice by the public authorities of the production units which will be able to benefit from tax relief...

(Page 11) On the other hand, the question arises as to the extent to which the production capacity developed in France as a result of the aid scheme which the Commission has just declared illegal and incompatible with the Treaty is to be taken into account in determining the volumes for which a unit may apply for approval.

Needless to say, there is no question of rendering the eligibility of such undertakings more complicated than for other potentially interested producers. Nevertheless, it is advisable to avoid a situation where the only actual beneficiaries of the mechanism are French producers of biofuels, by virtue of their existing availability of production capacity developed on the basis of an aid scheme not in conformity with Community law.

The Commission has already dealt with this question in the abovementioned decision in which it considered that "the advantage to the manufacturers [of biofuels] of the direct aid was temporary, or at least marginal, although not quantifiable. While it did enable them to supply biofuels at a competitive price, the quantities concerned were generally not very large in relation to the market for fuels in general"...

(Page 12) In conclusion, the plan for an exemption mechanism as notified by your authorities does not distort competition or affect trade to an extent contrary to

the common interest since no discrimination is involved as regards the eligibility of undertakings and there is no discretionary element as regards the choice of beneficiaries or the grant of approvals. It may therefore be granted the derogation provided for by Article 92(3)(c) as being intended to facilitate the development of certain activities, in view of the fact that it forms part of the strategy of reducing dependence on petroleum for energy, developing alternative energy sources and making better use of agricultural resources...

Finally, the Commission finds that the present notification concerns a reduction of excise duties covered by Directive 92/81...

(Page 13) On the basis of the information given by the French authorities, it seems that what is involved here is the "implementation of a limited tax exemption programme, designed to demonstrate the industrial feasibility of the biofuels sectors and to achieve improvements in the economic performance thereof."

It also seems that this programme is of limited scope, since biofuels at present in France account for only about 0.5% of the consumption of petroleum products and 0.8% of the fuels market.

Rigorous monitoring of products is envisaged in order to monitor any incidental effects of the use of products of vegetable origin and to keep the consumer informed and protected.

Additional tests will also be carried out on the stability of the product in storage and corrosion problems.

For all those reasons, it appears that the mechanism notified has the characteristics of a pilot project within the meaning of Article 8(2)(d) of Directive 92/81/EEC...

In the light of the above considerations, I have the honour to inform you that the Commission has decided not to raise objections under the provisions on State aid regarding the exemption from the Taxe Intérieure sur les Produits Pétroliers which France intends granting for certain volumes of ETBEs and methyl esters...'

15 In the amending Finance Law for 1997 (Law No 97-1239 of 29 December 1997, published in the *Journal Officiel de la République Française* of 29 and 30 December 1997, at p. 19101) the French Republic made provision, in Article 25, for partial exemption from the TIPP, which was set at FRF 230 per hectolitre for esters of vegetable oils incorporated into domestic fuel or into diesel oil and FRF 329.50 per hectolitre for the alcohol content of the derivatives of ethyl alcohol (ETBE in particular) of agricultural origin incorporated in high-grade fuels and petrol. That exemption from duty is given to the production units approved by the French authorities following a tendering procedure announced in a notice published in the *Official Journal of the European Communities*.

16 A notice of invitation to tender for approval of biofuel production units, for maximum volumes of 350 000 tonnes of esters and 270 000 tonnes of ETBE, was published in the *Official Journal* of 19 November 1997 (OJ 1997 C 350, p. 26). By letter of 18 February 1998 the French authorities notified the details of the scheme to the Commission together with the results of the abovementioned invitation to tender. Four applications for approval were then lodged, covering a total volume of 227 600 tonnes per year for the ETBE sector.

The biofuels market

17 'Biofuel' is a generic term which, strictly, applies only to combustible material of non-fossil biological origin. The term is frequently used more loosely to describe blended fuels containing fossil fuel as well as 'biofuel' in the strict sense of the word.

18 Thus, biofuels in the broad sense, of the kind at issue in these proceedings, may be divided into two large categories: ethanol, which is used as such as a fuel, albeit only experimentally at present, and bio-additives which are used to increase the octane level of fuel. The second category can in turn be divided into two sub-categories: bio-additives for diesel and bio-additives for petrol.

19 The contested decision relates essentially to the measures provided for in the contested scheme which relate to the second of those two sub-categories: first, ETBE, which is used as a bio-additive for petrol and, second, esters derived from rape and sunflower seed oils, which are used as additives in diesel and domestic heating fuel. In these proceedings, the applicant's objection to the contested decision relates essentially to the measures under the contested scheme which relate to the ETBE sector.

