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

5 April 2006 *

In Case T-351/02,

Deutsche Bahn AG, established in Berlin (Germany), represented initially by M. Schütte, M. Reysen and W. Kirchhoff, and subsequently by Messrs Schütte and Reysen, lawyers, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by V. Kreuschitz and J. Flett, acting as Agents, with an address for service in Luxembourg,

defendant,

supported by

Council of the European Union, represented by A.-M. Colaert, F. Florindo Gijón and C. Saile, acting as Agents,

intervener,

* Language of the case: German.

APPLICATION for the annulment of the Commission's decision of 12 September 2002 rejecting a complaint lodged by the applicant on 5 July 2002,

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

composed of B. Vesterdorf, President, J.D. Cooke, R. García-Valdecasas, I. Labucka and V. Trstenjak, Judges,

Registrar: K. Andova, Administrator,

having regard to the written procedure and further to the hearing on 21 September 2005,

gives the following

Judgment

Legal context

1 Article 1(1) of 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) provides that Member States are to impose a harmonised excise duty on mineral oils in accordance with that directive.

2 Under Article 8(1) of Directive 92/81, Member States are to exempt from the harmonised excise duty inter alia 'mineral oils supplied for use as fuels for the purpose of air navigation other than private pleasure flying'.

3 Directive 92/81 was repealed with effect from 31 December 2003 by Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (OJ 2003 283, p. 51).

4 As set out in Paragraph 4(1) of the Mineralölsteuergesetz (German Law on the taxation of mineral oils) of 21 December 1992 (BGBl. 1992 I, p. 2185, corrigendum in BGBl. 1993 I, p. 169) (hereinafter 'the MinöStG'):

'Subject to the provisions of Paragraph 12, mineral oils may be used with exemption from tax

...

(3) as fuel for the purpose of air navigation

(a) by airlines carrying out the commercial transport of persons and goods or the supply for consideration of services,

...'

5 As set out in Article 4 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty (OJ 1999 L 83, p. 1):

'1. The Commission shall examine the notification as soon as it is received. Without prejudice to Article 8, the Commission shall take a decision pursuant to paragraphs 2, 3 or 4.

2. Where the Commission, after a preliminary examination, finds that the notified measure does not constitute aid, it shall record that finding by way of a decision.

3. Where the Commission, after a preliminary examination, finds that no doubts are raised as to the compatibility with the common market of a notified measure, in so far as it falls within the scope of Article [87](1) of the Treaty, it shall decide that the measure is compatible with the common market ... . The decision shall specify which exception under the Treaty has been applied.

4. Where the Commission, after a preliminary examination, finds that doubts are raised as to the compatibility with the common market of a notified measure, it shall decide to initiate proceedings pursuant to Article [88](2) of the Treaty ...'

6 Article 10 of Regulation No 659/1999 reads as follows:

'1. Where the Commission has in its possession information from whatever source regarding alleged unlawful aid, it shall examine that information without delay.

2. If necessary, it shall request information from the Member State concerned. Article 2(2) and Article 5(1) and (2) shall apply mutatis mutandis.

...'

7 Article 13(1) of Regulation No 659/1999 provides:

'The examination of possible unlawful aid shall result in a decision pursuant to Article 4(2), (3) or (4) ...'

8 According to Article 20 of Regulation No 659/1999:

'...

2. Any interested party may inform the Commission of any alleged unlawful aid and any alleged misuse of aid. Where the Commission considers that on the basis of the information in its possession there are insufficient grounds for taking a view on the case, it shall inform the interested party thereof. Where the Commission takes a decision on a case concerning the subject matter of the information supplied, it shall send a copy of that decision to the interested party.

3. At its request, any interested party shall obtain a copy of any decision pursuant to Articles 4 and 7, Article 10(3) and Article 11.'

9 According to Article 25 of Regulation No 659/1999:

'Decisions taken pursuant to Chapters II, III, IV, V and VII shall be addressed to the Member State concerned. The Commission shall notify them to the Member State concerned without delay and give the latter the opportunity to indicate to the Commission which information it considers to be covered by the obligation of professional secrecy.'

Facts and proceedings

10 Deutsche Bahn AG is the German national railway undertaking. Considering that the tax exemption provided for in Paragraph 4(1)(3)(a) of the MinöStG in respect of aviation fuel was leading to a distortion of competition between undertakings engaged in rail transport (in particular high-speed trains) and undertakings engaged in air transport, the applicant, by letter of 5 July 2002, complained to the Commission about that exemption and requested that it initiate the investigation procedure under Article 88 EC.

11 On 12 September 2002, Ms Loyola de Palacio, at that time the Member of the Commission responsible for transport, sent a letter to the applicant, wrongly dated 21 September 2002, which was worded as follows (hereinafter 'the contested decision'):

'Thank you for your recent letter, concerning competition in Germany between Deutsche Bahn and "low-cost airlines" in which you ask the Commission to take measures against the tax exemption for aviation kerosene.

In the formal complaint annexed to your letter, you argue that the tax exemption for aviation kerosene is not compatible with the internal market. The European Commission considers however that the exemption in question does not constitute State aid in the sense of Article 87(1) of the EC Treaty. The tax exemption is based on the Council Directive on the harmonisation of the structures of excise duties on mineral oils ... which was unanimously adopted by the Member States in accordance with Article 93 of the EC Treaty. It should furthermore be underlined that the Directive does not leave any margin of discretion to the Member State. Therefore, the tax exemption stipulated in § 4 Abs. 1 Nr. 3 lit. a) [Paragraph 4(1)(3)(a)] of the German Oil Tax Law [MinöStG] must be considered as an implementation of the European Directive [92/81], and not as an attempt to grant aid.

Moreover, the European Directive is in line with international practice based on policies established by the International Civil Aviation Organisation (ICAO) under the terms of the Convention on International Civil Aviation (the "Chicago Convention").

Because the tax exemption for aviation kerosene is not considered to raise a State aid issue, the Commission does not intend to initiate the State aid investigation procedure according to Article 88 of the EC Treaty.

The European Commission has indeed — as you correctly point out in your letter — repeatedly referred to the problem of the tax exemption. On several occasions the Commission has requested that the issue be discussed within the ICAO framework with a view to introducing an aviation fuel tax or measures with similar effect. An ICAO working group is currently looking at how market based measures such as levies, emissions trading and voluntary mechanisms might be introduced for international civil aviation.

Independently of the question of international law, the European Commission notes in its White Paper on European transport policy published in 2001 that consideration might be given "to abolishing the tax exemption for kerosene on intra-Community flights. This path is by no means free of problems, since it would demand equal treatment vis-à-vis non-Community carriers operating intra-Community flights". ... The efforts of the Commission have so far not led to any modification to the current Directive [92/81].'

