OPINION OF ADVOCATE GENERAL JACOBS

delivered on 24 February 2005 [1]

Introduction

1. In this case the Commission appeals against the judgment of the Court of First Instance of 5 December 2002 (hereinafter 'the contested judgment') [2] dismissing its objection to the admissibility of the action lodged by the association Aktionsgemeinschaft Recht und Eigentum eV (hereinafter 'ARE' or 'the applicant') challenging a decision of the Commission of 22 December 1999 (hereinafter 'the contested decision'). [3]

2. The appeal raises two main issues. First, in what circumstances is an association to be regarded as directly and individually concerned by a Commission decision authorising the grant of aid to recipients who are not members of the association? Second, in what circumstances may the Court of First Instance interpret an applicant's pleas in law, or raise a new plea of its own motion, in order to justify a finding of direct and individual concern?

The background to the appeal

The facts

3. In the contested decision, the Commission, without initiating the formal examination procedure provided for in Article 88(2) EC, raised no objection to the aid embodied in certain modifications to the German Entschädigungs- und Ausgleichsleistungsgesetz (Indemnification and Compensation Act, hereinafter 'the EALG') introduced by the Ausgleichsleitungsgesetz (hereinafter 'the Compensation Act').

1 — Original language: English.

2 — Case T-114/00 *Aktionsgemeinschaft Recht und Eigentum* v *Commission* [2002] ECR II-5121

3 — In OJ 2000 C 46, p. 2.

4. Those modifications were designed to render the aid scheme compatible with the common market as required by a previous decision of the Commission on the aid scheme, Commission Decision 1999/268/EC of 20 January 1999 on the acquisition of land under the German Indemnification and Compensation Act (hereinafter the 'decision of 20 January 1999'). [4]

5. The applicant is an association of groups concerned with issues relating to property ownership in the agricultural and forestry sectors, displaced and expropriated persons, victims of expropriation in the industry, craft and commerce sectors, and small and medium-sized enterprises which had their principal place of business and country of origin in the former Soviet zone of occupation or in the former German Democratic Republic.

6. Following the reunification of Germany in 1990, approximately 1.8 million hectares of agricultural and forestry land were transferred from the State assets of the German Democratic Republic to those of the Federal Republic of Germany.

7. Under the Compensation Act, which entered into force on 1 December 1994, certain agricultural land situated in the former German Democratic Republic and held by the Treuhandanstalt, the public-law body responsible for restructuring undertakings of the former German Democratic Republic, could be acquired by various categories of persons for less than half its actual market value.

8. The first such category comprises, on a preferential basis, those who held a farming lease; the successors to the former agricultural cooperatives; resettled persons who were expropriated between 1945 and 1949 or during the period of the German Democratic Republic and who, since then, have resumed farming; and farmers described as newly settled who did not previously own any land in the new Länder, provided in all cases that they were resident there on 3 October 1990 and had, on 1 October 1996, a long-term lease in respect of land formerly owned by the State and to be privatised by the Treuhandanstalt. The second such category comprises former owners expropriated before 1949 who have not benefited from restitution of their property and have not resumed agricultural activity locally. The latter may acquire only land not purchased by persons in the first category.

9. That law also provided for the possibility of acquiring forestry land on a preferential basis, with a statutory definition of the relevant categories of persons.

4 — OJ 1999 L 107, p. 21.

10. Following complaints lodged by German nationals and nationals of other Member States concerning that land acquisition scheme, the Commission initiated, on 18 March 1998, a review procedure under Article 93(2) of the EC Treaty (now Article 88(2) EC; in what follows I shall use throughout, for convenience, the present numbering of the articles of the Treaty). [5]

11. That review procedure culminated in the decision of 20 January 1999 [6] in which the Commission declared that the land acquisition scheme was incompatible with the common market in so far as the aid which it granted was tied to residence on 3 October 1990 and exceeded the maximum intensity rate for aid for the acquisition of agricultural land. That rate had been fixed at 35% for agricultural land in areas other than those less-favoured within the meaning of Council Regulation (EC) No 950/97 of 20 May 1997 on improving the efficiency of agricultural structures. [7] All other aspects were found not to contain aid elements.

12. With regard, in particular, to the condition of residence on 3 October 1990 laid down by the Compensation Act, the Commission found that the law gave natural and legal persons in the new Länder an advantage over persons without a registered office or residence in Germany and was therefore liable to contravene the ban on discrimination under Articles 43 to 48 EC since de facto it was almost exclusively German nationals who met that condition — particularly those previously resident in the new Länder.

13. The condition therefore had the effect of excluding those persons not meeting the criterion that their (principal) place of residence be in the territory of the German Democratic Republic. The condition of 'residence on 3 October 1990' could be justified only where it was both necessary and appropriate to serve the purpose pursued by the legislature, namely, to include persons who or whose families had lived and worked in the German Democratic Republic for decades.

14. The Commission considered that to achieve that objective, there was no need for a qualifying date for residence on 3 October 1990 since, in accordance with Paragraph 3(1) of the Compensation Act, those newly settled natural or legal persons were allowed to participate in the land acquisition scheme if on 1 October 1996 they had a long-term lease on previously State-owned land to be privatised by the Treuhandanstalt. In the course of its main examination, the Commission was expressly informed by parties to the procedure that by

5 — OJ 1998 C 215, p. 7.