20 ETBE is produced by a catalytic reaction between isobutylene (a petro-chemical product) and ethanol (commonly known as alcohol) in approximately equal quantities. Ethanol can be produced either from agricultural products ('bioethanol') or synthetically by reacting ethylene (a petro-chemical product) with water.

21 MTBE, which is produced by a catalytic reaction between isobutylene and methanol, which is obtained from methane, that is to say natural gas, can also be used to increase the octane level of petrol.

Procedure

22 The applicant brought this action, under Article 173 of the EC Treaty (now, after amendment, Article 230 EC), by application lodged at the Registry of the Court of First Instance on 20 June 1997.

23 By application lodged at the Registry of the Court of First Instance on 25 September 1997, the French Republic applied for leave to intervene in support of the form of order sought by the defendant.

24 By order of the President of the Third Chamber, Extended Composition, of 9 December 1997, the application for leave to intervene was granted.

25 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber, Extended Composition) decided to open the oral procedure. As a measure of organisation of procedure, it called on the parties to give written answers to certain questions. The parties complied with that request. After receiving the written replies of the defendant, the applicant requested, by letter of 7 September 1999, that it should produce certain additional documents.

26 The parties presented oral argument and replied to the questions of the Court at the hearing on 15 September 1999.

Forms of order sought

27 The applicant claims that the Court of First Instance should:

— annul the contested decision;

— order the defendant to pay the costs;

— order the intervener to pay the costs occasioned by its intervention.

28 The Commission, supported by the French Republic, contends that the Court of First Instance should:

— dismiss the application as inadmissible in relation to the decision not to raise objections to the scheme as it concerns esters and as unfounded as to the remainder of the application:

— order the applicant to pay the costs.

Admissibility

Arguments of the parties

29 The applicant states, first, that it is one of the principal producers of synthetic ethanol, a product competing with bioethanol, which benefits from the contested scheme. Since the contested decision was adopted without recourse to the procedure provided for in Article 93(2) of the Treaty, the applicant contends that it has standing to bring proceedings by virtue of the judgment of the Court of Justice in Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487. It submits in that connection that the Commission wrongly failed to initiate a procedure under Article 93(2).

30 The applicant also contends that the Commission cannot challenge its standing to take action against the contested decision in so far as it relates to the esters sector since the contested aid scheme covers both ETBE and esters without distinction.

31 The Commission does not challenge the standing of the applicant to challenge the contested decision in so far as it relates to the ETBE sector. It contends, however, that the applicant has no standing as regards the part of the decision concerning esters. It states that the applicant has never made any affirmations as to its interest in esters. The circular argument put forward by the applicant in that connection in its reply hides, in the Commission's submission, the fact that the two sectors at issue are not interdependent.

32 The French Republic submits that the applicant cannot be regarded either as an undertaking which is 'concerned' within the meaning of Article 93(2) of the

Treaty or as one to which the contested decision is of direct and individual concern. Consequently, it contends the application is inadmissible in its entirety.

Findings of the Court

33 A decision must first be given on the plea of partial inadmissibility raised by the Commission.

34 It must be borne in mind that, pursuant to the fourth paragraph of Article 173 of the Treaty, a natural or legal person may contest only measures which produce binding legal effects capable of affecting that person's interests by bringing about a significant change in its legal situation (Case T-117/95 *Corman* v *Commission* [1997] ECR II-95 and Case T-178/94 *ATM* v *Commission* [1997] ECR II-2529, paragraph 53). Consequently, where a measure against which an action for annulment has been brought comprises essentially distinct parts, only those parts of that measure which produce binding legal effects capable of bringing about a significant change in the applicant's legal situation can be challenged.

35 In this case, the Court finds that the contested decision relates to aid measures applicable to two distinct biofuel sectors as far as the composition and use of those biofuels and the markets which they affect are concerned. It must be observed in that connection that the arguments developed by the applicant in support of its four substantive pleas in law relate essentially solely to the measures applicable to the ETBE sector alone. The applicant also relies on its status as a producer of synthetic ethanol, a product competing with one of the two components of ETBE, bioethanol, as a basis for its *locus standi*.

36 In those circumstances, it must be concluded that the contested decision, in so far as it relates to measures concerning the esters sector, does not bring about a significant change in the applicant's legal situation and does not therefore affect its interests.

37 The present action, to the extent to which it relates to the measures in the contested scheme applicable to the esters sector, is therefore inadmissible.