12 In reply to that letter, the applicant, on 30 September 2002, sent to the Commission a letter worded as follows:

'Thank you for your letter of [12] September 2002 in which you express your view regarding the complaint lodged by Deutsche Bahn against the exemption from excise duties on mineral oils of aviation fuel. It is with interest and satisfaction that I read that the Commission also no longer considers the tax exemption for kerosene to be appropriate. In that regard, Deutsche Bahn expressly finds itself confirmed in its opinion that the exemption from excise duties on mineral oils is increasingly leading to unfair competition, in particular on the part of "low-cost" airlines at the expense of transport by ICE high-speed train.

Consequently, we are even more disappointed that you do not want to carry out any State aid inquiry regarding that tax exemption which distorts competition. We ask you to reconsider your position once more. In our opinion, the adoption of the Directive concerning mineral oils does not preclude an investigation of the aspects relating to State aid. At that time, there was no competition between rail and air transport. That situation has changed in the course of the last ten years. In our opinion, the Commission can and must take that change into account.

If the Commission were to adhere to the view of the law put forward in your letter, that question would have to be referred to the competent European courts for the purpose of clarification.

In the hope that such legal proceedings may be avoided, we remain at your disposal.'

13 In a letter of 25 November 2002, which was received by the applicant after the present application had been lodged, Ms Loyola de Palacio repeated the essential content of her letter of 12 September 2002.

14 By application lodged at the Registry of the Court of First Instance on 28 November 2002, the applicant brought the present action.

15 By application lodged at the Registry of the Court of First Instance on 5 December 2002, it also brought an action for declaration of failure to act (registered under number T-361/02) seeking a declaration that the Commission unlawfully refrained from taking a decision on its complaint.

16 On 9 January 2003, Ms Loyola de Palacio sent the applicant a letter worded as follows:

'I refer to my letters of 12 September 2002, which was wrongly dated 21 September, and 25 November 2002, the content of which I would like to reiterate and confirm in view of subsequent events ...

I do not believe that this matter comes under the State aid rules. Neither I nor the European Commission has taken a decision pursuant to the Regulation [No 659/1999] or on the basis of any other legal basis in this respect. The Commission has not taken a position either. It is clear from the abovementioned letters that I share that opinion. However, in order to rule out a possible misunderstanding on your part, ... you may consider any part of my letters from which you or your counsel draw another conclusion as either consistent with my position or as withdrawn.'

17 On the same day, the Commission sent that letter to the Court of First Instance informing it that it had withdrawn the abovementioned two letters of 12 September and 25 November 2002. The Commission deduced from this that the present case had become devoid of purpose.

18 On 25 February 2003, the applicant submitted its observations on the letter of 9 January 2003, in which it claimed that it still had an interest in pursuing the action.

19 By order of 6 November 2003, the President of the Fifth Chamber (Extended Composition) of the Court of First Instance granted the Council leave to intervene in support of the form of order sought by the Commission in this case. The Council lodged its statement in intervention on 22 December 2003. The applicant submitted its observations on that statement on 15 March 2004.

20 Upon reading the Report of the Judge-Rapporteur, the Court of First Instance (First Chamber, Extended Composition) decided to open the oral procedure and, by way of measures of organisation of procedure, requested that the parties reply to certain questions. They complied with those requests.

21 By order dated 20 June 2005 in Case T-361/02 *Deutsche Bahn* v *Commission*, not published in the ECR, the Court of First Instance dismissed the applicant's action for declaration of failure to act as manifestly inadmissible.

22 The parties presented oral argument and answered the questions put to them by the Court of First Instance at the hearing on 21 September 2005.

Forms of order sought by the parties

23 The applicant claims that the Court should:

— declare the action admissible;

— annul the contested decision, and order the Commission to pay the costs;

— in the alternative, if the Court decides that the contested decision has been abrogated or withdrawn by the letter of 9 January, declare that that decision is void and order the Commission to pay the costs;

— in the further alternative, if the Court decides that there is no need to adjudicate, order the Commission to pay the costs under Article 87(6) in conjunction with Article 90(a) of the Rules of Procedure of the Court of First Instance.

24 The Commission contends that the Court should:

— dismiss the action as inadmissible and, in any event, as unfounded;

— order the applicant to pay the costs.

25 The Council contends that the Court, if it considers the action admissible, should declare the objection of illegality raised by the applicant to be manifestly unfounded and order the applicant to pay the costs.

Admissibility

Arguments of the parties

26 First, the Commission submits that the letter of 12 September 2002 does not constitute a challengeable act. It claims that the letter has no legal effect, as in it Ms Loyola de Palacio informed the applicant of a legal position which was clear, namely,

that the information supplied by the applicant on 5 July 2002 did not come within the scope of the rules concerning State aid, and that, for that reason, the exemption at issue could not constitute a State aid. According to the Commission, Ms Loyola de Palacio did not intend to settle the matter in a legally binding manner. Furthermore, the Commission states that the contested decision cannot be classified as a decision on State aid because, in the present case, certain of the characteristics of the procedure in these matters are absent, relating to the adoption of such decisions by the Commission, their publication, and the fact that they are addressed to the Member State (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719 (hereinafter *'Sytraval'*), paragraph 45). Even if Regulation No 659/1999 were to be found to apply in this case, the contested decision is nothing other than an informal communication of information, as provided for in the second sentence of Article 20(2) of that Regulation, and is therefore not challengeable.

27 The Commission adds that the judgments cited by the applicant concerning the alleged legal effect of the contested decision are irrelevant in that they were either delivered before the adoption of Regulation No 659/1999 or do not relate to matters capable of falling within Article 20 of that regulation. Furthermore, the applicant is playing with words when it claims that the Commission actually took a decision on the case which was submitted to it and that Article 20(2) of Regulation No 659/1999 is therefore not applicable. The Commission maintains that it was not able to take a decision on this case as it already knew, at the time when the complaint was made, that the matters which were communicated to it did not relate to State aid and even less to unlawful aid or aid unreasonably applied.

28 Secondly, the Commission maintains that the applicant has no legal interest in bringing proceedings. The letter of 12 September 2002, even if it had been a challengeable act, was withdrawn by the letter of 9 January 2003 and is therefore without effect.

29 In any event, that last letter confirms the legal opinion expressed on 12 September 2002 and also states unambiguously that it is only a personal opinion as to the law which does not bind the Commission and that the Commission has not adopted any decision.

30 In this respect, the Commission explains that it was only in the event that 'the lawyer or lawyers for the person to whom the letter of 12 September 2002 is addressed drew other conclusions from it that it was necessary to state, in the last sentence [of the letter of 9 January 2003], that, in that case, it preferred to withdraw the passages to which another interpretation was given before they became the object of a superfluous and avoidable action.'

31 According to the Commission, there is no risk of its repeating the conduct at issue in the future. The applicant only has to make an application based on Article 20(2) of Regulation No 659/1999 for the Commission to reply by means of a decision addressed to the Federal Republic of Germany, which would then indeed be actionable. Under Article 20(3) of that Regulation, the applicant would receive a copy of that decision.