6 — Cited in footnote 4 above.

7 — OJ 1997 L 142, p. 1.

far the majority of long-term lease agreements had been concluded with east Germans. Thus it was clear that even if the legitimacy of the objective pursued by the legislature (the participation of east Germans in the land acquisition scheme) were recognised, the object would not, in practical terms, have been defeated if there had been no qualifying date of 3 October 1990.

15. In the same decision of 20 January 1999, the Commission ordered the Federal Republic of Germany to recover the aid declared incompatible with the common market and already granted and not to grant any further new aid under that scheme.

16. Following that decision, a new draft law was produced, the draft Vermögensrechtsergänzungsgesetz (Act supplementing the Law of Property Act) abolishing and amending some of the detailed rules of the land acquisition scheme.

17. That new draft law was notified to the Commission which authorised it in the contested decision, without initiating the review procedure provided for in Article 88 (2) EC.

18. The Commission found that aspects held by it in its decision of 20 January 1999 to be incompatible with the common market were not included in the draft law. In particular, the requirement of residence on 3 October 1990 was abolished and the intensity rate of the aid was fixed at 35% (in other words, the purchase price for the land in question was fixed at the actual value less 35%). The main requirement for the acquisition of land at a reduced price would henceforth be possession of a long-term lease. The Commission also found that, in view of the assurances provided by the German authorities, there was sufficient land available to correct any discrimination without cancelling the contracts concluded under the original EALG.

19. In so far as the new provisions still contained elements which, with the application of otherwise equal criteria, would favour east Germans, such an advantage fell within the scope of the objective of restructuring agriculture in the new Länder while at the same time ensuring that the persons concerned, or their families, who had lived and worked in the German Democratic Republic for decades, could also benefit from those provisions. In its decision of 20 January 1999, the Commission had recognised the legitimacy of that objective and had not challenged it.

20. By that finding, the Commission rejected a number of criticisms which it had received

from several parties concerned, including the applicant, following the decision of 20 January 1999, to the effect that, even in the absence of the requirement of residence on 3 October 1990, the land acquisition scheme was still discriminatory by reason of the requirement of possession of a long-term lease, a requirement which would have the effect of maintaining the residence criterion and making the area of land available insufficient.

21. Following the Commission's authorising decision, the Vermögensrechtsergänzungsgesetz was adopted by the German legislature.

22. By application lodged at the Registry of the Court of First Instance on 2 May 2000 the applicant brought an action challenging the contested decision.

The objection of inadmissibility

23. The Commission, supported by Germany, submitted that the action was inadmissible for two reasons: first, the contested decision was not of direct and individual concern to the applicant; second, the applicant had committed an abuse of process.

24. The Commission argued that only undertakings competing with the undertakings in receipt of aid may be regarded as individually concerned by a decision authorising such aid, in particular if they have played an active part in the preceding main examination and in so far as their market position is materially affected by the aid which is the subject of the contested decision.

25. As regards associations of economic operators, the Commission submitted that only those which have played an active part in the procedure under Article 88(2) EC are recognised as being individually concerned by such a decision, in so far as they are affected in their capacity as negotiators or where they have substituted themselves for one or more of their members who could themselves have brought an admissible action. On the facts of the case, the Commission considered that the applicant did not fulfil those requirements and therefore was not individually concerned by the contested decision.

26. The Commission further argued that the action was inadmissible a fortiori since the land acquisition scheme constitutes a system of aid, whose authorisation by the Commission is therefore a measure of general scope which applies to objectively determined situations and entails legal effects for categories of persons envisaged in a general and abstract manner.

27. Finally, the Commission argued that the applicant represented essentially or even exclusively German interests, whereas its action sought a declaration from the Court that the land acquisition scheme at issue involved discrimination based on nationality and did not, therefore, qualify for authorisation by the Commission.

28. The Commission concluded that there was no link between the applicant's particular interests and the interests which it represented in the present action, which were not its own. An association is not entitled to bring an action under the fourth paragraph of Article 230 EC if it does not represent the interests of its members. The Commission pointed out in that regard that the applicant's members were not nationals of other MemberStates but persons who were wronged during the war and the post-war period in the former Soviet zone of occupation and the former German Democratic Republic.

29. Germany agreed that the action should be declared inadmissible because the applicant was not individually concerned by the contested decision. It added that the beneficiaries of the aid had not yet been individually distinguished and named. In addition, the applicant could not be directly concerned because there was no causal connection between the contested decision and the applicant's alleged interest under competition law. Even if the complaint based on breach of the principle of the prohibition of discrimination were well founded, that would not automatically lead to the recovery of the land by the former owners represented by the applicant.

30. Both the Commission and Germany considered that the applicant and its members were more concerned with changing the system governing property ownership, which pursuant to Article 295 EC cannot be affected by Community law, than with their competitive position on the market.

31. The applicant observed, first, that it represented more than a thousand undertakings operating in agriculture, which were in a relationship of competition for the purposes of Community law with the beneficiaries of the land acquisition scheme, and some of which operated on the same market. The applicant further maintained that its objective was to secure not a change in the system of property ownership but effective application of the Commission's obligation to scrutinise aid, in order to safeguard the economic interests of its members who were competitors of the beneficiaries of aid.

