JUDGMENT OF THE COURT (Sixth Chamber)
16 May 2002 *

In Case C-321/99 P,

Associação dos Refinadores de Açúcar Portugueses (ARAP), established in Lisbon (Portugal),

Alcântara Refinarias — Açúcares SA, established in Santa Iria de Azóia (Portugal),

and

Refinarias de Açúcar Reunidas SA (RAR), established in Oporto (Portugal),

represented by G. van der Wal, advocaat, with an address for service in Luxembourg,

appellants,

APPEAL against the judgment of the Court of First Instance of the European Communities (Fourth Chamber, Extended Composition) of 17 June 1999 in Case T-82/96 *ARAP and Others* v *Commission* [1999] ECR II-1889, seeking to have that judgment set aside,

* Language of the case: English.

the other parties to the proceedings being:

Commission of the European Communities, represented by J. Macdonald Flett, acting as Agent, with an address for service in Luxembourg,

defendant at first instance,

Portuguese Republic, represented by S. Brasil de Brito and L. Fernandes, acting as Agents, with an address for service in Luxembourg,

and

DAI — Sociedade de Desenvolvimento Agro-Industrial SA, established in Monte da Barca (Portugal), represented by L. Sáragga Leal, D. Franco and R. Oliveira, advogados, with an address for service in Luxembourg,

interveners at first instance,

THE COURT (Sixth Chamber),

composed of: N. Colneric, President of the Second Chamber, acting for the President of the Sixth Chamber, C. Gulmann, J.-P. Puissochet (Rapporteur), R. Schintgen and V. Skouris, Judges,

Advocate General: L.A. Geelhoed,
Registrar: D. Louterman-Hubeau, Head of Division,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 29 March 2001,

after hearing the Opinion of the Advocate General at the sitting on 6 December 2001,

gives the following

Judgment

1 By application lodged at the Court Registry on 27 August 1999, Associação dos Refinadores de Açúcar Portugueses (ARAP), Alcântara Refinarias — Açúcares SA and Refinarias de Açúcar Reunidas SA (RAR) brought an appeal under Article 49 of the EC Statute of the Court of Justice against the judgment of the Court of First Instance of 17 June 1999 in Case T-82/96 *ARAP and Others* v *Commission* [1999] ECR II-1889 ('the judgment under appeal'), by which that Court dismissed their application for annulment of the Commission decision of 11 January 1996 not to raise objections to State aid in favour of Sociedade de Desenvolvimento Agro-Industrial SA ('DAI') notified under No N11/95 (hereinafter 'the contested decision' or 'the contested measure'), and of the Commission's letter of 19 March 1996, informing the applicants of that decision (hereinafter 'the letter of 19 March 1996').

Legal background

2 According to the first paragraph of Article 42 of the EC Treaty (now the first paragraph of Article 36 EC), '[t]he provisions of the Chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the Council..., account being taken of the objectives [of the common agricultural policy] set out in Article 39'.

3 In that connection, Article 44 of Council Regulation (EEC) No 1785/81 of 30 June 1981 on the common organisation of the markets in the sugar sector (OJ 1981 L 177, p. 4) provides: '[s]ave as otherwise provided in this Regulation, Articles 92 to 94 of the Treaty shall apply to the production of, and trade in, the products listed in Article 1(1)', which include in particular beet sugar and cane sugar, and also sugar beet and sugar cane. Under Article 45 of that regulation, it is to 'be applied so that appropriate account is taken, at the same time, of the objectives set out in Articles 39 and 110 of the Treaty'.

4 Under Article 26 of Annex I, Chapter XIV(c), of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties (OJ 1985 L 302, p. 23, hereinafter 'the Act of Accession of the Kingdom of Spain and the Portuguese Republic'), a quota for beet sugar production of 60 000 tonnes per year was allocated to the Portuguese Republic. That quota was intended for undertakings established in mainland Portugal which were 'likely to start up sugar production'. It was raised to 70 000 tonnes by Council Regulation (EC) No 1599/96 of 30 July 1996 amending Regulation No 1785/81 (OJ 1996 L 206, p. 43).

5 With a view to strengthening economic and social cohesion in accordance with Article 130a of the EC Treaty (now, after amendment, Article 158 EC), Council

Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments (OJ 1988 L 185, p. 9) entrusts the Structural Funds with *inter alia* the tasks of promoting the development and structural adjustment of the regions whose development is lagging behind ('Objective 1'), speeding up the adjustment of agricultural structures ('Objective 5(a)') and promoting the development of rural areas ('Objective 5(b)'). According to the Annex to that regulation, Portugal in its entirety is regarded as a region covered by Objective 1.

6 The Council laid down provisions for implementing Regulation No 2052/88 as regards the European Agricultural Guidance and Guarantee Fund (EAGGF), Guidance Section, in its Regulation (EEC) No 4256/88 of 19 December 1988 (OJ 1988 L 374, p. 25).

7 Pursuant to Article 10 of Regulation No 4256/88, the Council laid down the forms of and the conditions for the contribution by the Guidance Section of the EAGGF to measures to improve conditions under which agricultural products are processed and marketed, with a view to achieving the objectives of Regulation No 2052/88, in its Regulation (EEC) No 866/90 of 29 March 1990 on improving the processing and marketing conditions for agricultural products (OJ 1990 L 91, p. 1).

8 Article 1(1) of Regulation No 866/90, as amended by Council Regulation (EC) No 3669/93 of 22 December 1993 (OJ 1993 L 338, p. 26, hereinafter 'Regulation No 866/90'), introduces a common measure under Objective 5(a), which is also designed to help to achieve Objectives 1 and 5(b).

9 Regulation No 866/90 provides for the adoption by the Commission of 'selection criteria', which, under Article 8(1), are to be used to determine which investments are to receive assistance from the EAGGF Guidance Section, laying down priorities and indicating those investments which must be excluded from Community financing. Under Article 8(2), '[t]he selection criteria shall be drawn up in accordance with the guidelines of the Community's policies, particularly the common agricultural policy'.

10 Pursuant to Article 8(3) of Regulation No 866/90, the Commission adopted Decision 94/173/EC of 22 March 1994 on the selection criteria to be adopted for investments for improving the processing and marketing conditions for agricultural and forestry products and repealing Decision 90/342/EEC (OJ 1994 L 79, p. 29). According to the preamble to that decision 'the selection criteria reflect the guidelines of the common agricultural policy' (seventh recital) and their application should 'take account of the duly justified specific needs of certain local productions' (fifth recital). Paragraph 2.8 of the Annex to that decision excludes 'all investments concerning *sugar*... with the exception of those which provide for:

— ...

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

11 Under Article 16(5) of Regulation No 866/90, '[w]ithin the field of application of this Regulation, Member States may take aid measures which are subject to conditions or rules concerning granting which differ from those provided for in

this Regulation, or, where the amounts of aid exceed the ceilings specified herein, on condition that such measures comply with Articles 92 to 94 of the EC Treaty'.

12 According to the Commission communication of 12 July 1994 regarding State aid for investments in the processing and marketing of agricultural products (OJ 1994 C 189, p. 5, hereinafter the 'communication of 12 July 1994'), when applying those provisions of the Treaty to State aid measures, the Commission will apply by analogy *inter alia* the sectoral restrictions governing the part-financing of such investments by the Community. That rule of assessment was reiterated in the Commission communication of 23 March 1995, concerning State aid in that sector (OJ 1995 C 71, p. 6, hereinafter the 'communication of 23 March 1995') and in that of 2 February 1996 on the same subject (OJ 1996 C 29, p. 4, hereinafter the 'communication of 2 February 1996'). According to the last communication all State aid relating to the investments referred to in point 2.8 of the Annex to Decision 94/173 is excluded if the particular conditions laid down therein are not fulfilled.