32 The applicant considers that this action is admissible. In particular, it contends that the letter of 12 September 2002 is a challengeable act in that in it the Commission expresses a definitive legal opinion which produces binding effects (Case 60/81 *IBM* v *Commission* [1981] ECR 1857, paragraph 10, and the order of the Court of First Instance in Case T-182/98 *UPS Europe* v *Commission* [1999] ECR II-2857, paragraph 39).

33 It stresses that the action did not become redundant following the letter of 9 January 2003. It retains a legal interest in bringing proceedings as there has been no valid withdrawal of the contested decision. Furthermore, even if the letter of 12 September 2002 has been withdrawn, its legitimate interest in a declaration that that letter is unlawful none the less remains intact.

Findings of the Court

34 Under the fourth paragraph of Article 230 EC, a natural or legal person may institute proceedings against a decision which is addressed to him.

35 According to settled case-law, only measures which produce binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position may be the subject of an action for annulment under Article 230 EC (*IBM* v *Commission*, cited in paragraph 32 above, paragraph 9, and Case T-112/99 *Métropole Télévision — M6 and Others* v *Commission* [2001] ECR II-2459, paragraph 35). Thus, an action for annulment is available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects (Case 22/70 *Commission* v *Council* [1971] ECR 263, paragraph 42 and Case T-353/00 *Le Pen* v *Parliament* [2003] ECR II-1729, paragraph 77).

36 In its complaint, the applicant alleges that the exemption provided for in Paragraph 4(1)(3)(a) of the MinöStG, in favour of airlines alone, distorts competition between air transport, particularly those companies offering low fares, and rail transport on the passenger transport market, thereby infringing Article 87 EC.

37 In the letter of 12 September 2002, the Commission replies that it considers that the exemption at issue cannot constitute State aid in that it stems from the transposition of Directive 92/81, a Community measure, and consequently the State aid rules do not apply (see paragraph 11 above).

38 The Commission submits that the letter of 12 September is not a challengeable act (see point 26 above).

39 In order to determine whether that letter is an attackable measure, it is necessary first of all to establish the purpose of the applicant's letter of 5 July 2002 to which it replies.

40 The purpose of the applicant's letter of 5 July 2002 was to submit to the Commission a reasoned complaint relating to an alleged infringement of Article 87 EC. That complaint, comprising more than 800 pages, included a large number of items of evidence, economic data and statistics, aimed at substantiating the allegation regarding the existence of State aid and, in particular, of a distortion of competition resulting from the exemption in question. In its complaint, the applicant expressly asked the Commission to begin the formal investigation procedure under Article 88 EC.

41 Regardless of whether the complaint was well founded or not, it is evident that, upon receiving that complaint, the Commission was in possession of 'information regarding alleged unlawful aid' within the meaning of Article 10(1) of Regulation No 659/1999. It is clear from that provision that the Commission must examine such information without delay (see paragraph 6 above). It has the right to contact the Member State concerned, but at that stage is not obliged to do so.

42 Under Article 13 of Regulation No 659/1999, a preliminary examination of 'possible unlawful aid' must result in a decision pursuant to Article 4(2), (3) or (4) (see paragraph 7 above). In particular, Article 4(2) of that regulation provides that if, after a preliminary examination, the Commission finds that the subject matter of the

information in its possession does not constitute aid, it must record that finding by way of a decision (see paragraph 5 above).

43 Aside from that possibility of taking a decision under Article 4 of Regulation No 659/1999, the Commission, when in possession of information indicating the possible existence of State aid, has no option but to inform the interested parties that there 'are insufficient grounds for taking a view on the case' pursuant to the second sentence of Article 20(2) of that regulation (see paragraph 8 above).

44 In this case, it is clear that the letter of 12 September 2002 does not contain a decision not to raise objections under Article 4(3) of Regulation No 659/1999 nor a decision to initiate the formal investigation procedure under Article 4(4). It is therefore necessary to determine whether it contains a decision within the meaning of Article 4(2) of that regulation or whether it merely constitutes an informal communication, as provided for in Article 20(2) of the regulation.

45 The Court considers that, in this case, the Commission, contrary to its submission, did not take the option offered by the second sentence of Article 20(2) of Regulation No 659/1999. Far from stating that there are insufficient grounds for taking a view on the case, the Commission, both in the contested decision and the letters of 25 November 2002 and 9 January 2003, adopts a clear and definitive position. It states that the complaint does not enable the existence of State aid to be identified as the exemption at issue does not stem from a decision by the German authorities to provide aid, but is the result of the obligation imposed on Germany to transpose Directive 92/81 (see paragraph 11 above).

46 It must be borne in mind, in this respect, that in its order in *Deutsche Bahn* v *Commission* (see paragraph 21 above) the Court dismissed the action for declaration of failure to act brought by the applicant in Case T-361/02 on the ground that the letter of 12 September 2002 constituted the 'taking of a clear and explicit position on the applicant's complaint' (paragraph 20).

47 That letter cannot therefore be interpreted as merely informing the applicant of the absence of sufficient grounds for taking a view on the case within the meaning of the second sentence of Article 20(2) of Regulation No 659/1999. In that letter the Commission adopted an explicit and reasoned position.

48 As for the question whether the letter of 12 September 2002 contains a decision as provided for in Article 4(2) of Regulation No 659/1999, namely a finding by the Commission, after a preliminary investigation, that the measure in question does not constitute aid, it is expressly stated in the letter that the Commission is of the opinion that 'the exemption in question does not constitute State aid in the sense of Article 87(1) of the EC Treaty' (see paragraph 11 above).

49 Thus, in accordance with its obligation under Article 10 of Regulation No 659/1999, the Commission examined the information provided by the applicant and found, in its letter of 12 September 2002, that there was no aid on the ground that the exemption was not attributable to the Member State concerned. It is thus clear that that letter contains a decision within the meaning of Article 4(2) of Regulation No 659/1999. The Commission's ground for concluding that there is no State aid and the fact that the preliminary examination did not require an in-depth and extensive analysis by it of the information forming the subject-matter of the complaint are irrelevant in that regard.

50 The Commission submits that the letter of 12 September 2002 cannot be considered to be a decision such as that referred to in Article 4(2) of Regulation No 659/1999 on the ground that the complaint brought on 5 July 2002 did not come within the scope of the State aid rules. The Commission adds that the letter was neither addressed nor communicated to a Member State, as required under Article 25 of that regulation (see paragraph 9 above).

51 Those arguments cannot be accepted. First of all, it is settled case-law that the form in which acts or decisions are cast has no bearing on the right to challenge them by way of an application for annulment and that it is necessary to look at their substance in order to ascertain whether they are acts within the meaning of Article 230 EC (see the case-law cited in paragraph 35 above; see also, to that effect, Case T-3/93 *Air France* v *Commission* [1994] ECR II-121, paragraphs 43, 57 and 58).

