JUDGMENT OF THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)
5 June 1996 *

In Case T-398/94,

Kahn Scheepvaart BV, a company incorporated under Netherlands law, with its registered office in Rotterdam, represented by Thomas Jestaedt, Rechtsanwalt, Düsseldorf, and Tom R. Ottervanger, of the Rotterdam Bar, with an address for service in Luxembourg at the Chambers of Carlos Zeyen, 67 Rue Ermesinde,

applicant,

v

Commission of the European Communities, represented by Paul Nemitz and Jean-Paul Keppenne, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of the Commission's decision of 25 October 1994 authorizing for 1994 a German aid scheme for shipbuilding,

* Language of the case: English.

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

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

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 12 March 1996,

gives the following

Judgment

The legal background

1 On the basis of Article 92(3)(d) (now Article 92(3)(e)) and Article 113 of the EC Treaty, the Council has adopted specific rules on the compatibility with the common market of State aid in the shipbuilding sector. Those rules are set out in Council Directive 90/684/EEC of 21 December 1990 on aid to shipbuilding (OJ 1990 L 380, p. 27, hereinafter 'the Seventh Directive'), as amended by Council Directive 92/68/EEC of 20 July 1992 (OJ 1992 L 219, p. 54) and Council Directive 93/115/EC of 16 December 1993 (OJ 1993 L 326, p. 62). The Seventh Directive distinguishes between production aid, known as operating aid, which is subject to a maximum ceiling, on the one hand, and restructuring aid to support desirable structural changes in the European shipbuilding sector, on the other. The Seventh Directive entered into force on 1 January 1991 for a period of three years. Its validity was extended for the year 1994 by Directive 93/115.

2 Article 3(1) of the Seventh Directive provides *inter alia* that 'all forms of aid to shipowners or to third parties which are available as aid for the building or conversion of ships shall be subject to the notification rules in Article 11'. Under Article 3(2), 'the grant equivalent of the aid shall be subject in full to the rules set out in Article 4 and the monitoring procedures laid down in Article 12, where the aid is actually used for the building or conversion of ships in Community shipyards'.

3 Article 4(1) of the Seventh Directive provides that 'production aid in favour of shipbuilding and ship conversion may be considered compatible with the common market provided that the total amount of aid granted in support of any individual contract does not exceed, in grant equivalent, a common maximum ceiling expressed as a percentage of the contract value before aid' (hereinafter 'the ceiling').

4 For 1994 the Commission fixed the ceiling provided for in Articles 4(1) and 5(1) of the Seventh Directive at 9% (Commission communication 94/C 37/05, OJ 1994 C 37, p. 4).

Background to the dispute

5 The applicant is a Netherlands private company and a subsidiary of the Swiss company Jumbo Shipping Company SA (hereinafter 'Jumbo Shipping'). The applicant's main activities are the lifting and carriage by sea of heavy loads. It operates various heavy lift vessels.

6 By letter of 13 April 1994 the applicant lodged a complaint with the Commission against subsidies which it claimed Germany was granting for the building of two vessels ordered by Schiffahrtskontor Altes Land GmbH (hereinafter 'SAL') and associated companies in the Heinrich group from the shipbuilder J. J. Sietas KG Schiffswerft GmbH&Co for delivery in late 1994 or early 1995. The applicant

complained in particular that the tax advantages provided for in Paragraph 82f of the Einkommensteuerdurchführungsverordnung (Implementing regulations on income tax, hereinafter 'the EStDV') and Paragraph 15a in conjunction with Paragraph 52(19) of the Einkommensteuergesetz (Law on Income Tax, hereinafter 'the EStG'), in combination with other subsidies, constituted aid which exceeded the ceiling laid down by the Seventh Directive.

7 After the complaint was lodged, an exchange of correspondence took place between the parties. By letter of 7 October 1994 the applicant provided additional information on the financing of the construction of the *MS Frauke*, one of the vessels referred to in the complaint. In the course of 1994 there were also contacts between the parties in the form of telephone conversations and meetings. The applicant was represented on several of those occasions by Jumbo Shipping.