38 As regards, next, the French Republic's plea of inadmissibility, it must be emphasised that, by virtue of the fourth paragraph of Article 37 of the EC Statute of the Court of Justice, which is applicable to procedure before the Court of First Instance by virtue of the first paragraph of Article 46 of that statute, submissions made in an application to intervene are to be limited to supporting the submissions of one of the parties.

39 The French Republic's plea of inadmissibility must therefore be rejected as going beyond the defendant's claim that the present action is partially inadmissible. The defendant challenged the admissibility of the action only in so far as it relates to the part of the contested decision concerning measures applicable to the ETBE sector.

40 In this case, it is unnecessary for the Court to consider of its own motion the question of the admissibility of the action with regard to the part of the decision relating to the ETBE sector under the contested scheme.

Substance

41 In this action, the applicant puts forward, essentially, four pleas in law. The first alleges infringement of Article 92(3) of the EC Treaty (now, after amendment, Article 87(3) EC). The second alleges infringement of Directive 92/81. The third alleges infringement of Article 95 of the EC Treaty (now, after amendment, Article 90 EC). The last plea alleges infringement of Article 190 of the EC Treaty (now Article 253 EC).

42 For reasons which will be explained in due course, the Court will consider first the plea alleging infringement of Directive 92/81.

Arguments of the parties

43 The applicant submits that Article 8(2)(d) of Directive 92/81, in so far as it relates to 'pilot projects for the technological development of more environmentally-friendly products', was not applicable to this case. The contested scheme does not in any way pursue technological development but is entirely oriented towards industrial production. The only possible exception in this case would therefore be a Council decision adopted in accordance with Article 8(4) of Directive 92/81.

44 It also observes that, in the contested decision, the Commission expresses the view that the contested scheme falls within the scope of Article 8(2)(d) of Directive 92/81 without attempting to explain why it took the opposite view in its decision of 18 December 1996.

45 The follow-up of the use of products of vegetable origin, information for consumers and tests of the stability of the product in storage and on corrosion problems referred to in the contested decision likewise cannot lead to the conclusion that the beneficiary undertakings operate as 'pilot plants' in view of the scale of the production programmes concerned and the fact that the viability of the technology used has already been largely established.

46 In response to the Commission's argument concerning the existence of a margin of discretion as to the meaning of 'pilot project', the applicant maintains that any such margin cannot be such as to do violence to the language. According to usage, a 'pilot project' must satisfy at least two criteria: first, it must be small-scale and, second, it must be experimental and must therefore provide for scientific evaluation of its results. In this case the contested scheme does not meet either of those two criteria.

47 The applicant then states that the sixth recital in the preamble to Directive 92/81 requires any exemption not to give rise to any distortion of competition, and that it demonstrated in relation to its first plea that the contested scheme does create such distortion in the ethanol market.

48 The Commission states that neither Directive 92/81 nor any of the other acts adopted by the institutions defines the expression 'pilot project'. The Member States therefore are left a margin of discretion as to what they understand by that expression. The Commission must recognise that margin in assessing the compatibility with the directive of a tax exemption adopted at national level (see Case T-266/94 *Skibsværftsforenigen and Others* v *Commission* [1996] ECR II-1399, paragraph 172).

49 The decision of 18 December 1996 cannot, according to the Commission, provide useful guidance on the applicability of Article 8(2)(d) of Directive 92/81

because that decision related to ethanol production and not to that of biofuels mixed with petrol, as in this case. Moreover, the fact that there is no ETBE plant at present outside France reinforces the conclusion that the contested scheme does concern 'pilot projects'.

50 The Commission also contends that the legal context of the provision concerned requires the term 'pilot project' to be interpreted broadly. It states that Article 3 of Directive 92/81 provides that the rates of duty are to be set by reference to units of 1 000 litres. A tax exemption is in fact only needed where the scale of the project is such that excise duty might inhibit the project. The Commission maintains in any event that a project's status as a 'pilot project' cannot be tested by reference to the number of tonnes produced or the market shares acquired but must be based on whether or not the project distorts competition, and it does not in this case.

51 There are also certain technical problems yet to be resolved in relation to biofuels, as is clear from the research undertaken in the context of the Altener programme for the promotion of renewable energies in the Community and in the United States Department of Energy.

52 The Commission states that since 1986 the Community has refocused its research towards projects that have more immediate prospects for commercial application. It emphasises, finally, the link between the scheme's 'pilot project' status and its policy in favour of the use of renewable resources.