Background to the dispute

13 In the contested decision, notified to the Portuguese Government by letter of 11 January 1996, the Commission raised no objection under Article 92 of the EC Treaty (now, after amendment, Article 87 EC) and Article 93 of the EC Treaty (now Article 88 EC) with regard to State aid N11/95 granted by the Portuguese Republic to DAI's investment project for the establishment of a beet sugar refining plant at Coruche (Portugal) in the Tagus and Sorraia valley.

14 That investment project was intended for the production of the white sugar quota allocated to the Portuguese Republic by the Act of Accession of the Kingdom of Spain and the Portuguese Republic.

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

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

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

18 The aid granted to DAI is of three kinds.

19 A first grant of aid of PTE 1 275 290 000 takes the form of tax reliefs granted under the general aid scheme introduced in Portugal by Decree-Law No 95/90 of 20 March 1990 amending the Estatuto dos Beneficios Fiscais (Tax benefits

measure) and introducing a scheme specifically for large-scale investment projects. The scheme provides for special tax reliefs, limited to a period of 10 years, for companies making investments in excess of PTE 10 000 million. The maximum aid available is 10% of the net investments made or, in exceptional cases, 20%.

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

21 In the contested decision the Commission first noted that the public investment aid granted in the form of tax reliefs in favour of DAI was granted in accordance with the aid scheme set up by Decree-Law 95/90. It went on to observe that that part of the aid did not exceed 10% of the investment and that the Community rules applicable to the agricultural sector, to which its decision of 3 July 1991 made reference, did not, in those circumstances, require the prior notification referred to in Article 93(3) of the Treaty. Finally, having explained that its examination, under Articles 92 and 93 of the Treaty, of the part relating to investments involved verification of compliance with the Community provisions on State aid in the agricultural sector, the Commission stated that the tax reliefs in question were not excluded by Decision 94/173.

22 A second grant of aid of PTE 380 000 000 for vocational training for staff at the new refinery was regarded as compatible with the common market. The contested decision indicated in that regard that, 'according to Commission practice, measures of this kind intended to impart new knowledge are authorised for up to 100% of the eligible expenses' and that, '[i]n this case, the aid does not exceed 68% of eligible expenses'.

23 The Commission took the view in the contested decision that the third type of aid in question, the grant of PTE 1 912 335 000 (that is, 15% of the eligible investments) by way of co-financing of investments eligible for Community aid in the amount of PTE 6 372 065 000 (that is, 49.97% of the eligible investments) under Regulation No 866/90, did not fall within the scope of Articles 92 and 93 of the Treaty. It postponed consideration of the question whether the sugar refinery project met the conditions for Community financing under that regulation.

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

Proceedings before the Court of First Instance and the judgment under appeal

25 By application received at the Registry of the Court of First Instance on 29 May 1996, the applicants brought an action under Article 173 of the EC Treaty (now, after amendment, Article 230 EC), for annulment of the contested decision and the letter of 19 March 1996. The Portuguese Republic and DAI intervened in support of the forms of order sought by the Commission. That action was dismissed by the judgment under appeal.

26 The Court of First Instance considered, as a preliminary point, the pleas of inadmissibility raised by the Commission, supported by the Portuguese Republic and DAI, against the application for annulment.

27 First, it dismissed the application for annulment of the letter of 19 March 1996 as inadmissible. It held, at paragraphs 29 and 30 of the judgment under appeal, that the letter was purely informative and was not therefore an act open to challenge under Article 173 of the Treaty.

28 Next, at paragraphs 35 to 37 of the judgment under appeal, the Court of First Instance considered the Commission's first objection of inadmissibility, inasmuch as the contested decision concerned aid granted in the form of tax reliefs. The Commission contended that those reliefs were covered by the decision of 3 July 1991 and that it had therefore confined itself to recording, in the contested decision, that those reliefs constituted existing aid. In its view, the annulment of the contested decision could in no way call such aid into question, so that the applicants had no interest in bringing proceedings. The Court of First Instance rejected that plea of inadmissibility. It held that it had first of all to examine whether those measures were compatible with the common agricultural policy in order to assess whether they were actually covered by the decision of 3 July 1991 and then to consider whether that decision was lawful. It stated that, if it were to annul the contested decision because of the incompatibility of those reliefs with the rules of the common agricultural policy or because the decision of 3 July 1991 was unlawful, that annulment would have the effect of calling into question the aid paid to DAI, which demonstrated that the applicants had an interest in bringing proceedings. In that regard, it held that the separate question of the admissibility of the plea that the decision of 3 July 1991 was illegal could only be examined later in connection with the assessment of the substance of the claim for annulment.

29 Finally, at paragraphs 38 to 40 of the judgment under appeal, it rejected the second objection of inadmissibility in which it was contended that the applicants were not directly and individually concerned by the contested decision within the

meaning of the fourth paragraph of Article 173 of the Treaty. It held that the applicants could secure compliance with the procedural guarantees afforded them by Article 92(2) of the Treaty as interested third parties, if the Commission decided not to open the procedure under that provision, only if they had the opportunity to challenge that decision before the Court of First Instance. Moreover, the Court held, only the adoption of the contested decision enabled the applicants to appraise the extent to which their interests were affected.

30 As regards the substance of the contested decision, the Court of First Instance considered in turn the pleas raised by the applicants against the three categories of aid granted to DAI, that is to say, tax reliefs, aid for vocational training and investment aid under Regulation No 866/90.

31 The first plea raised by the applicants as regards the tax reliefs was that the decision of 3 July 1991 was illegal.

32 As regards the objection of inadmissibility raised against that plea on the basis that the applicants should have brought an action against those measures before the national court, relying on Article 184 of the EC Treaty (now Article 241 EC) in order to prevent implementation of the decision, the Court of First Instance held, at paragraphs 46 to 50 of the judgment under appeal, that that objection could not be upheld. It held that effective judicial protection of the applicants' rights was assured only if they had an opportunity to raise an objection alleging the irregularity of the decision of 3 July 1991 in proceedings challenging the Commission decision relating to individual aid, which alone allowed them to determine precisely the extent to which their individual interests are affected.

33 In paragraphs 55 to 57 of the judgment under appeal, the Court of First Instance rejected the first part of the first plea, alleging failure to examine the sectoral

consequences of the general scheme of tax reliefs. It held that the applicants had not demonstrated that compliance with the rules applicable to the sugar sector was not ensured by the conditions laid down in the decision of 3 July 1991. Further, it pointed out that the aid granted in the sugar sector under the general scheme of tax reliefs did not escape Commission control since the Commission could at any time verify the compatibility of such individual aid with that decision and in particular with the rules applicable to the agricultural sector concerned.

34 The second part of the first plea, alleging a lack of transparency in the procedure for approval of the decision of 3 July 1991, was rejected by the Court of First Instance at paragraphs 61 to 63 of the judgment under appeal. The Court of First Instance held that the lack of any publicity concerning notification and examination of a grant of aid under Article 93(3) of the Treaty cannot be assimilated to a lack of transparency. While the Court recognised that the examination of State aid forming part of the preliminary stage did not enable the Commission to take account of the interests of third parties, it pointed out that the procedure incorporated sufficient guarantees and was therefore fully justified by the need to avoid delay where it was clear that the measure notified by the Member State concerned or complained about by a third party did not constitute State aid or constituted State aid compatible with the common market.