8 Following the extension of the validity of the Seventh Directive for the year 1994 by Directive 93/115, the Member States were obliged to notify all the aid schemes for shipbuilding in force in 1994, including schemes which had already been authorized for 1991 to 1993. On 25 October 1994 the Commission adopted a decision addressed to the German Government concerning those schemes, in accordance with its obligation to examine their compatibility with the provisions of the Seventh Directive. By that decision, in accordance with Articles 3, 4, 6 and 8 of the Seventh Directive, it authorized for 1994 the application of five aid schemes which concerned shipbuilding only in an incidental manner, including general guarantee schemes, investment aid and aid for research and development. The present dispute does not, however, concern those schemes. Furthermore, in accordance with Articles 3 and 4 of the Seventh Directive, the Commission extended during 1994 approval for other aid schemes directly involving shipbuilding, including the various tax relief schemes under Paragraph 82f of the EStDV and Paragraphs 15a and 52(19) of the EStG, which the applicant challenges. The decision of 25 October 1994 was notified to the German authorities by letter of 11 November 1994.

9 By letter of 31 October 1994 the Commission informed Jumbo Shipping of the adoption of the decision of 25 October 1994. A copy of the letter was sent to the applicant.

Procedure and forms of order sought by the parties

10 By application lodged at the Registry of the Court of First Instance on 30 December 1994, the applicant brought an action against the Commission's decision. The case was allocated to a Chamber of three judges. After hearing the parties, the Court, by decision of 11 January 1996, assigned the case to the Third Chamber, Extended Composition, composed of five judges.

11 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber, Extended Composition) decided to open the oral procedure without any preparatory measures of inquiry.

12 The parties presented oral argument and their replies to the Court's questions at the hearing in open court on 12 March 1996.

13 The applicant claims that the Court should:

— annul the Commission's decision;

— take such further action as the Court may deem appropriate;

— order the Commission to pay the costs.

14 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Subject-matter of the proceedings

15 It is necessary first of all to define the subject-matter of the application, since the Commission has argued that the applicant altered the subject-matter in its reply. The applicant, according to the Commission, sought to extend the application so as to seek annulment not only of the decision of 25 October 1994 on the aid schemes but also of the alleged implicit refusal, contained in the letter of 31 October 1994, 'to investigate under Article 93(2) of the Treaty whether the concrete tax advantages from which the owners of the *MS Frauke* [would] benefit, in combination with other aid measures, constitute [d] aid incompatible with the common market' (point 8 of the reply).

16 The Court notes the applicant's confirmation, in reply to the questions put to it at the hearing, that the subject-matter of its application was not only the annulment of the decision of 25 October 1994 but also the annulment of the alleged implicit refusal, by the letter of 31 October 1994, to investigate under Article 93(2) of the Treaty whether the concrete tax advantages from which the owners of the *Frauke* would benefit, in combination with other aid, were compatible with the common market.

17 According to the wording of the application instituting the proceedings, 'the applicant hereby applies ... for the annulment of the Decision of the Commission of 25 October 1994 (the "Decision") ... authorizing a tax scheme in connection with the financing of heavy lift vessels, communicated to the applicant by letter of 31 October 1994'. Under the heading 'Conclusion' the applicant asks the Court to 'annul the Decision', that is, the Commission's decision of 25 October 1994. It may be observed that that decision, addressed to the German Government, relates solely to the German general aid schemes, including the scheme which the applicant challenges. The Commission expressed no opinion on the individual aid measures in that decision.

18 Although point 7 of the application asserts that 'by approving in the Decision of 31 October 1994 the application of the scheme, and thereby rejecting the complaint, the Commission has infringed ... Article 93(2) of the EC Treaty', and although it may be deduced from reading the application as a whole that the

applicant is principally concerned by the practical application of the general aid scheme in question, and more particularly by the financing of the two vessels ordered by SAL and the associated companies (one of which is the *Frauke*), the applicant has not sought a form of order relating to the individual application of the contested scheme in its application. The Court considers that the passage quoted above should be interpreted as forming part of the argument in support of the present application.

19 The Court therefore finds that the form of order contained in the application seeks only the annulment of the decision of 25 October 1994 in so far as that decision authorizes the application by the German authorities of the provisions on tax advantages set out in Paragraph 82f of the EStDV and Paragraph 15a in conjunction with Paragraph 52(19) of the EStG. Moreover, the Court notes that even though the applicant submits, in points 7 and 8 of the reply, that by adopting the decision of 25 October 1994 the Commission also addressed to it a decision refusing to investigate whether the tax advantages taken with the other aid measures from which the owners of the *Frauke* would benefit constituted aid incompatible with the common market, the first page of the reply nevertheless shows that the aim of the application is still the annulment of the 'Commission Decision of 25 October 1994'.