52 Moreover, as has been stated in paragraph 41 above, when the Commission has been put in possession of information relating to alleged unlawful aid, it is obliged to examine that information without delay pursuant to Article 10(1) of Regulation No 659/1999. If, as in this case, the Commission does not merely inform the interested party that there are insufficient grounds for taking a view on the case, but takes a clear and reasoned position by stating that the measure at issue does not constitute aid, it can be acting only in accordance with Article 4(2) of that regulation. Having adopted a decision which essentially includes a decision taken under Article 4(2), the Commission is not entitled to exclude it from the review of the Community judicature by declaring that it did not take such a decision, by trying to withdraw it, or by deciding not to address the decision to the Member State concerned, contrary to Article 25 of Regulation No 659/1999.

53 What is more, the Commission cannot rely in this respect on the case-law of the Court of Justice and, in particular, on the *Sytraval* case. That judgment was given before the procedural system for dealing with complaints in connection with State

aid was laid down by Regulation No 659/1999. That regulation seeks to codify and reinforce the Commission's practices in that area in accordance with the case-law of the Court of Justice (second recital in the preamble to the Regulation).

54 Furthermore, it must be borne in mind that, in the case which gave rise to the judgment in *Sytraval*, the Commission had adopted a decision addressed to the Member State concerned rejecting the complaint at issue, but had not communicated the text of that decision to the complainants (*Sytraval*, paragraphs 14 and 46). The Commission had informed the complainants only of the effect of its decision (paragraph 15). The Court of Justice held that it was the decision addressed to the Member State which had to form the subject-matter of any action for annulment and not the communication addressed to the complainants (paragraph 45).

55 In this case, the Commission did not address a decision to the Federal Republic of Germany regarding the alleged State aid. If the Commission had, as was incumbent on it under Article 25 of Regulation No 659/1999, addressed such a decision to the German authorities, the applicant, as the party entitled to the procedural safeguards provided for by Article 88(2) EC, would have been entitled to challenge its validity as a person directly and individually concerned within the meaning of the fourth paragraph of Article 230 EC (see, to that effect, *Sytraval*, paragraphs 41 and 48). Therefore, the Commission is not entitled to rely on the fact that it did not address a decision to the Member State and thus on its non-compliance with Article 25 of Regulation No 659/1999, in order to deny the applicant its procedural safeguards.

56 It must be added that Regulation No 659/1999 expressly makes clear that it seeks inter alia to increase legal certainty, particularly as regards the procedures to be followed in matters of State aid (third, seventh and eleventh recitals in the preamble to the Regulation). That objective would clearly be prejudiced if the Commission were entitled to close cases in that area in ways outside the procedural framework provided for in the Regulation.

57 Furthermore, contrary to the Commission's submission (see paragraph 29 above), Ms Loyola de Palacio did not state, either in the contested decision (see paragraph 11 above) or in her letter of 9 January 2003 (see paragraph 16 above), that she was expressing a personal opinion in that decision. On the contrary, she clearly took an administrative decision on behalf of the Commission.

58 In that regard, it is irrelevant that that letter does not stem from the adoption of a definitive decision on the complaint by the college of Commissioners (see paragraph 26 above). Such a decision can be adopted only if a proposal to that end has been submitted by the Member of the Commission responsible. The letter of 12 September 2002 gives the impression that Ms Loyola de Palacio had no intention of submitting the matter to the college. She stated that the complaint could not be investigated under Article 87 EC and Regulation No 659/1999 and, therefore, it could not be the subject of any decision of the college.

59 As regards the fact that the letter was not published (see paragraph 26 above), it is sufficient to note that a measure does not have to be published in order to be the object of an action for annulment.

60 The Commission furthermore maintains that the applicant has no legal interest in bringing proceedings, because the letter of 12 September 2002 was withdrawn by the letter of 9 January 2003 (see paragraph 16 above) and is therefore without any effect (see paragraph 28 above).

61 It must immediately be pointed out that the letter of 9 January 2003 is worded ambiguously. First, referring to the letters of 12 September and 25 November 2002, the Commissioner states that she 'would like to reiterate and confirm the content in

view of subsequent events'. Secondly, she states that the applicant may 'consider any part of [her] letters from which [it] or [its] counsel draw[s] another conclusion as either consistent with [her] position or as withdrawn'. In view of that particularly ambiguous language, the Court considers that that letter must be read against the Commission's position.

62 It is apparent from the letter of 9 January 2003 that the Commission retained its view that no investigation of the complaint under Article 88 EC was warranted. Thus it did not change its view that the tax exemption did not constitute State aid within the meaning of Article 87(1) EC and it did not initiate the procedure provided for in Article 88(2) EC. It expressly confirmed the content of the letter of 12 September 2002 in its letter of 25 November 2002 and, as the Commission admits in its written submissions, in its letter of 9 January 2003. Nor, moreover, did the Commission decide to re-examine its position.

63 It is clear from all the foregoing that the letter of 12 September 2002 contains in essence a decision within the meaning of Article 4(2) of Regulation No 659/1999 and that it continues to have legal effects in spite of the letter of 9 January 2003. Therefore, this action is admissible and there is still a need to rule on it.

Substance

64 The applicant relies on six pleas in law: (i) infringement of the principle of legality, (ii) infringement of the duty to state reasons, (iii) infringement of Article 87 EC, (iv) infringement of Article 88 EC, (v) a misapplication of Article 307 EC and (vi) infringement of the principle of equal treatment.

65 The first, third and fourth pleas will be examined together.

The first, third and fourth pleas

Arguments of the parties

66 Under its third plea in law, the applicant submits that Paragraph 4(1)(3)(a) of the MinöStG constitutes State aid, within the meaning of Article 87 EC, which is incompatible with the common market.

67 First, it observes that, as the airlines operating in Germany are completely exempt from general excise duties on mineral oils under Paragraph 4(1)(3)(a) of the MinöStG, their tax burdens are considerably reduced so that they enjoy a financial advantage.

68 Secondly, as the loss of revenue due to that exemption (EUR 435 million in 2002) is at the expense of the German budget, the advantage is granted using State resources. The applicant states that, contrary to the Council's submission, the existence of aid is not dependent on the presence of an 'additional burden' for the State. In that regard, the Council acknowledges that a tax exemption, like the one in this case, is a classic example of aid within the meaning of Article 87 EC.

69 The applicant adds that Paragraph 4(1)(3)(a) of the MinöStG undoubtedly constitutes an act of the Federal Republic of Germany as it was adopted by the legislative bodies of that Member State. It states that that provision represents only one element in the general scheme for the taxation of mineral oils in Germany and that the Court did not call into question the legal nature, qua national measure, of the acts transposing Article 8(1)(a) and (b) of Directive 92/81 in Case C-346/97 *Braathens* [1999] ECR I-3419, and Case C-437/01 *Commission* v *Italy* [2003] ECR I-9861.