35 The Court of First Instance also rejected, at paragraphs 66 to 68 of the judgment under appeal, the third part of the first plea, concerning the alleged impropriety of the internal procedure for the adoption of the decision of 3 July 1991, since the applicants had not, in its view, produced any significant evidence capable of raising serious doubts as to the legality of that procedure.

36 At paragraphs 72 to 75 of the judgment under appeal, the Court of First Instance rejected the second plea raised by the applicants, alleging that the Commission

should have assessed the tax reliefs in the light of Articles 92 and 93 of the Treaty. It recalled that the Court of Justice had held, in Case C-47/91 *Italy* v *Commission* [1994] ECR I-4635, that once a general aid scheme has been approved by the Commission, the individual implementing measures do not need to be notified to it unless reservations to that effect were expressed in the approval decision. It stated that direct examination of each individual aid would, in that case, be contrary to the principles of protection of legitimate expectations and legal certainty. The Court of First Instance also held that an individual aid granted in implementation of a general aid scheme could not in principle be regarded as an unforeseeable application of that scheme. The Court of First Instance also observed that, in the present case, the tax reliefs did not exceed 10% of the investment made and were compatible with the Community law applicable in the sector concerned. According to the Court of First Instance, they therefore complied with the conditions laid down by the decision of 3 July 1991 and did not thus need to be notified to the Commission, so that it would not have been entitled to examine them in the light of Article 92 of the EC Treaty.

37 The third plea relating to the tax reliefs, alleging that they were incompatible with the common agricultural policy, was rejected by the Court of First Instance at paragraphs 84 to 94 of the judgment under appeal. The Court of First Instance first recalled that the Commission had to examine the propriety of the tax reliefs granted to DAI having regard only to the conditions it imposed in the decision of 3 July 1991 and, in particular, to the rules applicable to the sugar sector. It went on to point out that those tax reliefs, which were intended to facilitate the development of certain economic regions in accordance with Article 92(3)(c) of the Treaty, were compatible with the aims pursued by both Regulation No 1785/81 and by the Community's structural measures in the agricultural sector. The Court of First Instance concluded that the applicants' arguments concerning aggravation of the overproduction of sugar in the Community and an increase in the charges borne by the Guidance Section of the EAGGF, were not such as to call into question the aid for the setting up of a beet sugar refinery in Portugal. Finally, it noted that the file contained no persuasive evidence casting doubt on the viability of the beet sugar refinery which benefited from the measures in question.

38 At paragraphs 98 to 101 of the judgment under appeal, the Court of First Instance rejected the sole plea raised by the applicants relating to the aid for

vocational training of infringement of Article 92(3)(c) of the EC Treaty. The Court of First Instance held, first, that each of the three types of aid granted to DAI had to be examined individually in the light of the legal rules applicable to it. It went on to point out that, according to the case-law of the Court of Justice (Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraphs 24 and 25), in its review of the legality of a decision taken under Article 92(3)(c) of the Treaty, the Community Court must restrict itself to determining whether the Commission has exceeded the scope of its discretion by a manifest error of assessment or by misuse of powers. The Court of First Instance held, finally, that the applicants had put forward no argument sufficient to call into question the notion that the vocational training aid at issue would contribute to the development of certain economic activities without adversely affecting trading conditions to an extent contrary to the common interest.

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

40 At paragraphs 111 to 120 of the judgment under appeal, the Court of First Instance rejected the first of those pleas, which it held to be based on Article 44 of Regulation No 1785/81, which provides, on the basis of Article 42 of the Treaty, that Article 92 of the Treaty *inter alia* applies to production of and trade in agricultural products only to the extent determined by the Council. The Court of First Instance noted, first of all, that actions of a structural nature conducted under the auspices of the Guidance Section of the EAGGF did not fall within the scope of Regulation No 1785/81 but within that of Regulation No 866/90, a regulation based on Article 42 of the Treaty and Article 43 of the EC Treaty (now, after amendment, Article 37 EC). It inferred from the absence of any provision in Regulation No 866/90 expressly providing for the application of

Articles 92 and 93 of the Treaty and Article 94 of the EC Treaty (now Article 89 EC) to aid eligible for Community co-financing under the Guidance Section of the EAGGF, that such aid had to be assessed in the specific context of the common action undertaken in accordance with that regulation and could not be the subject of examination under Articles 92 and 93 of the Treaty.

41 The Court of First Instance went on to point out that, even if Article 44 of Regulation No 1785/81 could be interpreted as specifically providing for the application of Articles 92 to 94 of the Treaty to every aid measure concerning sugar production and marketing, it had to be applied having regard to the aims of the common agricultural policy, whose precedence over the application of the Treaty provisions relating to competition is enshrined in the Treaty itself, in Article 42. According to the Court, the application of Articles 92 and 93 of the Treaty to aid eligible for Community co-financing in the context of Regulation No 866/90 would be liable to frustrate the pursuit of certain aims of the common agricultural policy by means of specific structural action undertaken in conformity with the criteria laid down in Decision 94/173. The Court held that Regulation No 866/90 itself ensured the consistency of investment aid, co-financed by the Community and the Member State concerned pursuant to that regulation, with the common agricultural policy. It thus concluded that the application of Articles 92 and 93 of the Treaty to investment aid eligible for Community co-financing under Regulation No 866/90 would be incompatible with the precedence over the rules on competition accorded by the Treaty to the common agricultural policy.

42 Finally, at paragraph 124 of the judgment under appeal, the Court of First Instance rejected the applicants' second plea, according to which the investment aid was excluded by Regulation No 866/90 because it was incompatible with the common agricultural policy and could not be based on Decision 94/173, which was itself incompatible with that policy. The Court held, referring to paragraphs 89 and 90 of its judgment, that aid granted with a view to utilising the quota allocated to mainland Portugal was not incompatible with the aims of the common agricultural policy.

Forms of order sought

43 The appellants claim that the Court should:

— declare their appeal admissible;

— set aside the judgment under appeal to the extent required by that appeal;

— annul the contested decision or refer the case back to the Court of First Instance in accordance with Article 54 of the EC Statute of the Court of Justice;

— order the Commission to pay the costs of both sets of proceedings.

44 The Commission contends that the Court should:

— set aside paragraphs 35 to 95 of the judgment under appeal and declare the application inadmissible in so far as it was directed against the part of the contested decision relating to the tax reliefs; or, in the alternative,

— set aside paragraphs 35 to 41 and 46 to 50 of the judgment under appeal but confirm the remainder of the judgment; or, in the further alternative,

— set aside the words 'in their view' contained in paragraph 36 of the judgment under appeal and such other parts of the judgment the Court considers appropriate, and decide on the pleas of admissibility raised by the Commission but dismissed by the Court of First Instance;

and

— dismiss the appeal as manifestly inadmissible and/or unfounded without opening the oral procedure and order the appellants to bear the costs;

or

— dismiss the appeal and order the appellants to bear the costs.

45 The Portuguese Republic contends that the Court should:

— uphold the judgment under appeal;

— dismiss the appeal against that judgment in its entirety.

46 DAI contends that the Court should:

— dismiss the appeal as inadmissible with respect to the first and second limbs of the first plea, the second and third limbs of the second plea, the fourth plea and the sixth plea;

— dismiss the remainder of the appeal as unfounded; and

— order the appellants to pay the costs of both sets of proceedings,

or

— dismiss the appeal in its entirety as unfounded; and

— order the appellants to pay the costs of both sets of proceedings.