53 The French Government, as well as endorsing the Commission's arguments, states that the latter's report on the results of the Altener programme of 12 March 1997 (COM(97)122) notes that 'in cooperation with Member States' experts [the

Commission] decided that a market-driven approach with a high degree of industry input was appropriate to implement this programme element...'.

Findings of the Court

54 It must be borne in mind at the outset that the purpose of the contested decision is to appraise the contested scheme in the light of Article 92(3)(c) of the Treaty under which, by way of derogation from the prohibition contained in Article 92(1) of the Treaty, aid to facilitate the development of certain economic activities, where such aid does not adversely affect trading conditions to an extent contrary to the common interest, may be regarded as compatible with the common market.

55 According to settled case-law, the Commission enjoys a broad discretion in the application of Article 92(3) of the Treaty. Since that discretion involves complex economic and social appraisals, the Court's review of any decision adopted in that context is limited (Joined Cases T-371/94 and T-394/94 *British Airways and Others and British Midland Airways* v *Commission* [1998] ECR II-2405, paragraph 79). However, that discretion conferred on the Commission by Article 93 of the Treaty does not permit the Commission to authorise Member States to derogate from provisions of Community law other than those relating to the application of Article 92(l) of the Treaty (Joined Cases C-134/91 and C-134/91 *Kerafina and Vioktimatiki* [1992] ECR I-5699, paragraph 20).

56 It must next be pointed out that the margin of discretion which the Commission lawfully intends leaving to the Member States in applying the concept of 'pilot projects for the technological development of more environmentally-friendly products' referred to in the abovementioned Article 8(2) of Directive 92/81 must be distinguished from the margin of discretion conferred on the Commission by

Article 93 of the Treaty in order to determine to what extent State aid is compatible with the common market within the meaning of Article 92 of the Treaty. Whereas the power conferred on the Commission by Article 93 of the Treaty presupposes that that institution will undertake discretionary appraisals of complex economic and social situations, of which judicial review must be of a limited nature, any appraisal of an application of the provision of Directive 92/81 at issue here must, in contrast, be guided by a plausible interpretation of the legislative concepts of a vague and indeterminate character used in it, an appraisal which, in the last resort, is a matter for the Community judicature.

57 Consequently, and in accordance with *Kerafina and Vioktimatiki*, cited in paragraph 55 above, it is incumbent both on the Commission, when appraising a notified aid scheme, and on the Community judicature before which an action for annulment has been brought to ensure observance of the limits inherent in any contextual and reasonable interpretation of terms used in Community legislation.

58 It is in the light of those principles that the second plea in law must be examined.

59 This plea raises, first of all, the question of the scope of Article 8(2)(d) of Directive 92/81, cited in paragraph 3 above. It will then be necessary to consider whether the application of that provision in the contested decision falls within its scope as hereinafter defined.

60 Whilst it is true that the term 'pilot projects for the technological development of more environmentally-friendly products' used in Directive 92/81 leaves room for a degree of flexibility of interpretation which is inherent in any expression that has not been precisely defined, that term cannot, on the other hand, be interpreted as allowing the Member States to apply it in a quasi-discretionary manner. The very wording of Article 8(2)(d) of Directive 92/81 does not allow the Member States to apply exemptions from excise duties to all pilot projects

concerned with the development of more environmentally-friendly products. That provision expressly requires such projects to pursue the technological development of such products, thereby limiting the type of pilot projects that can come within its scope.

61 Also, it is clear from the preamble to that directive and from Article 1(1) thereof that the directive is intended, through harmonisation of excise duties on mineral oils, to give effect to the free movement of the products concerned and thereby to promote the proper functioning of the internal market. According to settled case-law, derogations from those fundamental Community principles must be interpreted and applied strictly (Joined Cases 2/62 and 3/62 *Commission* v *Luxembourg and Belgium* [1962] ECR 425, and Case T-571/93 *Lefebvre and Others* v *Commission* [1995] ECR II-2379, paragraph 48). Contrary to the Commission's contention, it follows from that case-law that Article 8(2)(d) of Directive 92/81 must be interpreted strictly.

62 Moreover, the sixth recital in the preamble to Directive 92/81 states that 'it is appropriate to permit Member States to apply on an optional basis certain other exemptions or reduced rates within their own territory where this does not give rise to distortions of competition'. It is clear from that recital that the whole of Article 8(2) of Directive 92/81, including, therefore, the term 'pilot projects for the technological development of more environmentally-friendly products' in subparagraph (d), must be interpreted in the light of the distortions of competition to which the measures applying that provision are capable of giving rise.