70 Although Paragraph 4(1)(3)(a) of the MinöStG is a measure transposing Article 8(1)(b) of Directive 92/81, it is an act of the Member State and therefore a measure imputable to the State in accordance with Article 87(1) EC (see, in that regard, Case C-208/90 *Emmott* [1991] ECR I-4269, paragraph 21, and Case C-37/92 *Vanacker and Lesage* [1993] ECR I-4947, paragraph 7). The applicant observes that under Article 249 EC, a directive is binding only as to the result to be achieved, whilst the choice of the form and methods of transposition is left to the national authorities. Therefore, contrary to the Commission's assertion, there cannot be such a thing as a directive which leaves no room for manoeuvre to the State.

71 In this case, Article 8(1) of Directive 92/81 left a margin of discretion to the Member States in that they had to exempt aviation fuel from the harmonised excise duty 'under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse'. Furthermore, as submitted by the Council, the German legislature had a margin of discretion to avoid a distortion of competition by exempting other modes of transport from the excise duty on mineral oils within the framework of possibilities offered by Directive 92/81.

72 Thirdly, the applicant submits that the exemption at issue also constitutes a selective measure which favours certain undertakings or the production of certain goods within the meaning of Article 87 EC.

73 Fourthly, it states that Paragraph 4(1)(3)(a) of the MinöStG leads to a distortion of competition within the meaning of Article 87(1) EC. The Commission acknowledged that there was a competitive relationship between high-speed trains and means of air transport on intra-Community routes (Commission Decision of 9 December 1998 (Case No *IV/M.1305 — EUROSTAR*) (OJ 1999 C 256, p. 3), paragraph 21). The applicant claims that, in its complaint, it sufficiently established that such a competitive relationship also existed on German domestic routes. Furthermore, although the applicant has to pay a whole series of taxes on the primary energy sources which it uses, the exemption at issue allows airlines to reduce their costs considerably and thus to offer prices on German domestic routes which are lower than those offered by the applicant.

74 Fifthly, the exemption at issue affects trade between Member States in that (i) airlines generally operate in several Member States and (ii) high-speed trains link various European capital cities so that they find themselves in a direct competitive relationship with air transport.

75 According to the applicant, it is clear from the foregoing that Paragraph 4(1)(3)(a) of the MinöStG constitutes State aid within the meaning of Article 87(1) EC. The contested decision is therefore unlawful.

76 The applicant also submits that the aid at issue is incompatible with the common market. Paragraph 4(1)(3)(a) of the MinöStG clearly fails to fulfil the conditions in Article 87(2) EC and cannot be declared compatible under Article 87(3) EC.

77 Furthermore, it submits that the Commission wrongly considers in the contested decision that Article 8(1)(b) of Directive 92/81 precludes the application of Article 87 EC. That provision of secondary law has to be evaluated in the light of Article 87 EC and the other provisions of primary law governing State aid which are a specific expression of the principle of free competition (Case 26/78 *INAMI* v *Viola* [1978] ECR 1771, paragraphs 9 to 14; see also the Opinion of Advocate General Lenz in Case 52/84 *Commission* v *Belgium* [1986] ECR 89, 99). It is clear from the principle of the precedence of Community law that a conflict of application between secondary law and primary law is to be resolved either by interpreting the provision of secondary law so as to render it consistent with the primary law (in particular by extending the tax exemption to operators of high-speed trains) or, in cases where such an interpretation is not possible, by not applying the provision of secondary law (Case 300/86 *Van Landschoot* v *Mera* [1988] ECR 3443).

78 It also has to be concluded from a textual, systematic and teleological interpretation of Article 8(1) of Directive 92/81 that Article 87 EC applies in the present case. Firstly, it is apparent from the wording of that provision that the exemption from excise duty is valid only 'without prejudice to other Community provisions'. Secondly, according to case-law, optional tax exemptions under Article 8(2) and (4) of Directive 92/81 are restricted by the general provisions aimed at protecting competition, including Article 87 EC (see, for example, Case T-184/97 *BP Chemicals* v *Commission* [2000] ECR II-3145, paragraph 62), so that the tax exemption at issue has to be restricted in the same way. Thirdly, a teleological interpretation of Article 8(1)(b) of Directive 92/81 is in keeping with the applicability of the Treaty rules on competition to the tax exemption on aviation fuel as that provision is aimed at the creation of an effective internal market and the standardisation of the conditions of competition.

79 The applicant disputes the Council's claim that the partial harmonisation of a tax by a measure of secondary Community law necessarily causes the measure to fall

outside the scope of the Treaty provisions concerning State aid unless the directive on which that harmonisation is based expressly provides for their application. That interpretation fails to have regard to the hierarchy of norms. If the Council had wanted to exclude the application of Article 87(1) EC, it should have based the Directive not only on Article 93 EC, but also on Article 89 EC and thereby exempt the measures at issue from the procedure for reviewing State aid. Likewise, the Council could have stated that the measures provided for by the Directive were compatible with the common market on the basis of Article 88(2) EC, Article 87(3)(e) EC or possibly Article 73 EC. That would correspond to the practice generally followed by the Council (see, for example, Regulation (EEC) No 1107/70 of the Council of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway (OJ 1970 L 130, p. 1)). Since the Council does not establish any derogation from primary law on the basis of the powers laid down in primary law, it is the primary law which applies, namely, in the present case, Articles 87 EC and 88 EC. The Council's claim that such derogation was in fact envisaged has to be dismissed since that derogation was not expressed clearly and explicitly.

80 In that regard, the applicant disputes the Council's view that the fact that one of the aforementioned provisions concerning aid was not used as a power is merely a formal defect of no importance. The Directive provides no grounds for tacitly excluding measures implementing it from review under the provisions applying to State aid. On the contrary, it is necessary to base the Directive expressly on the corresponding power.

81 The applicant adds that the Commission and the Council subject the tax exemptions provided for by Directive 2003/96, which replaces Directive 92/81, to a detailed examination in the light of the rules concerning aid. It is therefore incomprehensible that the defendant and the intervener now refuse to review the tax exemptions provided for by Directive 92/81 under the criteria in Article 87 EC.

82 The applicant admits that the Commission cannot rule on the validity of directives of the Council. However, it states that the Commission can and must check whether the transposition by a Member State of the tax exemption provided for by Directive 92/81 complies with the provisions of the Treaty concerning aid and satisfy itself that the national law does not, as from the date of transposition, have the effect of creating a distortion of competition which is incompatible with the common market. The Commission must also review the residual room for manœuvre which Member States have for extending the tax exemption to rail transport under Article 8(2)(c) of that Directive. The applicant states, in this respect, that Case T-82/96 *ARAP and Others* v *Commission* [1999] ECR II-1889, paragraph 14, is not relevant as it relates to a regulation, which does not need to be transposed by a Member State, and not to a directive.