Admissibility of the main appeal

47 The Commission and DAI seek a declaration by the Court that the main appeal is clearly inadmissible since it does no more than repeat or reproduce verbatim the

pleas in law relied on before the Court of First Instance and contains no specific legal argument for having the judgment under appeal set aside.

48 According to settled case-law, where an appeal merely repeats or reproduces verbatim the pleas in law and arguments previously submitted to the Court of First Instance, including those based on facts expressly rejected by that Court, it fails to satisfy the requirements under Article 51 of the EC Statute of the Court of Justice and Article 112(1)(c) of the Rules of Procedure. In reality, such an appeal amounts to no more than a request for re-examination of the application submitted to the Court of First Instance, which, under Article 49 of the EC Statute of the Court of Justice, falls outside the jurisdiction of the Court of Justice (see, in particular, the order of 25 March 1998 in Case C-174/97 P *FFSA and Others* v *Commission* [1998] ECR I-1303, paragraph 24).

49 However, provided that the appellant challenges the interpretation or application of Community law by the Court of First Instance, the points of law examined at first instance may be discussed again in the course of an appeal (Case C-210/98 P *Salzgitter* v *Commission* [2000] ECR I-5843, paragraph 43). Indeed, if an appellant could not thus base his appeal on pleas in law and arguments already relied on before the Court of First Instance, an appeal would be deprived of part of its purpose.

50 In the present case the main appeal, taken as a whole, specifically seeks to challenge the position adopted by the Court of First Instance on various points of law raised before it at first instance. It indicates clearly the aspects of the judgment under appeal which are criticised and the pleas in law and arguments on which it is based.

51 The claim that the Court should dismiss the appeal as manifestly inadmissible in its entirety must therefore be rejected.

The Commission's cross-appeal

Arguments of the parties

52 The Commission contends that the action before the Court of First Instance, to the extent that it was directed against the part of the contested decision relating to tax reliefs, was inadmissible. The Court was wrong to hold, at paragraphs 35 to 37 of the judgment under appeal, that a letter from the Commission containing information that an individual aid is covered by a general aid scheme already approved by the Commission always constitutes an act susceptible to judicial review under Article 173 of the Treaty. The Commission contends that at first instance the appellants had no legal interest in seeking annulment of the contested measure because annulment would not affect their legal position in any way. That measure merely recorded that the tax reliefs at issue constituted existing aid covered by an approved general scheme. It thus had no legal effects and could not, therefore, be regarded as constituting a decision. The Commission puts forward the following arguments in support of its contentions.

53 As a preliminary point, the Commission contends that the statements by the Court of First Instance at paragraphs 35 and 36 of the judgment under appeal that, on the one hand, the objection of inadmissibility raised by the Commission could not be upheld and, on the other hand, the question of inadmissibility could not be examined at that stage of the judgment, contradict one another. That internal contradiction is incompatible with the obligation to state reasons under Article 190 of the EC Treaty (now Article 253 EC).

54 The Commission's other arguments develop its central assertion that the contested measure is not in the nature of a decision as regards the appellants as third parties, but rather a statement of facts. The reasoning followed by the Court of First Instance, which makes the question of the admissibility of the action

conditional on examination of its merits, allows complainants to call into question, by means of a challenge to an individual aid, the validity of a Commission decision approving a general aid scheme, a decision which is, after all, by then definitive. This prejudices the interests of the beneficiaries of the aid and of the Member States concerned, in breach of the principles of legal certainty and protection of legitimate expectations, as was acknowledged in *Italy* v *Commission*, cited above, and Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833. Complainants are thereby given a further means of redress, whereas their objections in connection with aid such as that at issue should be made before the national court, it being for that court to refer, if it considers it necessary, a question to the Court of Justice on the validity of the decision approving the general aid scheme.

55 In the alternative, the Commission requests the Court to set aside paragraph 36 of the judgment under appeal in so far as, in the English version, English being the language of the case, it relies on the words 'in their view'. The Commission contends that it constitutes an error in law to base the admissibility of an action for annulment before the Court of First Instance on the subjective view of the applicant.

56 The appellants submit, as regards the alleged contradiction between paragraphs 35 and 36 of the judgment under appeal, that the Commission has not established an error of law. In any event, such a contradiction could not lead to that judgment's being set aside.

57 As regards the other arguments of the Commission, the appellants submit that the grounds of the judgment under appeal must be upheld. They take the view that the question of the admissibility of the action for annulment does indeed depend on the question whether the tax reliefs granted under Decree-Law No 95/90 fall within the scope of the decision of 3 July 1991. They argue that the decision by which the Commission deemed an individual aid measure to be covered by a

general aid scheme which had already been approved does affect their interests directly and cannot therefore be defined as a statement of facts. Judicial protection of the appellants under the rules relating to State aid entails that their action be held admissible, as it represents the only legal means of examining the legality of the decision of 3 July 1991 and of assessing whether the individual aid measure at issue complied with the general scheme.

58 As regards the Commission's argument that the Court should set aside the words 'in their view' in paragraph 36 of the English version of the judgment under appeal, the appellants submit that the Court of First Instance did not base the admissibility of the action on a subjective analysis of their interests. It merely held that they had an interest in seeking the annulment of the contested decision, basing their action on the fact that the tax reliefs were not, in their view, covered by the decision of 3 July 1991. The Court of First Instance considered the merits of that view at paragraphs 44 to 50 of the judgment under appeal.

Findings of the Court

59 First, it is clear from reading paragraphs 35 and 36 of the judgment under appeal that they are not vitiated by any contradiction, contrary to the contention of the Commission. To begin with, in paragraph 35, the Court of First Instance rejected the objection of inadmissibility raised by the Commission. In paragraph 36 it set out the reasons why it considered that the objection could not be upheld. Whilst, at the end of paragraph 36, it deferred consideration of one question of admissibility, that question concerned the more specific allegation by the Commission that the objection that the decision of 3 July 1991 was illegal was itself inadmissible. The Court of First Instance analysed that separate question at paragraphs 44 to 50 of the judgment under appeal. The argument alleging a contradiction in the grounds thus cannot be upheld.

60 Second, as regards the appellants' interest in bringing proceedings against the part of the contested decision relating to tax reliefs, it is clear from the case-law of the

Court of Justice, as the Commission points out, that individual grants of aid under a general aid scheme approved by the Commission which meet the conditions of that scheme constitute existing aid which does not need to be notified (*Italy* v *Commission*, cited above, paragraphs 21 to 26). Since it is not notified before it is implemented, such aid does not require an express decision by the Commission and its legality can only be assessed by the national courts (*TWD Textilwerke Deggendorf*, cited above, paragraphs 15 to 18).

61 However, the background to the present dispute is not the same. It is clear from the documents on the Court file that the individual tax reliefs at issue were examined by the Commission, which had received complaints about them from the appellants. The Commission took the view that those measures did comply with the two conditions laid down by the decision of 3 July 1991 for them to be classified as existing aid, exempt as such from formal notification and from examination of their compatibility with Articles 92 and 93 of the Treaty. In taking that position, the Commission did not confine itself to recording that the individual measures at issue were in the nature of existing aid. Taking the view that those measures were covered by the decision of 3 July 1991, it also decided not to open the procedure provided for by Article 93(2) of the Treaty. The appellants, who could have intervened as complainants in such a procedure if the Commission had opened it, would be deprived of that guarantee if they did not have the option of challenging before the Court of First Instance the assessment made by the Commission (see, to that effect, Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, paragraphs 20 to 24).