63 In that connection, it is common ground that the closer research and development carried out by an undertaking, in the technological field for example, come to the marketing stage and, consequently, the commercial exploitation of the products concerned, the more likely it is that such activities will have an impact on competition. It is also common ground that pilot or demonstration projects usually represent the last stage of research and development before industrial

exploitation on a larger scale of the results of such research (see, to that effect, the Community framework for State aid for Research and Development, OJ 1996 C 45, p. 5, point 2.2 and Annex I).

64 Regardless of whether the Community framework for State aid for Research and Development was applicable in this case, the need for consistent application of all Community legislation means that the abovementioned framework is one of the factors on which the Community judicature may rely in determining the scope to be attributed to a term used in a Community legislative measure.

65 In that regard, it must be emphasised that the importance of the proximity of the implementation of a pilot project to the subsequent commercial application of the results thereof did not escape the Commission when it adopted the decision of 18 December 1996 in which that institution considered, in relation to an earlier scheme that was substantially comparable to the contested scheme, that the 'French authorities' remarks confirm the Commission's argument that the real purpose and effect of the measure is not basic or even applied research, within the meaning of the aforementioned Directive, but the development on a commercial scale of non-food uses and the establishment of a larger volume of production of biofuels based on set-aside land'.

66 It follows from all the foregoing that the latitude which, in the Commission's submission, must be available to the Member States in applying the provision at issue of Directive 92/81 is liable to render that directive entirely ineffectual, thereby removing the limitation inherent in such derogations from the harmonised rules on customs duties. The Commission was required to interpret the term 'pilot projects for the technological development of more environmentally-friendly products' not only in a textual and restrictive manner but also in a manner which takes particular account of the proximity of the programme for exemption from customs duties examined by it to its possible subsequent commercial exploitation.

67 It is therefore necessary to consider whether the way in which Article 8(2)(d) of Directive 92/81 was applied in this case is compatible with the principles just stated.

68 In must first be noted that, in the contested decision (page 7), the Commission considered that 'the measures which [the French authorities] have so far taken to promote biofuels have been limited to studying the technical feasibility of producing them in pilot units and incorporating them in fuels and combustibles marketed in their territory. At present, it is necessary to demonstrate the economic feasibility of the biofuels sector and to achieve improvements in the economic performance thereof.' In the same decision it goes on to say (page 13) that 'On the basis of the information given by the French authorities, it seems that what is involved here is the "implementation of a limited tax exemption programme, designed to demonstrate the industrial feasibility of the biofuels sectors and to achieve improvements in the economic performance thereof".'

69 It is thus expressly indicated in the contested decision that the contested scheme was designed essentially not to demonstrate the technical or technological feasibility of producing biofuels but rather to evaluate the economic performance and industrial capacity of the existing biofuel production plants. The Commission had, moreover, made the same finding in its decision of 18 December 1996. The aim inherent in the contested scheme therefore goes far beyond the implementation of a pilot project pursuing the technological development of more environmentally-friendly products, as required by Article 8(2)(d) of Directive 92/81, regardless of the measurable impact of that scheme in terms of market shares in the relevant markets.

70 It follows that, by deciding that the contested scheme, notified to it as a programme intended to demonstrate the economic and industrial viability of the

ETBE sector, was to be regarded as a pilot project for the technological development of more environmentally-friendly products, the Commission infringed Article 8(2)(d) of Directive 92/81.

71 That conclusion is not invalidated by the Commission's contention that the impact of the contested scheme on the market would be limited. That impact, in so far as it might be precisely quantifiable, cannot transform a project essentially concerned with the economic and industrial development of biofuels into a project concerned with the technological development of biofuels.

72 Moreover, the contested decision is not free of ambiguity in its analysis of the market share of undertakings producing ETBE. The Commission states in it that, in appraising the contested scheme in the light of Directive 92/81, '[I]t also seems that this programme is of limited scope, since biofuels at present in France account for only about 0.5% of the consumption of petroleum products and 0.8% of the fuels market.'