32. The applicant took the view that the fact that it represented mainly German interests was irrelevant from the point of view of its

members' competitive position under Community law. Moreover, the applicant had a particular interest in the annulment of the contested decision in that, if the prohibition of discrimination based on nationality were applied strictly, the land would have to be redistributed and the applicant's members would have a better chance of gaining access to it.

33. The applicant added at the hearing before the Court of First Instance that, even if that Court took the view that it could not be considered to be an association of undertakings or economic operators, it should still be regarded as individually concerned by the contested decision by reason of its position as a negotiator with the Commission and its participation in the procedure.

The contested judgment

34. By the contested judgment the Court of First Instance dismissed the objection of inadmissibility and declared the action admissible.

35. The Court first noted that since the contested decision was addressed to Germany, it must be considered whether it was of individual and direct concern to the applicant in accordance with the *Plaumann* case-law. [8]

36. The Court went on to recall the different purposes of the procedures provided for by Article 88(2) and (3) EC and the case-law to the effect that where the Commission, without initiating the procedure under Article 88 (2) EC, finds on the basis of Article 88(3) EC that aid is compatible with the common market, the persons intended to benefit from the procedural guarantees under Article 88 (2) EC may secure compliance therewith only if they are able to challenge that decision of the Commission before the Court.

37. Pursuant to that case-law, where, by an action for the annulment of a Commission decision taken at the end of the preliminary stage, an applicant seeks to secure compliance with the procedural guarantees provided for by Article 88(2) EC, the mere fact that it has the status of a 'party concerned' within the meaning of that provision is sufficient for it to be regarded as directly and individually concerned for the purposes of the fourth paragraph of Article 230 EC. [9]

8 — Paragraphs 41 and 42 of the contested judgment.

9 — Paragraphs 43 and 44 of the contested judgment.

38. Since the contested decision was taken on the basis of Article 88(3) EC, without the Commission's having initiated the formal procedure provided for by Article 88(2) EC, the Court of First Instance concluded that the applicant had to be regarded as directly and individually concerned by the contested decision if, first, it was seeking to safeguard the procedural rights provided for by Article 88(2) EC and, second, it had the status of a 'party concerned' within the meaning of that paragraph. [10]

39. As to whether by means of its action the applicant was seeking to safeguard procedural rights arising from Article 88(2) EC, the Court of First Instance concluded that, even though the applicant had not expressly alleged infringement by the Commission of the obligation to initiate the procedure under Article 88(2) EC, thus preventing the exercise of the procedural rights provided for thereby, 'the pleas for annulment put forward in support of the present action, and in particular that based on breach of the prohibition of discrimination on grounds of nationality, must be construed as seeking to establish that the measures at issue pose serious difficulties as regards their compatibility with the common market, difficulties which place the Commission under an obligation to initiate the formal procedure'. [11]

40. That finding paved the way for the application by the Court of First Instance of the case-law pursuant to which the Commission is obliged to initiate that procedure if an initial review has not objectively enabled it to overcome all the difficulties raised by the assessment of the compatibility of the State measure in question with the common market.

41. The Court noted that 'since the Treaty imposes on the Commission the obligation to give the parties concerned the opportunity to submit their comments only in the context of the stage of the review provided for by Article 88(2) EC, those parties can assert the objectively difficult nature of the review to be carried out by the Commission and secure compliance with their procedural guarantees only if they have the opportunity of contesting before the Court of First Instance the decision not to initiate the procedure under Article 88(2) EC'. [12]

42. The Court of First Instance concluded that 'in the present case, the action must therefore be construed as alleging that the Commission failed, despite the serious difficulties posed by the assessment of the compatibility of the aid in question, to initiate the formal procedure provided for by Article 88(2) EC and as seeking, in the

10 — Paragraph 45 of the contested judgment.

11 — Paragraph 47 of the contested judgment.

12 — Paragraph 48 of the contested judgment.

final analysis, to safeguard the procedural rights conferred by that paragraph'. [13]

43. Having reinterpreted in that way the subject-matter of the action, the Court of First Instance then considered whether the applicant had the status of a 'party concerned' within the meaning of Article 88(2) EC, in which case it would be individually concerned by the decision.

44. The Court held that 'it is settled case-law that "parties concerned" within the meaning of Article 88(2) EC include not only the undertaking or undertakings benefiting from the aid, but those persons, undertakings or associations whose interests might be affected by the grant of the aid, in particular competing undertakings and trade associations. It is also settled case-law that, in order for its action to be admissible, an undertaking other than the recipient of the aid must demonstrate that its competitive position in the market is affected by the grant of the aid. Where that is not the case, it does not have the status of a party concerned within the meaning of Article 88(2) of the Treaty'. [14]

45. The Court of First Instance examined whether at least some members of the association could be regarded as 'parties concerned' within the meaning of Article 88(2) EC, in order to determine whether the association itself could be held to be a party concerned for the purposes of the same provision. That meant ascertaining whether the competitive position of its members on the market was affected by the grant of the aid in question. The Court took the view that it was, to the extent that some of the applicant's members were economic operators who could be regarded as direct competitors of the beneficiaries of the aid at issue. To reach that conclusion the Court relied on the applicant's statutes which in its view showed unambiguously that the persons whose interests it protected, or at least an appreciable proportion of them, were economic operators. [15]