62 Accordingly, in holding, at paragraph 36 of the judgment under appeal, that the fact that the aid at issue was existing aid did not deprive the applicants of an interest in bringing proceedings in that case, on the ground that such aid might not be covered by the decision of 3 July 1991, and, at paragraphs 39 and 40 of that judgment, that the applicants could secure compliance with the procedural guarantees under Article 93(2) of the Treaty only if they were able to challenge the contested decision before the Community Court, the Court of First Instance did not err in law.

63 As regards, thirdly, the Commission's claim in the alternative that the Court should set aside the words 'in their view' in paragraph 36 of the English version of the judgment under appeal, it is clear from the grounds of that judgment that the Court of First Instance did not decide on the admissibility of the application on the basis of a subjective appraisal of the interests of the applicants, but, as explained above, on the basis of the rules governing the admissibility of actions under Article 173 of the Treaty. Against that background, the Commission's claim, even if it is admissible, is not well founded.

64 It follows from the foregoing that the Commission's cross-appeal must be dismissed.

The merits of the main appeal

The first plea, concerning the objection that the decision of 3 July 1991 was illegal

Arguments of the parties

65 By their first plea the appellants allege that the Court of First Instance erred in law in holding, at paragraphs 55 to 57 of the judgment under appeal, that the decision of 3 July 1991, by which the Commission approved the general scheme of tax reliefs laid down by Decree-Law No 95/90, ensured compliance with the rules applicable to the sugar sector. They submit that that conclusion is based on two erroneous findings.

66 First, in the decision of 3 July 1991, the Commission made the grant of individual aid under Decree-Law No 95/90 conditional on compliance with the 'rules and guidelines laid down by Community law in relation to certain industrial, agricultural and fisheries sectors'. However, contrary to what the Court of First Instance held, such a condition is inadequate and too imprecise to be regarded as an appropriate condition to safeguard the interests of the common agricultural policy in a sensitive sector such as sugar.

67 Second, the Court of First Instance was wrong to infer from Article 93 of the Treaty that the Commission can at any time verify the compatibility of individual aid granted to the sugar sector with the rules applicable to the agricultural sector concerned. In that connection, the appellants submit that the Commission's powers under Article 93(1) of the Treaty, which do not allow it to suspend the payment of aid, cannot be regarded as an appropriate alternative to the procedure provided for by Article 93(2) and (3) of the Treaty, where a general aid scheme is applied. Moreover, the position of third parties is substantially weaker in the case of 'constant review' under Article 93(1) of the Treaty than it is in the case of the application of Article 93(2) and (3) of the Treaty.

68 The Commission contends that this plea, which merely repeats the arguments relied on at first instance, is not admissible. As to the merits, it agrees with the analysis set out at paragraphs 55 to 57 of the judgment under appeal and contends that, when it approves a general aid scheme, it must, as it did in the present case, take the necessary steps to ensure that the relevant special sectoral rules that it has adopted are also taken into consideration.

69 The Portuguese Government submits that the Court of First Instance's view is, for the most part, based on the idea that approval of a general aid scheme does not entail any derogations from the rules applicable to each sector. Since approval by the Commission of such schemes is legally possible, the reasoning it followed in

its decision of 3 July 1991, which was upheld by the Court of First Instance, is the best guarantee of compliance with all the rules which may be relevant at the time of implementation of the general aid scheme. The Portuguese Government dismisses, moreover, the appellants' suggestion that the approval of such a scheme must be accompanied by a statement of the applicable sectoral conditions. Such a solution entails practical and legal disadvantages, since the alleged need to set out the sectoral conditions would detract from the clarity of the scheme. The Portuguese Government also points out that the Court of First Instance took account, at paragraph 56 of the judgment under appeal, of compliance with sectoral rules and the protection of the interests of third parties, where it stressed that the Commission could at any time verify the compatibility of aids.

70 DAI contends, for the same reasons as the Commission, that the first plea is inadmissible. As to the merits, it contends that the protection of the interests of third parties is not weaker under Article 93(1) of the Treaty than under Article 93(3) thereof.

Findings of the Court

71 As regards the admissibility of this plea, the same response must be given to the Commission and DAI as was given at paragraphs 48 to 51 of this judgment to the objection of inadmissibility raised against the main appeal as a whole, that is to say, the objection must be rejected.

72 As regards the merits, it is settled case-law that the Commission may approve general aid schemes in the course of the review it must carry out under Articles 92 and 93 of the Treaty and dispense with notification by Member States of individual aid measures taken under such schemes, subject to the reservations it

may express in the decision allowing such schemes (*Italy* v *Commission*, cited above, paragraph 21, and Case C-278/95 P *Siemens* v *Commission* [1997] ECR I-2507, paragraphs 31 to 33). The Commission has a wide discretion in this matter (Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraph 18).

73 Second, it is for the Commission, when it approves a general aid scheme, to take the necessary measures to ensure that the sectoral rules other than the general competition rules will be complied with by the Member State concerned.

74 In the event, the Commission made the approval under its decision of 3 July 1991 subject to the express condition that the individual aid was in conformity with 'the rules and guidelines laid down by Community law in relation to certain industrial, agricultural and fisheries sectors'. It also required the Portuguese Government to notify 'all projects enjoying reliefs of between 10 and 20% (ESL) and all those in sensitive sectors'.

75 The appellants have not put forward any more arguments than they did at first instance capable of establishing that those instructions were in breach of the rules applicable to the sugar sector or were insufficient to the extent that the decision of 3 July 1991 was vitiated by illegality.

76 Moreover, it is common ground that the Commission is not prevented, after the adoption of a decision approving a general aid scheme, from examining the compatibility of an individual aid measure with that decision. Such an examination can be carried out at any time under Article 93(1) of the Treaty, particularly

in the event of any complaints which the Commission may receive. The decision of 3 July 1991 thus does not have the effect of preventing the legitimate interests of third parties from being taken into account and cannot, therefore, be regarded as an illegal restriction of the scope of Article 93(2) and (3) of the Treaty.

77 Accordingly, since the conditions laid down by the Commission in the decision of 3 July 1991 were not inadequate and that decision did not prejudice the protection of the legitimate interests of the appellants, the Court of First Instance did not err in law. The first plea must, therefore, be rejected.

The second plea, alleging that the tax reliefs should have been notified to the Commission

Arguments of the parties

78 The appellants submit that the Court of First Instance erred in law in holding, at paragraphs 72 to 75 of the judgment under appeal, that the Commission was not entitled to examine the compatibility of the tax reliefs granted to DAI with Article 92 of the Treaty. They argue that the reliefs did not constitute the foreseeable implementation, purely and simply, of the general aid scheme approved by the Commission. In a sensitive sector like sugar, characterised by large production surpluses, the Portuguese Government should have notified such measures to the Commission which should then have examined their compatibility directly in relation to Articles 92 and 93 of the Treaty, taking into account requirements which it was not able to assess when the general scheme was approved. The Court of First Instance thus applied the judgment in *Italy* v *Commission*, cited above, incorrectly.

79 The Commission considers that the second plea is manifestly inadmissible, like the first plea and for the same reasons. As to the substance, it points out that it is under an obligation to apply the relevant rules of the Treaty, as it did in the present case, in such a way as to take the objectives of regional and sectoral policy into account. Moreover, contrary to what the appellants allege, it is clear from the *Italy* v *Commission* judgment that, having approved a general aid scheme, the Commission cannot open the procedure under Article 93(2) of the Treaty in relation to an individual aid granted under such a scheme, without first ascertaining whether that aid met the terms of the approved scheme.