20 In those circumstances the Court considers that, pursuant to Article 44 of its Rules of Procedure, the head of claim put forward by the applicant at the hearing, seeking annulment of the letter of 31 October 1994 in so far as it constituted an implicit rejection of the complaint, must be declared inadmissible. Under Article 44 of those Rules, the parties must define the subject-matter of the proceedings in the application bringing the action. While Article 48 of the Rules of Procedure permits the introduction of new pleas in law under certain conditions, a party may not alter the actual subject-matter of the proceedings during the procedure (see on this point the judgments of the Court of Justice in Case 232/78 *Commission* v *France* [1979] ECR 2729, paragraph 3, and of the Court of First Instance in Case T-64/89 *Automec* v *Commission* [1990] ECR II-367, paragraph 69).

21 Consequently, the subject-matter of the proceedings comprises only the claim for annulment of the decision of 25 October 1994 in so far as it authorized the application by the German authorities of the provisions on tax advantages set out in

Paragraph 82f of the EStDV and Paragraph 15a in conjunction with Paragraph 52(19) of the EStG (hereinafter 'the contested decision' or 'the decision of 25 October 1994').

Admissibility of the head of claim seeking annulment of the decision of 25 October 1994

Arguments of the parties

22 The Commission, while not raising a formal plea of inadmissibility within the meaning of Article 114 of the Court's Rules of Procedure, challenges the admissibility of the application. It submits that since the contested decision was addressed to the German Government, an application directed against it is admissible only if it is of direct and individual concern to the applicant, within the meaning of the fourth paragraph of Article 173 of the Treaty (see the judgment of the Court of Justice in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95). In the present case, however, the applicant is not individually concerned.

23 The Commission observes, first, that the contested decision concerns a number of aid schemes for shipbuilding in Germany, which are to be implemented in an indeterminate number of cases. The potential beneficiaries of those schemes form an extremely broad class, and their number had not been determined and could not have been verified at the time when the contested decision was taken.

24 The Commission points out that, according to the case-law, even the potential beneficiaries of aid cannot bring proceedings unless they themselves satisfy the conditions laid down in the fourth paragraph of Article 173 of the Treaty (see the judgments of the Court of Justice in Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219, paragraph 15; Case 730/79 *Philip*

Morris v *Commission* [1980] ECR 2671, paragraph 5; and Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, paragraph 13).

25 The Commission argues that if it had taken a negative decision on a German aid scheme for shipbuilding, it would have followed from the case-law that an application for the annulment of that decision brought by one of the potential beneficiaries of the scheme would not be admissible (see the judgments of the Court of Justice in *Van der Kooy* and in Case C-6/92 *Federmineraria and Others* v *Commission* [1993] ECR I-6357, paragraphs 14 and 15). Moreover, since the applicant is merely a competitor of a customer of the potential beneficiaries of the aid scheme approved, its application is *a fortiori* inadmissible. The Commission points out that the applicant has not put forward any factors capable of demonstrating that the aid scheme in question affected its business in any way.

26 Furthermore, the Commission observes that the application concerns essentially the grant by the German Government of a particular aid to a specific company. The applicant could therefore have challenged the individual decision taken by the German authorities in implementation of the aid scheme in the national courts (see on this point the judgment of the Court of Justice in Case 281/82 *Unifrex* v *Commission and Council* [1984] ECR 1969, paragraph 11).

27 The Commission submits, finally, that the fact that it did not initiate the procedure provided for in Article 93(2) of the Treaty in the present case makes no difference to the conclusion that the contested decision is not of individual concern to the applicant. According to the Commission, the cases relied on by the applicant, namely the judgments of the Court of Justice in Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487 and Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, are not relevant, since they related to *ad hoc* aids and not to a general aid scheme as in the present case.

28 In this regard the Commission, referring to the Advocate General's Opinion in *Cook* v *Commission*, considers that, with respect to the possibility for 'parties concerned' within the meaning of Article 93(2) of the Treaty to challenge in the Court of First Instance a decision by the Commission not to initiate the procedure provided for in that provision, the scope of the aforesaid case-law should be limited. In order to avoid a situation in which a large number of undertakings can challenge decisions relating to general aid schemes, the Commission argues that the entitlement to contest a decision 'to raise no objections' must be limited to undertakings which are active competitors of an actual beneficiary of the aid in question, and thus exclude undertakings which are only marginally concerned. In view of the fact that the applicant, as an undertaking in the transport sector, is merely a competitor of a customer of a shipyard which is a potential beneficiary of the aid scheme in question, the Commission considers that the applicant is only indirectly and potentially concerned by the contested decision, or, as the Advocate General put it in *Cook* v *Commission*, only marginally concerned for the purposes of Article 93(2) of the Treaty.