46. The Court of First Instance had no doubt that the acquisition of agricultural or forestry land constitutes an essential element in the commercial strategy and competitive position of a farmer or forester. After examining the file, the Court concluded that it was established that the competitive positions of certain farmers and foresters who were members of the applicant association were affected by the land acquisition scheme. Thus, the Court took the view that the contested decision necessarily affected the competitive position of certain members of the applicant and that therefore, as 'parties concerned' within the meaning of Article 88 (2) EC, they would be entitled to bring individual actions for annulment of that decision. [16]

13 — Paragraph 49 of the contested judgment

14 — Paragraph 51 of the contested judgment

15 — Paragraphs 54 and 55 of the contested judgment

16 — Paragraphs 56 to 60 of the contested judgment.

47. As regards the actual purpose of the association, the Court of First Instance interpreted the applicant's statutes as showing that it was established to protect the interests and property rights of its members. By defending the interests of those economic operators in respect of property rights, and in particular the interest of farmers and foresters in being able to obtain land despite their unfavourable position vis-à-vis the potential beneficiaries of the land acquisition scheme, the applicant was defending the commercial and competitive interests of those members. For that reason, the Court rejected the Commission's argument that the applicant did not represent interests of undertakings but general social interests and that the case concerned only aspects relating to property law which fell outside the Community framework under Article 295 EC.

48. The Court also noted that it was apparent from the decision of 20 January 1999 and from the contested decision that the Commission itself had considered it necessary to examine the land acquisition scheme in the light of the Community rules on competition, in particular the rules concerning State aid. In those circumstances, the Commission could not reasonably deny that an association which objected to that land acquisition scheme and which included among its members many farmers who were in an unfavourable position compared with the potential beneficiaries of that scheme was in essence defending the competitive interests of its members.

49. Consequently, since the applicant was, according to Paragraph 2 of its statutes, an association formed to protect the collective interests of its members, which must also include the interests of members who were farmers and foresters, it must be considered to be entitled to bring an action for annulment on behalf of such members who, as parties concerned within the meaning of Article 88(2) EC, could have done so individually. [17]

50. The Court of First Instance also took the view that the applicant could be considered to be individually concerned by the contested decision inasmuch as its negotiating position was affected by that decision. The Court found that the applicant had played an active part in the formal review procedure which led to the adoption of the decision of 20 January 1999 and in the informal discussions relating to its implementation, doing so in many different ways and producing scientific reports in support of its case. According to the Court of First Instance the Commission itself had conceded that the applicant influenced the decision-making process and that it was a useful source of information.

51. That being so, the Court of First Instance found that on the basis of the relevant case-law the applicant would have been entitled to bring an action for annul-

17 — Paragraphs 61 to 63 of the contested judgment.

ment of the decision which concluded that formal procedure, namely, the decision of 20 January 1999, which the applicant decided not to do. According to the Court of First Instance the applicant did not do so because that decision did not run contrary to the interests defended by the applicant.

52. However, given that the two decisions were directly connected and given the role played by the applicant as a significant consulting partner during the formal procedure concluded by the decision of 20 January 1999, the Court found that the individual identification of the applicant as regards that decision necessarily extended to the contested decision, even though the applicant was not involved in the examination by the Commission which led to the adoption of the latter decision. [18]

53. The Court of First Instance therefore concluded that the applicant was individually concerned by the contested decision.

54. As regards the Commission's and Germany's argument that the land acquisition scheme constituted a system of aid and that therefore its authorisation by the Commission was a measure of general scope which applied to objectively determined situations and entailed legal effects for a category of persons envisaged in a general and abstract manner, the Court of First Instance observed that 'in certain circumstances a measure of general scope may be of individual concern to certain persons, and that that is precisely the case where the measure in question affects specific natural or legal persons by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons'. [19] In the opinion of the Court that was the situation in the present case.

55. The Court of First Instance also rejected the pleas of the Commission and Germany to the effect that there was no connection linking the particular interests of the applicant and its members to the interests represented by the applicant in its action. Since the applicant's members were, in particular, persons who do not have preferential access to land under the system of aid approved by the Commission, the annulment of the decision authorising that system would benefit those members inasmuch as it would help to put an end to the priority access to land enjoyed by their competitors.

56. That conclusion was not affected by the fact that the applicant relied, in its action, on breach of the prohibition of discrimination on grounds of nationality. Since the action for annulment served the interests of the applicant and of its members and the applicant was individually and directly concerned by the contested decision as the

18 — Paragraphs 65 to 70 of the contested judgment.

19 — Paragraph 71 of the contested judgment.

Court had established, it was permissible for it to plead any of the grounds of illegality listed in the second paragraph of Article 230 EC, including infringement of the articles of the Treaty concerning the prohibition of discrimination. The Court pointed out, moreover, that the applicant did not plead exclusively discrimination on grounds of nationality but also infringement of Article 88(3) EC. [20]

57. Finally, the Court of First Instance rejected the second plea of inadmissibility based on abuse of process, ruling that since the purpose of the action for annulment served the interests of the applicant and the applicant fulfilled the conditions laid down in the fourth paragraph of Article 230 EC, it could not be accused of having committed an abuse of process or a breach of the principle of the separation of legal remedies by bringing an action for annulment under Article 230 EC. [21]

58. The Court of First Instance accordingly dismissed the objection of inadmissibility.

20 — Paragraph 78 of the contested judgment.