80 The Portuguese Government submits that the Commission did not fail to analyse the sectoral compatibility of the tax relief scheme at issue. That aid was approved in accordance with Article 16(5) of Regulation No 866/90, which provides that Member States may take aid measures where the amount of aid exceeds that laid down for common measures in the context of the EAGGF, Guidance Section.

81 DAI submits that the second plea of the appeal is inadmissible in so far as it merely repeats the arguments put forward before the Court of First Instance and challenges a finding of pure fact regarding the foreseeability of the application of Decree-Law No 95/90 to the aid in question. In the alternative, DAI submits that there was no need to notify the aid as there was no provision in the decision of 3 July 1991 which required the Portuguese Republic to do so.

Findings of the Court

82 First, the second plea of the appeal sets out clearly the aspects of the judgment under appeal which are challenged and gives an account of the legal arguments in

support of it. In addition, this claim relates to the infringement of Community law the Court of First Instance is alleged to have committed in holding that the Commission did not have to examine the compatibility of an individual aid measure with Articles 92 and 93 of the Treaty and does not, therefore, constitute a challenge to a finding of fact, which, in an appeal, is outside the jurisdiction of the Court of Justice. Accordingly, this plea is admissible.

83 Second, when the Commission has before it a specific grant of aid alleged to have been made in pursuance of a previously authorised scheme, it cannot at the outset examine it directly in relation to the Treaty. Prior to the initiation of any procedure, it must first examine whether the aid is covered by the general scheme and satisfies the conditions laid down in the decision approving it. If it did not do so, the Commission could, whenever it examined an individual aid measure, go back on its decision approving the aid scheme, which had already involved an examination in the light of Article 92 of the Treaty. This would jeopardise the principles of the protection of legitimate expectations and legal certainty (*Italy* v *Commission*, cited above, paragraph 24). Aid which constitutes the strict and foreseeable application of the conditions laid down in the decision approving the general aid scheme is thus considered to be existing aid (*Italy* v *Commission*, cited above, paragraph 25), which does not need to be notified to the Commission or examined in the light of Article 92 of the Treaty.

84 In the present dispute, as pointed out at paragraph 20 of this judgment, the decision of 3 July 1991, approving the aid scheme set up by Decree-Law No 95/90, made authorisation for tax reliefs subject to two conditions, compliance with which the Commission, in the contested decision, verified before confirming that they had been fulfilled.

85 In that regard, the condition relating to the rules applicable in the agricultural sector concerned was not made subject, in the decision of 3 July 1991, to an obligation of prior notification of the planned aid. Rather, in that decision, the Commission required those rules to be respected in practice when individual

grants of aid were made. It is clear from the terms of the contested decision that the Commission took the view that the project for the construction of a beet sugar refinery in Portugal, eligible for Community financing under the EAGGF, was therefore compatible with the objectives of the common agricultural policy.

86 It follows from the foregoing that, in holding, at paragraphs 72 to 75 of the judgment under appeal, that the tax reliefs granted to DAI did not need to be notified and that the Commission was not entitled to examine them directly in relation to Article 92 of the Treaty, the Court of First Instance did not err in its application of Community law. The second plea must, therefore, be rejected.

The third plea alleging that the tax reliefs are incompatible with the aims of the common agricultural policy

Arguments of the parties

87 The appellants allege that Court of First Instance erred in law in holding, at paragraphs 84 to 94 of the judgment under appeal, that the application of Decree-Law No 95/90 to the sugar industry was not incompatible with the aims of the common agricultural policy. They rely on three arguments in support of that plea.

88 First, they submit that the refinery project at issue was not exempt from the Treaty provisions relating to State aid or from those concerning the common organisation of the market in sugar. Unlike Article 141 of the Act concerning the

conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1), the Act of Accession of the Kingdom of Spain and the Portuguese Republic does not contain any provision authorising exceptional measures of State aid. In the absence of such exceptional authorisation in that Act, it must be assumed that the rule prohibiting aid for the processing of sugarbeet in Regulation No 1785/81 applies to the investment project at issue.

89 Next, the appellants claim that the Court of First Instance erred in holding, at paragraphs 89 and 90 of the judgment under appeal, that the grant of a sugar quota to the Portuguese Republic entitled the Portuguese Government to grant State aid for the construction of a sugar refinery in mainland Portugal, aid which, in their view, creates an entirely artificial sugar producer and distorts competition by aggravating overproduction on the common market in sugar.

90 Finally, contrary to what the Court of First Instance held at paragraph 90 of the judgment under appeal, neither Regulation No 866/90 nor Decision 94/173 support the conclusion that the aid concerned is compatible with the common market organisation for sugar. The appellants assert that Decision 94/173 unlawfully made investment in the Portuguese beet sugar industry eligible for Community co-financing and that, in that decision, the Commission mistakenly considered it to be eligible simply because Portugal had been granted a sugar quota. They point out that this error was perpetuated in the Community guidelines for State aid in connection with investments in the processing and marketing of agricultural products.

91 The Commission contends that this third plea is inadmissible for the same reasons as the first two pleas are. As to the substance, it submits that the provisions

relating to the accession of Member States other than the Portuguese Republic are not at all relevant in this case and that the legal basis for the aid at issue is the decision of 3 July 1991. It argues that the appellants fail to take account of the fact that Regulation No 866/90 and Decision 94/173 are an integral part of the common agricultural policy. Regulation No 1785/81 should be interpreted in conjunction with those texts, which provide expressly for an exception to the rule of prohibition of State aid in the sugar sector in respect of the Portuguese quota. Moreover, the contested aid was, according to the Commission, authorised also as regional aid, an area in which the Commission has a wide discretion in determining what is compatible with the common market.

92 The Portuguese Government points out that Article 16(5) of Regulation No 866/90 allows Member States to take aid measures in addition to Community action. Moreover, Article 25 of Council Regulation (EEC) No 1600/92 of 15 June 1992 concerning specific measures for the Azores and Madeira relating to certain agricultural products (OJ 1992 L 173, p. 1), provides for aid to be granted for the development of sugar beet production and the processing of sugar beet harvested in the Azores into white sugar, up to the limit of a total annual production of 10 000 tonnes of refined sugar, which shows that, at Community level, aid measures in the sugar sector are not regarded with total disfavour. The Portuguese Government then points out that the sugar quota granted to the Portuguese Republic was contained in an instrument of the highest rank, namely, the Act of Accession of the Kingdom of Spain and the Portuguese Republic.

93 DAI submits that aid to promote utilisation of the sugar quota allocated to the Portuguese Republic by the Act of Accession cannot be construed as contrary to the aims of the common agricultural policy. It adds that the Court of First Instance did not hold that the legality of the aid granted to DAI follows automatically from the fact that Portugal was granted a sugar quota in that Act of Accession. On the contrary, it is clear from the Court's reasoning that the legal basis for the grant of such aid is to be found in the relevant provisions of Regulation No 866/90 and Decision 94/173.

Findings of the Court

94 First, by their third plea, supported by detailed arguments, the appellants set out clearly their challenge to the grounds of the judgment under appeal. This plea is therefore admissible.

95 Second, the tax reliefs granted to DAI must, as the decision of 3 July 1991 provides, comply with the rules of the common agricultural policy in the sugar sector laid down by Regulation No 1785/81.