83 The applicant thus deduces from the foregoing that the exemption from excise duty in favour of aviation fuel provided for in Article 8(1)(b) of Directive 92/81 is not compatible with Article 87 EC and is therefore inapplicable in its current form.

84 Furthermore, the applicant pleads that Article 8(1)(b) of Directive 92/81 is not applicable either as it is no longer covered by the power given by Article 93 EC. It observes, in this respect, that it is apparent from Article 241 EC that nothing precludes it from invoking the inapplicability of Article 8(1)(b) of Directive 92/81.

85 That directive harmonised the structures of excise duties on mineral oils and, like the other directives adopted within that context, is based exclusively on Article 93 EC and directed at the completion of the Community internal market within the meaning of Article 14 EC. The applicant admits that the tax exemption on aviation fuel provided for by Article 8(1)(b) of Directive 92/81 was probably necessary for the completion of the internal market when that directive was adopted, given the

competitive situation at the time. However, and as the Council has confirmed, airlines and the operators of high-speed trains currently find themselves in a highly competitive relationship and the excise duty exemption at issue leads to a distortion of competition (see paragraph 73 above). Consequently, the tax exemption on aviation fuel does not lead to the completion of the internal market, but, on the contrary, greatly distorts competition.

86 A measure which leads to a distortion of competition cannot be 'necessary' to ensure the establishment and functioning of the common market within the meaning of Article 93 EC. In accordance with the principle of proportionality, a measure can be considered necessary only in the absence of an alternative which distorts competition less (Case T-162/94 *NMB France and Others* v *Commission* [1996] ECR II-427, paragraph 69). According to the applicant, competition would be distorted less by the extension of the tax exemption provided for by Article 8(1)(b) of Directive 92/81 to operators of high-speed trains or by the abolition of that exemption from excise duty on mineral oils as regards intra-Community flights. Consequently, since the change in the competitive situation on the market at issue, the tax exemption on aviation fuel provided for by Article 8(1)(b) of Directive 92/81 is no longer necessary to ensure the establishment and functioning of the internal market and is no longer covered by Article 93 EC.

87 The applicant states that it does not deny that the Council could have based Directive 92/81 on Article 93 EC. However, it must still be asked whether, on account of changes in the competitive relationship between civil aviation and high-speed trains, the power provided for by Article 93 EC is sufficient to preclude an investigation of national measures transposing a directive in the context of the general provisions concerning aid. The applicant explains that it does not seek to obtain the annulment of the Directive, but that it considers that the power used does not preclude review by the Commission.

88 Within the context of the first plea in law, the applicant submits that the Commission ought to have carried out a thorough and impartial examination of the complaint (see, in that regard, Case C-449/98 P *IECC* v *Commission* [2001] ECR I-3875, paragraph 45, and Case T-95/96 *Gestevisión Telecino* v *Commission* [1998] ECR II-3407, paragraph 72). By entirely rejecting its complaint, the Commission failed to have regard to the principle of legality as well as some of the provisions in Regulation No 659/1999.

89 The applicant doubts that the Commission observed the principle of sound administration and its own internal rules in drafting the letter of 12 September 2002. In this respect, it states that although, under those internal rules, the college of Commissioners was competent in the present case, the case was clearly not brought before it.

90 Finally, in support of the fourth plea in law, the applicant alleges that by refusing, in the contested decision, to initiate the formal investigation procedure, the Commission infringed the obligations stemming from Article 88(2) and (3) EC and from Article 10(1) and Article 17 of Regulation No 659/1999.

91 In its reply, the applicant states that the Commission wrongly considers that, in view of the proposed amendments to the provisions concerned in Directive 92/81, it is relieved of the need to initiate a formal investigation procedure with regard to the aid in force.

92 The Commission considers that there clearly cannot be any question of State aid in the present case. It states that the exemption at issue is not imputable to the State in accordance with the relevant case-law (Case C-482/99 *France* v *Commission* [2002] ECR I-4397). The tax exemption provided for in Paragraph 4(1)(3)(a) of the

MinöStG is founded on Article 8(1)(b) of Directive 92/81 and Member States have no room for manoeuvre in transposing that exemption (*Braathens*, paragraph 69 above).

93 In reply to the applicant's argument that, in view of the precedence of the primary law, the law on State aid should be applied, the Commission maintains that the applicant fails to have regard to the fact that *France* v *Commission*, paragraph 92 above, also concerns the law on State aid and must be complied with. Furthermore, it rejects the argument that Article 8(1) of Directive 92/81 is not covered by the power in Article 93 EC and considers that the applicant is lumping together the issue which is actually relevant in that regard, namely that of the requisite harmonisation, and the issue of the impact on competition, which has no connection with Article 93 EC.

94 The Commission does not reply to the arguments which the applicant relies on in support of its first plea in law.

95 As for the fourth plea in law, the Commission submits that there was no need to initiate the formal investigation procedure. It adds that Directive 92/81 has been replaced by Directive 2003/96 so that it was unnecessary to initiate a formal investigation procedure.

96 The Council puts forward three arguments to show that the rules and the review procedure in respect of State aid which are provided for in Articles 87 to 89 EC are not applicable in this case. Firstly, those provisions are not applicable to measures adopted by the Community legislature unless the latter decides otherwise. The powers that Article 88 EC confers on the Commission do not permit it to declare that a Community provision in force is inapplicable.

97 Secondly, the exemption at issue cannot be regarded as State aid, as its aim and general structure are not designed to create an advantage which constitutes an additional burden on the State.

98 Thirdly, the Council notes that even if the exemption at issue were to be regarded as State aid, it would have the power to exempt certain categories of aid from complying with the procedure for reviewing their compatibility with the common market. It is apparent from the unconditional nature of the provision at issue that the Community legislature specifically precluded the possibility of such a review in circumstances such as those of this case.

Findings of the Court

99 Article 87(1) EC states that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall be incompatible with the common market, in so far as it affects trade between Member States.

100 That provision thus refers to the decisions of Member States by which, in pursuit of their own economic and social objectives, they give, by unilateral and autonomous decisions, resources to undertakings or other persons or procure for them advantages intended to encourage the attainment of the economic or social objectives sought (Case 61/79 *Amministrazione delle finanze dello Stato* v *Denkavit italiana* [1980] ECR 1205, paragraph 31).

101 Therefore, for advantages to be capable of being categorised as aid within the meaning of Article 87(1) EC, they must, *inter alia*, be imputable to the State (see *France* v *Commission*, cited above in paragraph 92, paragraph 24, and the case-law cited).

102 That is not the case here. Paragraph 4(1)(3)(a) of the MinöStG implements Article 8(1)(b) of Directive 92/81. The Court of Justice has held that the latter provision imposes on Member States a clear and precise obligation not to levy the harmonised excise duty on fuel used for the purpose of commercial air navigation (*Braathens*, cited in paragraph 69 above, paragraphs 30 to 32). In transposing the exemption into national law, Member States are only implementing Community provisions in accordance with their obligations stemming from the Treaty. Therefore, the provision at issue is not imputable to the German State, but in actual fact stems from an act of the Community legislature.