21 — Paragraph 82 of the contested judgment.

The appeal

59. The Commission lodged an appeal against the contested judgment on 19 February 2003. Before examining the grounds of appeal, it is worth noting that in the introduction to its appeal the Commission thought it necessary, as it had done in its objection of inadmissibility, to draw the attention of the Court to the fact that in its view the issues in dispute are in no way related to Community law and even less to the provisions on State aid.

60. In the Commission's submission the action and the applicant's motives for bringing it have more to do with a domestic conflict of interests arising from the national legislative treatment over how ownership of the land acquired by the former Democratic Republic of Germany after 1945 should be transferred to private hands after reunification than to any distortions of competition caused by the State aid elements. The Commission's view appears to be that the applicant, which represents former owners of the land, has used Community law to oppose the solution adopted by the German legislature to benefit long-term lease holders of the land to the detriment of its members, former owners.

61. Even if, as the Court of First Instance itself noted, it appears somewhat inconsistent for the Commission to claim that the

case has nothing to do with the competition rules of the Treaty when it has itself adopted two decisions on the matter under the State aid provisions of the Treaty, it must be acknowledged that from the documents in the file it is clear that the socio-economic and political issues underlying the national legislation at stake go far beyond the mere question of State aid, which constitutes only one element in the wider dispute between the applicant and the German authorities.

62. The Commission puts forward seven grounds of appeal which may be summarised as follows. It submits that the Court of First Instance has erred in law:

(1) by holding that, notwithstanding its general character, the contested decision is of individual concern to the applicant association and affects it (or one or more of its members) by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons;

(2) by holding that (where it is the decisive criterion) the degree of competitive relationship required for individual concern within the meaning of Article 230 EC as applied in the field of State aid differs according to whether the contested decision is adopted on the basis of Article 88(2) or (3) EC, thereby applying different criteria to the issue of admissibility;

(3) by applying a criterion relating to the competitive relationship (that there must be an effect on the competitive position of the applicant) which is less strict than the one established by the Court of Justice (that there must be a substantial effect on the competitive position of the applicant);

(4) by adding of its own motion a new plea in law not explicitly put forward by the applicant in its original application and by failing to give the Commission, the intervening Member State and the applicant an opportunity to express their views in that regard;

(5) by finding that the applicant was affected in its capacity as negotiator and that therefore it must be regarded as being individually concerned by the contested decision;

(6) by failing to give an adequate statement of the grounds on which the contested judgment is founded;

(7) by inconsistently finding that in the context of the procedures on State aid the applicant had, on the one hand, not been heard by the Commission and, on the other, that it had been heard to the point of reaching the status of negotiating party.

Addition of a new plea in law

63. I shall begin by examining the fourth ground of appeal contending that the Court of First Instance added of its own motion a new plea in law not explicitly put forward by the applicant.

64. The contested decision was taken on the basis of Article 88(3) EC, without the Commission's having initiated the formal procedure provided for by Article 88(2) EC. In view of that, the Court of First Instance noted that, according to the case-law, in order to be individually concerned the applicant had to establish, first, that it was seeking to safeguard the procedural rights provided for by Article 88(2) EC and, second, that it qualified as a 'party concerned' within the meaning of that paragraph.

65. Before the Court of First Instance the applicant did not explicitly state either in its written submissions or in its oral submissions that its intention in lodging its application was to safeguard its procedural rights arising from Article 88(2) EC, or that the Commission ought to have initiated the formal investigation procedure under Article 88(2) EC. In the words of the Court: '[t]he applicant has not expressly alleged infringement by the Commission of the obligation to initiate the procedure under Article 88(2) EC, preventing the exercise of the procedural rights provided for thereby'.

66. That, however, did not prevent the Court from finding that, 'in the final analysis' such was the aim of the applicant: '[h]owever, the pleas for annulment put forward in support of the present action, and in particular that based on breach of the prohibition of discrimination on grounds of nationality, *must be construed as seeking* to establish that the measures at issue pose serious difficulties as regards their compatibility with the common market, difficulties which place the Commission under an obligation to initiate the formal procedure'. The Court concluded that 'in the present case, the action *must therefore be construed* as alleging that the Commission failed, despite the serious difficulties posed by the assessment of the compatibility of the aid in question, to initiate the formal procedure provided for by Article 88(2) EC and as seeking, *in the final*

analysis, to safeguard the procedural rights conferred by that paragraph'. [22]

67. The Commission in its appeal argues that the Court of First Instance not only went clearly beyond a broad interpretation of the grounds on which the applicant based its application but also introduced a completely new and different plea under Article 230 EC, that of infringement of essential procedural requirements. The Commission also argues that the Court was not under a duty to raise such a plea of its own motion since it was not a public policy matter.