29 Moreover, should the Court consider that greater importance must be accorded to the procedural rights of third parties who have not been asked to submit observations, the Commission submits that account should at least be taken of the scope of the schemes in question (whether regional or sectoral); of the applicant's representations to the Commission during the administrative procedure; and of the fact that the applicant is affected in its capacity as a competitor of a customer of a beneficiary of the aid scheme in question, before deciding whether it is entitled to bring proceedings. The Commission notes in that connection that many of the contacts which it had prior to the adoption of the contested decision were with Jumbo Shipping, not with the applicant.

30 The applicant observes, first, that the Commission never disputed the fact that the applicant had a real interest in the complaint lodged and in the outcome of any investigation. The aid specifically challenged in the complaint, taking the form *inter alia* of individual tax relief, was intended to benefit certain shipowners in relation to the construction of two heavy lift vessels, one of which, the *Frauke*, was to be operated by the applicant's most important competitor, SAL. The applicant states that the market in which it operates forms part of the heavy lift maritime transport

sector and concerns heavy lift vessels capable of lifting cargo weighing over 200 tonnes with their own equipment. It maintains that only three major companies, including itself and SAL, are active in that market.

31 The applicant goes on to observe that the Commission, by deciding to raise no objections to the German aid scheme, thereby concluded that the application of that scheme was not contrary to Community law. In so doing, the Commission also refused to ascertain, pursuant to Article 93(2) of the Treaty, whether the tax advantages from which the owners of the *Frauke* would benefit, in combination with other aid measures, constituted aid incompatible with the common market. The Commission's decision, as communicated to the applicant, encompassed a decision addressed to the latter and open to challenge before the Court of First Instance (see the judgments of the Court of Justice in Joined Cases 166/86 and 220/86 *Irish Cement* v *Commission* [1988] ECR 6473 and in Case C-313/90 *CIRFS* v *Commission* [1993] ECR I-1125).

32 Should the Court consider that the contested decision was addressed only to Germany, the applicant submits that it follows from the case-law that 'parties concerned' within the meaning of Article 93(2) of the Treaty have standing to challenge decisions by which the Commission finds an aid to be compatible with the common market without initiating the procedure provided for in that article (see the *Cook* judgment). The applicant considers that it is a 'party concerned' because, as the case of the *Frauke* clearly shows, its interests are affected by the German tax scheme.

33 As to the Commission's argument to the effect that when a general aid scheme is approved there are no actual beneficiaries and no active competitors of the beneficiary undertakings, the applicant replies that the argument is not relevant in the present case, given that its competitive position is affected; that it had been in close contact with the Commission during the administrative procedure; and that the case relates to sectoral aid.

34 At the hearing the applicant argued that since the Commission was in a position to know the identity of the future beneficiaries of the aid scheme approved at the time when the contested decision was adopted, because of the prior publication of the various prospectuses, the contested decision in fact concerns a number of individual aids rather than a true general aid scheme.

35 Finally, at the hearing the applicant denied that it was possible for it to challenge in the German courts the individual aids granted to its competitors, in particular for the building of the *Frauke*, since those individual aids would be granted in pursuance of German tax provisions approved by the Commission. Moreover, in those circumstances, if the Court declared the application inadmissible, the practical application by the Commission of the rules on State aid would largely escape review by the Community judicature, which would be unacceptable. Furthermore, even if it were possible under national law for the applicant to challenge the lawfulness of a specific application of the aid scheme, that would have no bearing on the question of the admissibility of the present application.

Assessment of the Court

36 It should be noted to begin with that the fourth paragraph of Article 173 of the Treaty permits natural or legal persons to challenge decisions which are addressed to them or which, although in the form of a regulation or a decision addressed to another person, are of direct and individual concern to them. Whether this head of claim is admissible therefore depends on whether the contested decision, which was addressed to the German Government and which concluded the preliminary procedure provided for in Article 93(3) of the Treaty, is of direct and individual concern to the applicant.