103 The applicant states that the exemption was granted through State resources. However, the imputability of aid to a State is separate from the question whether aid was granted through State resources. It is clear from the case-law that they are separate and cumulative conditions (*France* v *Commission*, cited in paragraph 92 above, paragraph 24).

104 It is clear from the foregoing that some of the conditions which are fundamental to the application of Article 87 EC are not satisfied, so that the Commission was entitled to conclude that the exemption at issue did not fall within the scope of that article.

105 Contrary to the applicant's submission, the degree of latitude afforded to Member States by the introductory wording of Article 8(1) of Directive 92/81, which states that the exemptions are granted by the Member States 'under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse', applies only to the wording of the conditions for implementing the exemption referred to and does not affect the unconditional nature of the obligation imposed by that provision to grant exemption (*Braathens*, cited in paragraph 69 above, paragraph 31).

106 As for the applicant's argument that the Federal Republic of Germany could have avoided the distortion of competition by extending the exemption to high-speed trains under Article 8(2)(c) of Directive 92/81, it is sufficient to state that the Member States were perfectly entitled to limit themselves to transposing the mandatory provisions in the Directive and not to use the option of extending the exemption.

107 Furthermore, the applicant pleads that Article 8(1)(b) of Directive 92/81 is inapplicable. First, it stresses that, pursuant to the principle of precedence, the exemption from excise duty in favour of aviation fuel provided for in that provision is not compatible with Article 87 EC and is therefore inapplicable in its current form. If the Council had wanted to preclude the application of Article 87 EC, it should have based the Directive not only on Article 93 EC, but also on other articles in the Treaty (see paragraph 79 above). Secondly, the applicant claims that Article 8(1)(b) of Directive 92/81 is inapplicable as it is no longer covered by the power in Article 93 EC. It maintains that airlines and the operators of high-speed trains currently find themselves in a highly competitive relationship and that, as a result, the exemption at issue does not lead to the completion of the internal market, but, on the contrary, to a significant distortion of competition (see paragraph 85 above).

108 Even if the applicant intended to raise a plea of illegality with regard to Article 8 (1)(b) of Directive 92/81, that plea is not clear from its pleadings. In particular, in its observations on the Council's intervention, the applicant stated that its main argument is that Article 8(1)(b) of Directive 92/81 cannot preclude the Commission from investigating the exemption at issue under the procedures concerning State aid.

109 In any event, the applicant's arguments relating to the inapplicability of Article 8(1)(b) of Directive 92/81 cannot be upheld.

110 As regards its argument that that provision is inapplicable because it infringes Article 87 EC, it is enough to state that, as is clear from paragraph 104 above, that article is not applicable in the present case.

111 With respect to the argument based on Article 93 EC, it must be borne in mind that Directive 92/81 was unanimously adopted by the Council, on the basis of that article, in order to harmonise the structures of excise duties on mineral oils. The exemption provided for in Article 8(1)(b) of Directive 92/81 stemmed from provisions of international law laying down a tax exemption for aviation fuel. The applicant itself admits in its application that Article 8(1)(b) of Directive 92/81 was probably necessary at the time the Directive was adopted, as it sought to guarantee that competition between the different airlines in the Member States and between those airlines and operators in non-member states was not distorted (see paragraph 85 above).

112 Even if the applicant were right in pointing to the existence of a new competitive relationship between air and rail transport since the adoption of Directive 92/81, it

does not follow that Article 8(1)(b) of Directive 92/81 has become unlawful. It was for the Community legislature, which has a wide discretion in the exercise of its authority, to evaluate the situation and, if necessary, decide on the desirability of amending the provisions in force.

113 As regards the applicant's argument relating to the fact that the Commission and the Council subject the tax exemptions provided for by the provisions in Directive 2003/96 to a detailed examination in the light of the rules concerning State aid, it must be observed that Article 14(1)(b) of that directive provides for an exemption which applies to 'energy products supplied for use as fuel for the purpose of air navigation other than in private pleasure-flying'. It is clear from Article 14(2) of that directive that a Member State may, firstly, limit the scope of the exemption provided for in Article 14(1) to international and intra-Community transport and, secondly, waive the exemption where it has entered into a bilateral agreement with another Member State. Therefore, the national measures for transposing Article 14 of Directive 2003/96 are measures in respect of which States enjoy a margin of discretion, which explains why monitoring of their compliance with the provisions concerning State aid is provided for by Article 26(2) of that directive. It is clear from all of the foregoing that the third plea in law is not well founded.

114 Lastly, the first and fourth pleas in law are based on the premiss that the applicant lodged a complaint which warranted a thorough investigation by the Commission. In the light of the fact that Paragraph 4(1) of the MinöStG merely implements a mandatory provision of a Community measure (see paragraphs 99 to 104 above), the Commission was entitled to reject the complaint in the contested decision without needing to submit it to the college of Commissioners or to initiate the formal investigation procedure under Article 88(2) EC.

115 Consequently, the first, third and fourth pleas in law must be rejected.

The second plea: infringement of the duty to state reasons

Arguments of the parties

116 The applicant submits that the contested decision should be annulled for infringing the duty to state reasons laid down in Article 253 EC. In decisions finding that the State aid alleged in complaints does not exist, the Commission must explain to the complainant why the facts and points of law put forward in the complaint have failed to demonstrate the existence of State aid (*Sytraval*, paragraph 64).

117 In the present case, the statement of reasons on which the contested decision is based does not make it possible to understand why the facts and points of law put forward by the applicant in its complaint do not establish the existence of State aid.

118 The Commission and the Council do not express a view on the arguments put forward by the applicant in support of its second plea in law.

Findings of the Court

119 It is settled case-law that the statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review. The requirements of a statement of reasons must be appraised by reference to the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see *Sytraval*, paragraph 63, and the case-law cited).

120 In the present case, it is clear from the contested decision that the Commission rejected the complaint on the ground that the exemption referred to in Paragraph 4(1)(3)(a) of the MinöStG constituted an implementation of Directive 92/81 and not an attempt to grant aid (see paragraph 11 above). Contrary to the applicant's claim, such a statement of reasons, although brief, was sufficiently clear and comprehensible.

121 Consequently, the second plea in law must also be rejected as unfounded.

The fifth plea: infringement of Article 307 EC and the rules of international law

Arguments of the parties

122 The applicant maintains that the Commission's assertion that the applicability of the Community provisions concerning State aid is precluded by the Chicago Convention of 7 December 1944 on International Civil Aviation (United Nations Treaty Series, Vol. 15, p. 295) (hereinafter 'the Chicago Convention') and by many bilateral agreements relating to air traffic concluded on the basis thereof is not compatible either with the provisions of international law or with Article 307 EC.