68. ARE responds that the interpretation by the Court of First Instance of its application was reasonable and in accordance with the principle of procedural economy in that the opening of a new formal examination procedure would have been required in the event that its action was successful on the substance. ARE also contends that it may be inferred from its submissions relating to the substantive breach implied by the contested decision that there were 'serious difficulties' in determining the compatibility of the aid. Lastly, the applicant argues that in previous judgments the Court of First Instance has examined of its own motion, without being prompted by the parties, the issue of infringement of essential procedural requirements as a result of the Commission's failure to open the formal examination procedure under Article 88(2) EC.

22 — Paragraph 49 of the contested judgment, emphasis added. See points 37 to 49 above.

Interpretation of the applicant's submissions

69. The first step is to establish whether the Court of First Instance was right in its interpretation of the submissions of the applicant.

70. As an initial remark it must be noted that given the specific circumstances of the case and the case-law concerning locus standi of natural or legal persons under Article 230 EC in State aid cases, the disputed plea is significant because, if allowed, it makes the requirements of standing easier to satisfy.

71. The Community judicature must plainly be granted a certain flexibility in interpreting the pleas and submissions in an application and inferring from them, where necessary, the subject-matter of the application and the pleas in law on which it is based.

72. Such a power of interpretation is however confined within certain limits. Articles 21 of the Statute of the Court of Justice, 38 of the Rules of Procedure of the Court of Justice and 44 of the Rules of Procedure of the Court of First Instance provide that an application must contain, inter alia, the subject-matter of the dispute and a brief statement of the pleas on which the application is based.

73. It is settled case-law that the information given in the application must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court of First Instance to decide the case. [23] Furthermore, the Court has held that the words 'brief statement of the grounds' used in the Statute and the Rules of Procedure mean that the application must specify the nature of the grounds on which the application is based. Although a mere abstract statement of the grounds in the application does not alone satisfy that requirement, the grounds may be expressed in terms of their substance rather than of their legal classification provided that the ground of complaint relied upon is established in relation to the facts which have been set out. [24]

74. It appears from its written and oral submissions that the applicant advanced three main pleas:

— first, an infringement of essential procedural requirements in that the statement of reasons of the contested decision was inadequate because the Commission failed to verify whether, as a result of the modifications to the law proposed by Germany, any non-German national would be entitled to acquire land under the preferential scheme as amended;

— second, an infringement of the Treaty in that the contested decision was in breach of the principle of non-discrimination on grounds of nationality; and,

— third, an infringement of Article 88(3) EC, in that the Commission approved the measures proposed by Germany to implement the decision of 20 January 1999 without requiring, on the one hand, the declaration that all existing contracts entered into under the old regime were void and, on the other, the *ex novo* award of the affected lands.

75. On the basis of a careful reading of the original application lodged by the applicant, I do not consider that one could infer from its wording that the applicant's intent was to challenge the refusal of the Commission to open the procedure under Article 88(2) EC or to safeguard its procedural rights under that provision. No reference was made by the applicant in any of the procedural phases before the Court of First Instance either to the opening of the procedure under Article 88(2) EC or to the case-law that would support such a claim. In fact, the applicant first referred to the relevant case-law in its

23 — Order of the Court of First Instance in Case T-85/92 *De Hoe* v *Commission* [1993] ECR II-523, at paragraph 20.

24 — Joined Cases 19/60, 21/60, 2/61 and 3/61 *Société Fives Lille Cail and Others* v *High Authority* [1961] ECR 281, at 295 and order of the Court of First Instance in *De Hoe*, cited in footnote 23 above, at paragraph 21.

response to the fourth ground introduced by the Commission in the present appeal and even then failed in my view to show that its original intention had been, as construed by the Court of First Instance, to safeguard its procedural rights under Article 88(2) EC. The case-law under which parties concerned are entitled to challenge the refusal of the Commission to open a formal examination procedure under Article 88(2) EC is by now well established and has moreover received much attention amongst academics and practitioners.

76. Since the applicant did not specifically raise that plea and did not refer to the appropriate case-law, it seems to me that the Court of First Instance's reading of its true intentions has gone too far.

77. It is important to note that the applicant had already comprehensively submitted its views on the aid scheme through its participation in the procedure under Article 88(2) EC which led to the adoption of the decision of 20 January 1999. That decision contained the Commission's substantive analysis of the aid scheme and the contested decision was a mere implementation of its findings. The applicant's procedural rights had therefore already been exercised in those proceedings, which may explain, as the Commission suggests, why the applicant did not explicitly rely in its application on its procedural rights or challenge the refusal of the Commission to open the formal investigation procedure under that provision. [25]

78. It is true that in its application to the Court of First Instance the applicant relied in its first plea on the infringement of essential procedural requirements. However, that plea was based on an inadequate statement of reasons and not on a failure to respect the applicant's procedural rights under Article 88(2) EC. Those are in my view two very different pleas and there does not seem to be any logical link between the two. Nor does the applicant appear to have even referred to the first plea at the hearing.

79. Thus, whereas the applicant's pleas were directed against the compatibility of the contested decision with the Treaty, the Court of First Instance construed the action as challenging the refusal of the Commission to open the formal examination procedure under Article 88(2) EC and seeking to safeguard the procedural rights which that provision entails. In doing so that Court has

25 — See also points 90 to 93 below. In Case T-86/96 *ADLU* [1999] ECR II-179 the Court of First Instance held, at paragraph 49, that where interested parties avail themselves of their procedural guarantees under Article 88(2) EC, they cannot be considered, by virtue of that status alone, as being individually concerned.

in my view gone beyond an acceptable interpretation of the pleas put forward by the applicant, a matter which is all the more crucial in that the plea as construed by the Court is central to the admissibility of the case.