96 Article 44 of that regulation provides that Articles 92, 93 and 94 of the Treaty are to apply to the production of, and trade in, sugar. That article also provides that that general rule is to be applicable 'save as otherwise provided in this Regulation'. Article 45 thereof provides that it is to be applied so that appropriate account is taken, at the same time, of the objectives set out in Articles 39 of the EC Treaty (now Article 33 EC). Moreover, as the Court of First Instance pointed out at paragraph 89 of the judgment under appeal, Article 24 of that regulation was specifically amended by the Act of Accession of the Kingdom of Spain and the Portuguese Republic so as to allow to that Member State, on its mainland, the benefit of a production quota of 60 000 tonnes for sugar.

97 It is clear from those provisions that, while it does not, per se, authorise the payment of State aid to a project intended to utilise that quota, Regulation No 1785/81 in no way precludes that possibility.

98 At paragraph 89 of the judgment under appeal the Court of First Instance made the same preliminary finding and thus did not consider that the tax reliefs in

favour of DAI could be declared compatible with the common agricultural policy solely because of the allocation of that quota. Accordingly, the argument that, unlike the Act of Accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, the Act of Accession of the Kingdom of Spain and the Portuguese Republic did not contain a clause providing for the exceptional grant of State aid is, in any event, redundant.

99 Article 45 of Regulation No 1785/81 refers to the general objectives of the common agricultural policy set out in Article 39 of the Treaty, which include, in Article 39(2)(a), taking account of 'the particular nature of agricultural activity, which results from the social structure of agriculture and from structural and natural disparities between the various agricultural regions'. The rules applicable to investment in the sugar sector are thus not only those established by Regulation No 1785/81. They also appear in the legislative texts governing the structural and regional policy measures of the Community.

100 Those texts make provision for the Community, or the Portuguese Republic, to grant financial support for the investment project at issue.

101 First of all, Article 16(5) of Regulation No 866/90, a regulation adopted on the basis of Articles 42 and 43 of the Treaty and thus an integral part of the common agricultural policy, makes provision for Member States to grant, over and above the measures specifically provided for by that regulation, aid for the processing and marketing of agricultural products, under the conditions laid down by Articles 92 to 94 of the Treaty.

102 Next, the aid granted to DAI meets the criteria for eligibility of investment liable to benefit from financial aid under the Guidance Section of the EAGGF laid down by Decision 94/173. That decision provides, at point 2.8 of its annex, that, by

way of exception to the rule which excludes investment in the sugar sector, investment for the purpose of the utilisation of the quota provided for in the Act of Accession of the Kingdom of Spain and the Portuguese Republic may be given Community financing.

103 By the contested decision, the Commission indicated that in the sector of the processing and marketing of agricultural products, State aid must meet the criteria for selection of investments set by Decision 94/173. That guideline is the same as that in the Commission communications relating to State aid in that sector such as those of 12 July 1994 and 23 March 1995 and the communication of 2 February 1996, issued after the events which are the subject of this dispute.

104 Next, in taking the view that the objectives of the regional and agricultural policy of the Community justified the particular treatment of the investment project at issue, as regards a region covered by Objective No 1, the Commission did not exercise its discretion in a manifestly erroneous way. Nor did it disregard the terms of the authority conferred on it by Article 8 of Regulation No 866/90 to fix criteria for the eligibility of investments for Community action.

105 Finally, it must be pointed out that the fact that the investment made by DAI is specifically taken into account is a result precisely of the special treatment given to the Portuguese Republic by the Act of Accession of the Kingdom of Spain and the Portuguese Republic, as the Court of First Instance observed at paragraph 89 of the judgment under appeal.

106 Accordingly, the appellants' argument that the contested decision creates an artificial sugar producer and distorts competition by aggravating overproduction on the common market in sugar must be rejected.

107 It follows from the foregoing that, in holding that the tax reliefs granted to DAI were not incompatible with the aims of the common agricultural policy, the Court of First Instance did not err in law. Accordingly, the third plea can only be rejected.

The fourth plea relating to the error in law made by the Court of First Instance in refusing to assess the effect of the contested aid measures taken together

Arguments of the parties

108 By their fourth plea the appellants complain that the Court of First Instance did not take account, at paragraphs 98 to 101 of the judgment under appeal, of the effect of the various contested aid measures taken together. Those measures altogether represent more than 60% of the investment made by DAI and allow it to produce a surplus corresponding to 20 to 25% of national consumption, with guaranteed prices and a cost of less than 40% of fixed costs which can be written off over a very long period. DAI was thus placed in an extremely advantageous position.

109 The Commission contends that this plea is clearly inadmissible. As to the substance, it argues that the plea cannot succeed as it has a wide discretion in this matter and no manifest error can be established.

Findings of the Court

110 While the applicants argued before the Court of First Instance that the Commission had made an error of law in considering in isolation the effects on the common market of the aid for vocational training granted to DAI, it was only in relation to the part of the contested decision relating to that aid. They did not thus put forward a general claim for annulment directed at the contested decision as a whole, alleging that the Commission should have assessed the compatibility of the cumulative effect of the three contested measures in the light of Article 92 of the Treaty, as is confirmed by the part of their application entitled 'General grounds of the action' which does not mention that claim.

111 Thus, the Court of First Instance, at paragraph 98 of the judgment under appeal, pointed to the fact that the three types of aid examined in the contested decision were covered by different sets of legal provisions and had therefore to be examined individually in the light of those rules and the aims which they pursued, only in order to conclude that the compatibility with Article 92 of the Treaty of the aid for vocational training had to be considered separately and that specific plea rejected. The plea put forward by the appellants in the appeal is thus wider in scope than that put before the Court of First Instance.

112 Under Article 118 of the Rules of Procedure of the Court of Justice, Article 42(2) of those rules, which prohibits generally the introduction of new pleas in law in the course of the procedure, applies to the procedure before the Court of Justice on appeal from a decision of the Court of First Instance. In an appeal the Court's jurisdiction is thus confined to review of the findings on the pleas argued before the Court of First Instance (see Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 59, and the order of 28 June 2001 in Case C-352/99 P *Eridania and Others* v *Council* [2001] ECR I-5037, paragraphs 52 and 53).

113 The plea is, therefore, admissible only to the extent that it criticises the error of law allegedly made by the Court of First Instance in holding that aid for vocational training should be considered separately by the Commission.

114 As to that, the contested aid measures are covered by different sets of legal provisions. As stated at paragraph 86 of this judgment, the tax reliefs could be examined only in the light of the decision of 3 July 1991, which itself refers to the rules of the common agricultural policy, and not directly in the light of Article 92 of the Treaty. The national co-financing of the investment considered eligible for the Guidance Section of the EAGGF had to be examined in the light of Regulation No 866/90 and Decision 94/173, which determine the balance to be struck between the aims of the common agricultural policy and of the Community's regional policy in the sugar sector. The aid for vocational training was thus the only measure whose compatibility the Commission could assess directly in the light of Article 92 of the Treaty.

115 Accordingly, the judgment under appeal is not vitiated by any error of law on this point. The fourth plea must, therefore, be rejected.

The fifth plea, alleging that the Court of First Instance erred in law in deciding that Articles 92 and 93 of the Treaty did not apply

Arguments of the parties

116 The appellants submit that paragraphs 111 to 120 of the grounds of the judgment under appeal, according to which aid for investment projects eligible for

Community co-financing under Regulation No 866/90 cannot be examined under Articles 92 and 93 of the Treaty, are vitiated by an error of law. They argue that no provision of Regulations No 1785/81 and No 866/90 suggests that those articles are not applicable.