123 As regards public international law, the applicant claims that the tax exemption for aviation fuel provided for in international agreements does not in any way preclude the exemption based on Paragraph 4(1)(3)(a) of the MinöStG from being regarded as infringing Article 87(1) EC. Under the conflict of law rule in Article 30 of the Vienna Convention on the Law of Treaties of 23 May 1969 (United Nations Treaty Series, Vol. 788, p. 354), the provisions of international treaties concluded previously between the Member States apply only to the extent that they are compatible with later Treaty agreements, such as those resulting from their membership of the European Communities.

124 As regards Community law, the first paragraph of Article 307 EC is limited to protecting the rights of third countries in accordance with public international law and does not require Member States to assume their obligations under agreements which predate the Community treaties (Joined Cases 56/64 and 58/64 *Consten and Grundig* v *Commission of the EEC* [1966] ECR 299, 346). Consequently, as the situation in the present case is purely intra-Community, it is the primary law which

applies in the event of conflict (Case T-69/89 *RTE* v *Commission* [1991] ECR II-485, paragraph 103). Therefore, in the light of Article 307 EC as well, neither the Chicago Convention nor the bilateral international agreements based on it preclude the applicability to Paragraph 4(1)(3)(a) of the MinöStG of the provisions of Community law governing State aid. Furthermore, the Commission has stated on several occasions that the Chicago Convention was not binding with regard to intra-Community situations.

125 The Commission and the Council do not express a view on the arguments submitted by the applicant in support of its fifth plea in law.

Findings of the Court

126 This plea in law is irrelevant. The contested decision is based on the fact that Paragraph 4(1)(3)(a) of the MinöStG does not infringe the Community rules relating to State aid as there is no State measure in the present case (see paragraph 11 above). Consequently, the Commission did not apply the Treaty provisions concerning State aid.

127 Thus, contrary to the impression which the applicant wishes to give, the contested decision is not at all based on international law. The Commission did not in any manner rely on international law to substantiate its view that the provisions governing State aid were inapplicable. It referred to international law only in order to explain the context of the exemption at issue and to confirm that Directive 92/81 complied with international practice (see paragraph 11 above).

128 That finding is affected by the fact that the Commission simply added in the contested decision that Directive 92/81 was 'in line with international practice based on policies established by the [ICAO] under the terms of the [Chicago Convention]'.

129 It follows that the fifth plea in law is unfounded.

The sixth plea: infringement of the principle of equal treatment

Arguments of the parties

130 The applicant points out that the principle of equal treatment prohibits comparable situations from being treated differently unless such treatment is objectively justified (Case C-292/97 *Karlsson and Others* [2000] ECR I-2737, paragraph 39; see also, *Van Landschoot* v *Mera*, cited in paragraph 77 above, paragraph 9).

131 In the present case, the tax exemption for aviation fuel based on Article 8(1)(b) of Directive 92/81 and on the provision transposing Article 8(1)(b) of Directive 92/81 into national law, namely Paragraph 4(1)(3)(a) of the MinöStG, leads to unequal treatment between the applicant and the airlines operating on German domestic routes. Given that the applicant and the airlines offer, on German domestic routes, a service which, in the eyes of users, is substitutable, they are in a comparable situation. In that regard, the applicant stresses that there is a competitive relationship between air and rail, above all high-speed trains. The effect of the discriminatory treatment of the applicant in comparison with that of airlines operating on domestic routes is thus the result of the fact that only the latter are

exempt from excise duties on mineral oils. That difference in treatment is not objectively justified. Furthermore, the institutions have expressly acknowledged the existence of unjustified discrimination.

132 The applicant suggests that the Court of First Instance should put an end to that discrimination by applying, mutatis mutandis, the second paragraph of Article 231 EC (*Van Landschoot* v *Mera*, cited in paragraph 77 above). In particular, such an approach would make it possible not to apply the tax exemption at issue to airlines which are in a direct competitive relationship with the applicant.

133 In Case C-36/99 *Idéal tourisme* [2000] ECR I-6049, the Court of Justice stated that Member States could also tax air transport in order to remove the unequal treatment (paragraph 33). Furthermore, in the present case, the unequal treatment could also be remedied by exempting high-speed trains.

134 The Commission does not express a view on the arguments put forward by the applicant in connection with that plea in law.

135 The Council submits that the applicant is basing its argument on a false premiss, namely that rail transport and air transport, as they are potentially in competition, are comparable and have to be treated in the same way.

136 The Council states that it considered, as legislature, that having regard to the specific characteristics of air transport, it was appropriate to exempt fuel for the purpose of air navigation other than private pleasure flying. In reviewing the exercise of the legislature's wide discretion, the Court has to restrict itself to considering whether it

contains a manifest error or constitutes a misuse of power or whether the authority in question clearly exceeded the bounds of its discretion. The applicant in no way explains why the Council acted in a manifestly inappropriate fashion in the exercise of its discretion.

Findings of the Court

137 It is apparent from the case-law that the principle of equal treatment prohibits comparable cases from being treated differently, thereby subjecting some to disadvantages as opposed to others, unless such treatment can be objectively justified (*Karlsson and Others*, cited in paragraph 130 above, paragraph 39, and Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentale and Land Nordrhein-Westfalen* v *Commission* [2003] ECR II-435, paragraph 272).

138 The Court finds that the principle of equal treatment has not been infringed in the present case, because the situation of air transport undertakings is clearly different from that of rail transport undertakings. As regards their operational characteristics, their costs structure and the regulations to which they are subject, air and rail transport services are very different and are not comparable for the purpose of the principle of equal treatment.

139 In any event, the Court finds that the difference in treatment is objectively justified in the present case, having regard to the wide discretion of the Council as regards the objective justification of any differentiating treatment (Case T-267/94 *Oleifici Italiani* v *Commission* [1997] ECR II-1239, paragraph 47). In the light of the international practice of exempting aviation fuel from excise duties, which is enshrined in the Chicago Convention and in international agreements concluded

between States, competition between Community air transport operators and operators in non-member countries would be distorted if the Community legislature unilaterally imposed excise duties on that fuel. Consequently, the exemption provided for by Article 8(1)(b) of the Directive was objectively justified.

140 The sixth plea must therefore also be dismissed as unfounded.

141 It follows from all the foregoing that the application must be dismissed in its entirety.

Costs

142 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, 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 applicant has been unsuccessful, and the Commission has applied for costs, the applicant must be ordered to pay the costs.

143 The Council must bear its own costs, in accordance with the first subparagraph of Article 87(4) of the Rules of Procedure.

On those grounds,

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

hereby:

1. Dismisses the action;

2. Orders the applicant to pay the costs;

3. Orders the Council to bear its own costs.

Vesterdorf Cooke García-Valdecasas

Labucka Trstenjak

Delivered in open court in Luxembourg on 5 April 2006.

E. Coulon B. Vesterdorf

Registrar President