37 It is settled law that persons other than those to whom a decision is addressed may claim to be individually concerned within the meaning of the fourth paragraph of

Article 173 of the Treaty only if the decision affects them by reason of certain attributes peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed (see the judgments of the Court of Justice in *Plaumann*, cited above; Case 231/82 *Spijker* v *Commission* [1983] ECR 2559, paragraph 8; and Case C-309/89 *Codorniu* v *Council* [1994] ECR I-1853, paragraph 20; and of the Court of First Instance in Case T-2/93 *Air France* v *Commission* [1994] ECR II-323, paragraph 42; Case T-435/93 *ASPEC and Others* v *Commission* [1995] ECR II-1281, paragraph 62; and Joined Cases T-481/93 and T-484/93 *Vereniging van Exporteurs in Levende Varkens and Others* v *Commission* [1995] ECR II-2941, paragraph 51).

38 With respect to the legal character of the contested act, it must first be stated that in accordance with Articles 3 and 4 of the Seventh Directive, as extended for 1994 by Directive 93/115, the Commission approved *inter alia* the application during 1994 of the German tax provisions for the benefit of shipowners and investors in new ships (see paragraph 8 above). According to the contested decision, this involved the application of Paragraph 82f of the EStDV providing for a special depreciation scheme for new ships, for the benefit of shipowners, and Paragraph 15a in conjunction with Paragraph 52(19) of the EStG providing for tax relief, for the benefit of those investing in new ships. Those two tax schemes, again according to the contested decision, did not reduce the nominal tax to be paid but provided for the possible deferral of the tax payment, thereby conferring an advantage in net present value terms. It must be pointed out that in the contested decision the Commission did not express an opinion on the compatibility of the individual aids with the common market, since the Commission had taken note in that respect of the German authorities' undertaking that in applying the various schemes they would respect the ceiling applicable to operating aid under the Seventh Directive.

39 In view of the fact that the issue involved is the approval of the implementation of tax provisions of general application, the contested decision, although addressed to a Member State, thus appears with regard to the potential beneficiaries of those provisions to be a measure of general application covering situations which are determined objectively, and entails legal effects for a class of persons envisaged in a general and abstract manner.

40 Furthermore, it appears from the papers before the Court that the applicant is a Netherlands undertaking the main activities of which are the lifting and carriage by sea of heavy loads. It operates various heavy lift vessels. The applicant belongs to the same group of undertakings as the Swiss company Jumbo Shipping, although the latter, as a holding company, does not carry on any activity in that sector.

41 It follows that the contested decision is of general application with regard to the applicant, which is thus affected only by virtue of its objective capacity as a transport undertaking in the same manner as any other trader who is, or might be in the future, in the same situation (see the judgments of the Court of Justice in *Spijker*, paragraph 9, and in Case 11/82 *Piraiki-Patraiki and Others* v *Commission* [1985] ECR 207, paragraph 14). Furthermore, the adoption of the contested decision could have only a potential and indirect effect on the applicant's competitive position. Since the decision relates to the approval of a general aid scheme whose potential beneficiaries are defined only in a general and abstract manner, the existence of an actual beneficiary, and hence that of an active competitor of that beneficiary, presupposes the practical application of the aid scheme by the grant of individual aids.

42 The Court considers that the mere fact that the applicant made a complaint to the Commission, as described in paragraph 6 above, and in that connection corresponded and had meetings with the Commission, cannot constitute sufficient circumstances peculiar to the applicant by which it can be distinguished individually from all other persons, and thus confer on it standing to bring proceedings against a general aid scheme. Moreover, it appears from the wording of the contested decision that it was the extension of the validity of the Seventh Directive for the year 1994 and not the complaint lodged by the applicant, which made it necessary for the Commission to take a fresh decision on the compatibility with the common market of the various German aid schemes, including the scheme at issue.

43 Furthermore, even if the Commission had not approved the general aid scheme, the mere fact that a person is a potential beneficiary of the tax provisions of general

application cannot suffice to show that such a decision is of individual concern to that person within the meaning of the fourth paragraph of Article 173 of the Treaty (see the *Van der Kooy* judgment, paragraph 15). The Court therefore considers that the Commission was right to regard that case-law as applicable *a fortiori* in the present case.

44 As to the applicant's assertion that, having regard to the limited number of operators engaged in lifting and carriage by sea of heavy loads, its competitiveness is particularly affected by the application of the aid scheme for the benefit of the companies which ordered the *Frauke*, it should be noted that the Commission did not express an opinion in the contested decision on the compatibility of the individual aids with the common market (see paragraph 38 above). It follows that since this is a case involving approval of a general aid scheme, the applicant's argument is of no relevance here, the individual aids not being granted until after the practical application of the aid scheme in question. Moreover, the tax provisions at issue do not refer solely to the building of heavy lift vessels, which attracted the applicant's attention, but to shipbuilding generally in the Federal Republic of Germany, that is to say, the construction of a wide variety of ships.