117 The Commission contends, as a preliminary point, that this plea is clearly inadmissible. Then, as regards the substance, it points out that the Council determined, in the light of all the relevant legislation, that the State aid rules apply to aid measures going beyond what is provided for in Regulation No 866/90, but not to measures provided for in that regulation. The only material question in this case, it argues, is whether or not the measure is permitted by the common agricultural policy. It states that the measure is permitted pursuant to Regulation No 866/90.

118 The Portuguese Republic and DAI contend that Article 16(5) of Regulation No 866/90, in conjunction with the principle of the precedence of the Common agricultural policy, must be interpreted as precluding the application of the State aid rules to structural measures undertaken under the Guidance Section of the EAGGF.

Findings of the Court

119 The fifth plea, like the previous pleas, indicates clearly the contested parts of the judgment and sets out the legal arguments on which it is based. It is not therefore the mere repetition of the terms of the action at first instance and must, therefore, be declared admissible.

120 Second, as regards the merits of the plea, Article 44 of Regulation No 1785/81 merely provides that Articles 92, 93 and 94 of the Treaty are to apply to the production of, and trade in, sugar 'save as otherwise provided in this Regulation'. Moreover, that regulation refers, implicitly but necessarily, to the implementation of provisions other than those contained in it, in indicating, in Article 45, that its application must take account of the general objectives of the common agricultural policy set out in Article 39 of the Treaty, one aspect of which is the alleviation of regional disparities in that area.

121 Regulation No 866/90 sets out the conditions under which the Guidance Section of the EAGGF helps to further the objectives of regional cohesion of the common agricultural policy. It lays down as a ground rule, in Article 16(3) and (4), that Member States concerned by investment projects eligible for the Fund, as the Portuguese Republic is by the project at issue, must, like the beneficiaries of the Fund, undertake to participate in financing the investments selected by the Commission for assistance from the EAGGF. Co-financing by the Member States, such as that at issue, is thus not only authorised but required by the regulation.

122 Article 16(5) of Regulation No 866/90, which provides that Member States may take aid measures which are subject to conditions or rules concerning granting which differ from those provided for in that regulation, or, where the amounts of aid exceed the ceilings specified herein, on condition that such measures comply with Articles 92 to 94 of the Treaty, thus does not concern the national financial contribution required by Article 16(3) and (4) of that regulation but the aid which the Member States wish to give, over and above their obligatory contribution to the investment projects eligible for the Guidance Section of the EAGGF.

123 Accordingly, the Court of First Instance did not misapply Community law in holding that the co-financing provided by the Portuguese Republic to the

investment project at issue, eligible for the Guidance Section of the EAGGF, had to be assessed in the context of the common action undertaken in accordance with Regulation No 866/90 and could not be the subject of examination under Articles 92 and 93 of the Treaty.

124 The fifth plea must, therefore, be rejected.

The sixth plea, alleging that insufficient grounds were stated for the reply to the last plea in the action before the Court of First Instance

Arguments of the parties

125 The appellants submit that insufficient grounds are stated for the rejection, at paragraph 124 of the judgment under appeal, of their plea that the investment aid at issue is incompatible with Regulation No 866/90. The Court of First Instance did not take account of the various arguments which they put forward in support of this plea. They point out that they argued before the Court of First Instance that the aid concerned did not satisfy the requirements for co-financing laid down by Regulation No 866/90, and that that regulation could not therefore serve as the legal basis for precluding the application of Articles 92 and 93 of the Treaty.

126 The Commission considers that this plea is not founded. In its view, all the arguments which the applicants put forward in this plea are in fact reiterations of their claim that the aid in question is incompatible with the common agricultural policy, a claim which the Court of First Instance gave sufficient reasons for rejecting.

127 DAI contends that this ground of appeal is clearly inadmissible because it merely repeats the arguments put before the Court of First Instance without indicating the error of law allegedly made by it.

Findings of the Court

128 First, the sixth plea is admissible as it is directed against duly identified grounds of the judgment under appeal and does not merely reproduce the terms of the application to the Court of First Instance.

129 Second, it is clear from the argument of the appellants that, in this plea, they submit that, in rejecting their claim that the investment aid in question could not fall within the scope of Regulation No 866/90, the Court of First Instance did not rule on their arguments that the aid did not fulfil the basic conditions laid down by Articles 2 and 11 to 13 of that regulation. That part of the judgment is thus, it is alleged, vitiated by a failure to state sufficient reasons.

130 However, it must be borne in mind that, in the contested decision, the Commission took the view that the aid in question fell, on first analysis, within the scope of Regulation No 866/90. It concluded from this that the aid could not be examined directly in relation to Articles 92 and 93 of the Treaty and stated that it would analyse subsequently, in the light of Regulation (EEC) No 866/90, the aspect of co-financing of the project under that regulation. The Commission thus did not consider whether the project fulfilled the conditions for Community co-financing by the Guidance Section of the EAGGF, nor, therefore, whether the national contribution to that project met the basic conditions of the regulation.

131 The appellants criticised that appraisal before the Court of First Instance, arguing that the investment project in question did not fall within the scope of Regulation No 866/90 and that, therefore, Articles 92 and 93 of the Treaty were applicable in the case. They put forward two pleas in support of that complaint: the first was that Decision 94/173, adopted pursuant to Regulation No 866/90, was incompatible with the common agricultural policy and, therefore, illegal, while the second was that the basic conditions laid down by that regulation were not, in the event, met.

132 While, in order to reject the claim that Articles 92 and 93 were applicable to the project at issue, the Court of First Instance was obliged to rule, as it did at paragraphs 89 and 90 of the judgment under appeal, on the plea that Decision 94/173 was incompatible with the common agricultural policy, since that decision determined the scope of Regulation No 866/90, it did not have to rule on the arguments in support of the second plea, relating to the fulfilment of the basic conditions of that regulation, which did not affect the legality of the contested decision and were, therefore, inoperative.

133 Accordingly, in referring to paragraphs 89 and 90 of the judgment under appeal when rejecting the plea that the aid at issue was not within the scope of Regulation No 866/90, the Court of First Instance did not vitiate the judgment by an insufficient statement of reasons.

134 The sixth plea must, therefore, be rejected.

135 It follows from all the foregoing considerations that the appeal must be dismissed in its entirety.

Costs

136 Under Article 69(2) of the Rules of Procedure, which is applicable to the appeal procedure by virtue of Article 118 of those Rules, 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 and DAI have applied for costs and the appellants have been unsuccessful, the appellants must be ordered to pay the costs.

137 The first subparagraph of Article 69(4) of the Rules of Procedure, which also applies to the procedure on appeal by virtue of Article 118, provides in its first subparagraph that Member States and institutions which intervene in the proceedings are to bear its own costs. In accordance with that provision, the Portuguese Republic must be ordered to bear its own costs.

On those grounds,

THE COURT (Sixth Chamber),

hereby:

1. **Dismisses the appeal;**

2. **Dismisses the cross-appeal by the Commission;**

3. **Orders Associação dos Refinadores de Açúcar Portugueses (ARAP), Alcântara Refinarias — Açúcares SA and Refinarias de Açúcar Reunidas SA (RAR) to pay the costs;**

4. **Orders the Portuguese Republic to pay its own costs.**

Colneric Gulmann Puissochet

Schintgen Skouris

Delivered in open court in Luxembourg on 16 May 2002.

R. Grass

Registrar

F. Macken

President of the Sixth Chamber