80. That conclusion is further reinforced by the case-law of the Court of First Instance itself, as the Commission points out in its appeal.

81. In its judgment in *Skibsværftsforeningen*,[26] the Court, after recalling that the Commission took the contested decision in the course of the preliminary procedure provided for by Article 88(3) EC, held that '[s]ince the applicants have not sought its annulment on the ground that the Commission was in breach of the obligation to initiate the procedure provided for in [Article 88(2)] or on the ground that the procedural safeguards provided for by [Article 88(2)] were infringed ..., the mere fact that the applicants may be considered to be parties concerned within the meaning of [Article 88 (2)] cannot be sufficient to render the application admissible'. The Court then went on to examine whether the applicants fulfilled the *Plaumann* test in other ways.

82. The Court of First Instance applied the same approach in its judgment in *Nuove Industrie Molisane*[27] in which it dismissed the action because, amongst other grounds, the applicant had not invoked the failure of the Commission to initiate the formal examination procedure. The Court expressly refused to presume that the applicant had a legal interest in bringing proceedings on that basis.

83. It appears from those judgments that the Court of First Instance has in the past required from applicants the introduction of a specific plea explicitly challenging the refusal of the Commission to open the formal examination procedure under Article 88(2) EC and seeking the protection of their procedural rights thereunder. In those cases it did not consider it necessary to reinterpret the applications in order to conclude whether such a plea and intention could be inferred from the submissions. I cannot see why the present case should be treated differently in the absence of any grounds of justification.

84. I therefore conclude that the new plea on the basis of which the Court of First Instance resolved the case could not be inferred from the written or oral submissions of the applicant and that the plea was added by the Court of its own motion.

26 — Case T-266/94 *Skibsværftsforeningen and Others* v *Commission* [1996] ECR II-1399, at paragraph 45. See further points 106 et seq. below.

27 — Case T-212/00 *Nuove Industrie Molisane* v *Commission* [2002] ECR II-347, at paragraph 45.

The plea as a public policy matter

85. That conclusion brings me to the second issue, which the Commission also raises in its appeal, namely whether the Court of First Instance was entitled to add the new plea of its own motion as a public policy matter. It seems to me that the question must be answered in the negative, without there being any need to define exhaustively what new pleas a court may, or must, raise of its own motion on grounds of public policy — a problem which has provoked some debate. [28]

86. First of all, there is nothing in the contested judgment to suggest that the Court of First Instance intended to raise a plea of its own motion for reasons of public policy. That is particularly striking since in other cases in which that Court has decided to raise issues of its own motion concerning admissibility in the field of State aid, it has done so explicitly. [29]

87. Secondly, the Court of First Instance might have been expected not merely to state that it was introducing a new plea, but to justify doing so.

88. In any event, I do not consider that in the circumstances of the present case there was an issue of public policy.

89. It is settled case-law that the non-observance of the rights of defence during the administrative procedure qualifies as an infringement of an essential procedural requirement which the Court of First Instance is entitled or even obliged to raise of its own motion. [30]

90. However, I do not see that such infringement has taken place here.

91. The applicant actively participated throughout the formal examination procedure under Article 88(2) EC that culminated in the adoption of the decision of 20 January 1999 and also made observations in the period elapsing between that decision and the adoption of the contested decision. As

28 — See for example K. Lenaerts, 'De quelques principes généraux du droit de la procédure devant le juge communautaire' in Mélanges en Hommage à Jean-Victor Louis, ULB, vol. I, 241-261, at 245-249 and my Opinion of 15 June 1995 in Joined Cases C-430/93 and C-431/93 *Van Schijndel* [1995] ECR I-4705.

29 — See, inter alia, *Skibsværftsforeningen*, cited in footnote 26 above, at paragraph 40 and Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, at paragraph 23.

30 — See, inter alia, Joined Cases T-186/97, T-187/97, T-190/97 to T-192/97, T-210/97, T-211/97, T-216/97, T-217/97, T-218/97, T-279/97, T-280/97, T-293/97 and T-147/99 *Kaufring and Others* v *Commission* [2001] ECR II-1337 at paragraph 134 and the case-law cited therein.

the Court of First Instance acknowledges, [31] the contested decision constitutes 'exclusively and directly the implementation' of the decision of 20 January 1999 and it appears that no substantial new elements were introduced in the contested decision.

92. It follows that the applicant did enjoy an effective opportunity to submit its views throughout the formal administrative procedure and therefore its rights of defence were observed. The very justification for the finding of admissibility, namely the protection of procedural rights under Article 88(2) EC which would not otherwise be protected, is thus, on the facts of the case, difficult to sustain. [32]

93. In those circumstances I consider there was no breach of an essential procedural requirement justifying the Court on public policy grounds in acting of its own motion.

Defects in the approach of the Court of First Instance

94. There are two further shortcomings in the position taken by the Court of First Instance, whether it is regarded as reinterpreting the pleas of the applicant or adding a new plea of its own motion.