73 However, first, the contested decision states (page 7): '[T]he biofuels sector involves trade and therefore competition between the Member States. Clearly, biofuels are in competition with most fuels and combustibles of fossil origin. In particular, ETBEs compete with [MTBE] obtained from methanol which is normally produced from natural gas, which makes it possible to achieve production costs which are about half of those for ETBEs. Those two products are perfectly substitutable and are used to increase the octane content of lead-free petrol.' Furthermore, the French Republic itself likewise emphasised, in its statement in intervention, that the product in direct competition with ETBE was

MTBE. The authority of the Commission's statement that the impact of the contested scheme on the fuels market would be limited must therefore be put into perspective. The appraisal of the impact of the measures relating to the ETBE sector was not consistent in the decision as a whole: the markets used as a reference for analysis of the effects of implementation of the contested scheme for that sector were in one instance the limited market of additives for lead-free petrol (page 7) and in another a wider market extending to all fuels (page 13).

74 Second, in the contested decision the Commission confines itself to determining the present market shares of the various biofuel sectors without taking the further step of determining the market shares which they might acquire following implementation of the contested scheme, even though it recognised at the hearing that the scheme was bound to become more extensive.

75 The conclusion drawn in paragraph 72 above is likewise not invalidated by the fact that, beyond the main economic and industrial objective pursued by the French authorities, the contested scheme includes certain ancillary measures involving technical monitoring. That is particularly true in view of the general nature of the follow-up measures and "additional" tests mentioned in the contested decision. Measures of that kind also form an inherent part of all industrial activity carried on as a business.

76 In any event, neither the Commission not the intervener has alleged that the contested scheme is mainly directed towards encouraging technological research relating to key aspects of ETBE production or essential components thereof, such as bioethanol. The notice of invitation to tender published in the *Official Journal*, the French measures and draft measures relating to the contested scheme, the document from the Agency for the Environment and Energy Management concerning the Altener programme, produced by the intervener, and the White Paper for a Community Strategy and Action Plan to improve the market

penetration of biofuels, produced by the Commission, likewise do not give any indication whatsoever that the contested scheme in any way pursues the technological development of such products. On the contrary, those documents lay stress on the industrial aspect and the economic importance of that scheme and of the similar programmes designed to improve market penetration by biofuels.

77 The abovementioned Altener Programme and the White Book to which the intervener and the Commission refer could, moreover, at most confirm that the contested scheme forms part of the Community policy of encouraging the use of renewable resources, but without thereby showing that that scheme meets the requirements laid down by Article 8(2)(d) of Directive 92/81, as interpreted above.

78 It must be observed, finally, that there is no obstacle to tax-exemption schemes for better market penetration by biofuels, such as the one at issue in this case, being established in accordance with the Altener programme, provided that the requirements of Directive 92/81 are complied with, since such schemes may be the subject of a Council decision adopted pursuant to Article 8(4) of Directive 92/81. Numerous programmes in the Member States designed to encourage the use of more environmentally-friendly fuels have, moreover, been approved by the Council in accordance with that provision, as is clear from the answers given by the Commission to the written questions put to it by the Court and from the statements of the Commission's representative at the hearing.

79 It must be emphasised at this stage that, even if the Commission were to take the view that the intended measures are not as such incompatible with the common market within the meaning of Article 92 of the Treaty, such a finding would not allow it to refrain from raising objections against the notified scheme and thereby fail to comply with Article 8(2)(d) of Directive 92/81.

80 It follows that, by adopting the contested decision, in so far as it relates to measures of the contested scheme concerning the ETBE sector, the Commission exceeded the powers conferred on it by Article 93(3) of the Treaty. To that extent, the contested decision must be annulled.

81 In those circumstances, it is unnecessary to give a decision on the applicant's other pleas in law. Accordingly, the request for the production of documents referred to in paragraph 25 above is not conducive to determination of these proceedings and must therefore be rejected.

Costs

82 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 Commission has been unsuccessful, it must be ordered to pay the applicant's costs, as applied for in the latter's pleadings.

83 Under the first paragraph of Article 87(4) of the Rules of Procedure, Member States which intervene in the proceedings before the Court of First Instance are to bear their own costs. It follows that the French Republic must bear its own costs. It must also pay the costs incurred by the applicant as a result of its intervention.

On those grounds,

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

hereby:

1. Dismisses as inadmissible the action brought against Commission Decision SG(97) D/3266 of 9 April 1997 concerning an aid scheme for biofuels in France in so far as that decision relates to measures applicable to the esters sector;

2. Annuls the contested decision to the extent to which it relates to the measures concerning the ETBE sector;

3. Orders the Commission to pay the applicant's costs;

4. Orders the French Republic to bear its own costs and to pay those incurred by the applicant as a result of its intervention.

Potocki Lenaerts Azizi

Jaeger Meij

Delivered in open court in Luxembourg on 27 September 2000.

H. Jung
Registrar

A. Potocki
President