45 At the hearing the applicant argued that, having regard to the publication of the prospectuses before the contested decision was adopted, the latter in fact constituted the approval of a limited number of decisions to grant individual aids. The Court considers that even if such publication did take place, that finding would not in any event be capable of invalidating the assessment of the legal nature of the decision (see paragraphs 38 and 39 above). The aid scheme in question, as approved for 1994, does not apply only to the building of new ships for which a prospectus had been produced at the time when the contested decision was adopted, but is applicable generally to all shipowners and investors in new ships, including for example investment decisions with tax effects for 1994 taken after the adoption of the contested decision.

46 It follows from all the foregoing considerations that the applicant cannot be regarded as individually concerned by the contested decision.

47 Finally, it is necessary to deal with the applicant's argument that as a 'party concerned' within the meaning of Article 93(2) of the Treaty, it is entitled to bring proceedings against the decision to raise no objections to the German aid scheme and consequently not to initiate the procedure provided for in Article 93(2) (see the *Cook* judgment, cited above). It must be observed that in principle the applicant is not prevented from raising that argument by Articles 44 and 48 of the Court's Rules of Procedure. It is apparent from the account of the facts in the application, in particular with respect to the subsidy effects of the German tax scheme, that the applicant clearly seeks to demonstrate that the application of that scheme is incompatible with the Seventh Directive. Having regard to the fact that the structure of the procedure relating to State aid created by Article 93 of the Treaty prevents the Commission from declaring aid incompatible with the common market unless it has initiated the procedure provided for in Article 93(2) (see the *Matra* judgment, cited above, paragraph 33), it must be concluded that the application, which seeks annulment of the contested decision, is to be interpreted as also seeking annulment of the Commission's refusal to initiate the procedure provided for in Article 93(2) of the Treaty (see to that effect the *CIRFS* judgment, cited above, paragraph 18).

48 However, the applicant's argument cannot be upheld in the circumstances of the present case. While the Court of Justice has indeed recognized in the *Cook* and *Matra* judgments cited above that the 'parties concerned' within the meaning of Article 93(2) of the Treaty, defined as the 'persons, undertakings or associations whose interests might be affected by the grant of the aid, in particular competing undertakings and trade associations', are to be regarded as individually concerned by decisions refusing to initiate the procedure under Article 93(2), this Court considers that that case-law does not apply in the present case.

49 In the two cases cited, it was recognized that undertakings which were competitors of the actual beneficiaries of State aid had a remedy intended to ensure that the procedural guarantees provided for in Article 93(2) of the Treaty were respected, because in those cases the applications related to the lawfulness of a Commission decision finding that the grant of individual aids was compatible with the common market. By contrast, as the Court has already found in paragraph 39 above, the contested decision concerns the approval of an aid scheme whose potential beneficiaries are defined only in a general and abstract manner. The existence of an actual beneficiary thus presupposes the practical application of the aid scheme by the grant of individual aids. It follows that at the time of the adoption of a decision concerning a general aid scheme, and hence before the grant of individual aids in application of that scheme, there cannot be any 'competing undertakings', within the meaning of the judgments cited, which could invoke the procedural guarantees under Article 93(2) of the Treaty.

50 Moreover, the Court considers that to treat the application as admissible in the circumstances of the present case, where the applicant is only indirectly and potentially affected by the general aid scheme and is thus only marginally concerned by the contested decision, would, by depriving of its legal content the concept of 'individual concern' within the meaning of the fourth paragraph of Article 173 of the Treaty, have the effect of giving a virtually unlimited number of undertakings the right to bring proceedings against a decision of general application. Finally, even the possible absence of a remedy under German national law, as the applicant claims, cannot constitute a ground for the Court to exceed the limits of its jurisdiction set by the fourth paragraph of Article 173.

51 In the light of the foregoing considerations, the application must be declared inadmissible, without there being any need to examine whether the applicant is directly concerned by the contested decision.

Costs

52 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been asked for in the successful party's pleadings. Since the applicant has been unsuccessful, it must, having regard to the form of order sought by the Commission, be ordered to pay the costs.

On those grounds,

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

hereby:

1. Dismisses the application as inadmissible;

2. Orders the applicant to pay the costs.

Briët Vesterdorf Lindh

Potocki Cooke

Delivered in open court in Luxembourg on 5 June 1996.

H. Jung C. P. Briët

Registrar President