95. First, given the importance that such an approach had in resolving the objection to admissibility, the Court of First Instance should have given fuller reasoning. The judgment refers generally to 'the pleas of annulment put forward in support of the present action', without explaining what specific elements of the applicant's submissions justify such a reinterpretation of the subject-matter of the action. One may wonder whether the Court of First Instance has not also thereby failed to respect the need to sufficiently reason its judgments in order for the Court of Justice to be able to exercise its review. [33]

96. Secondly and more importantly, in the course of the proceedings the Commission was not given an opportunity to meet that new plea. As the Commission points out and as the above discussion shows, such a plea raises numerous interpretative issues on the State aid provisions which could have been argued by the Commission had it been given the chance to do so. The Court of First Instance did not take the necessary steps to address that difficulty such as, for instance, asking the Commission to submit argument on that point. The Commission is in my view right in claiming that the Court thereby disregarded its rights of defence.

31 — Paragraph 68 of the contested judgment.

32 — See ADLU, cited in footnote 25 above.

33 — See C-259/96 P *Council* v *De Nil and Impens* [1998] ECR I-2915, at paragraph 32.

97. In view of the foregoing I am of the opinion that by re-defining of its own motion the subject-matter of the action and adding a plea not introduced by the applicant without giving the parties the possibility to express their views, the Court of First Instance has erred in law and its judgment must be set aside on that ground.

The question of individual concern

98. It is still necessary however to consider whether there were any other grounds on which the Court of First Instance could properly hold the application admissible, or whether it has erred in law on those grounds also.

99. Once it is concluded that the applicant did not seek the annulment of the contested decision on the ground that the Commission was in breach of the obligation to initiate the procedure provided for in Article 88(2) EC, or on the ground that the procedural safeguards provided for by Article 88(2) EC had been infringed, the issue of individual concern must be decided by examining whether the applicant is affected by the contested decision by reason of other circumstances distinguishing it individually in like manner to the person addressed, in accordance with the *Plaumann* test. [34]

100. Pursuant to that test, natural or legal persons may be regarded as individually concerned by a measure not addressed to them only if it affects their position by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee. [35]

101. In proceedings challenging Commission State aid decisions, the vexed notion of individual concern under Article 230 EC has been applied in a qualified manner owing to the special features of the procedures under Article 88(2) and (3) EC. [36] The lack of consistency of the case-law has often been

34 — Case T-188/95 *Waterleiding Maatschappij 'Noord-West Brabant'* v *Commission*, [1998] ECR II-3713, at paragraph 54; *Skibsværftsforeningen*, cited in footnote 26 above, at paragraph 45.

35 — Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, at p. 107, and Case C-452/98 *Nederlandse Antillen* v *Council* [2001] ECR I-8973, paragraph 60.

36 — See points 106 to 114 below.

remarked upon, [37] which explains why in its appeal the Commission has requested the Court, for the sake of legal certainty, to clarify that important issue 'once and for all'.

102. The case-law does indeed appear to be somewhat inconsistent and to introduce certain artificial distinctions in terms of access to the Community judicature. Although I will make some general remarks on the case-law at the end of this Opinion, I am not sure that the instant case provides the best opportunity for the Court to adopt an entirely fresh approach to the matter, so I shall concentrate on answering the question of individual concern raised here on the basis of the existing, if uncertain, case-law.

103. The first issue to be resolved under this head is whether the applicant meets the test of individual concern by reason of the effect of the decision on its competitive position (the Commission's second and third grounds of appeal, which also particularise the first ground of appeal). The second issue is whether the applicant meets the test of individual concern by reason of its position as negotiator in the proceedings leading to the adoption of the decision.

The effect on the competitive position of the applicant

104. The contentious question is the degree to which the contested aid has to affect the applicant's competitive position on the market in order for it to have locus standi to challenge a decision of the Commission under Article 88(3) EC.

105. By its second and third grounds of appeal the Commission, relying on *COFAZ*, [38] claims in essence that, when the competitive position of the applicant is the key factor determining individual concern, the effect of the aid measure on the applicant's competitive position has always to be substantial, irrespective of whether Article 88(2) or (3) EC constitutes the decision's legal basis, or indeed of any other consideration. That is especially true, according to the Commission, when the Commission's decision refers to a general aid scheme, as in the present case. In the Commission's view, the Court of First

37 — See generally J. Winter, 'The rights of complainants in State aid cases: judicial review of Commission decisions adopted under Article 88 (ex 93) EC', (1999) 36 *Common Market Law Review 521*; U. Soltész and H. Bielesz, 'Judicial review of State aid decisions', (2004) *European Competition Law Review* 133; L. Flynn 'Remedies in the European Courts' in A. Biondi et al. (eds.), *The Law of State Aid in the EU*, Oxford 2004, at 283. See also J. Azizi, 'Droits de la défense dans la procédure en matière d'aides d'Etat: le point de vue judiciaire' in *Un rôle pour la défense dans les procédures communautaires de concurrence*, Bruylant Bruxelles, 1997, 87, especially pp. 112 to 120.

38 — Case 169/84 *COFAZ* v *Commission* [1986] ECR 391.

Instance, by merely requiring, in some of its case-law, that the competitive position of the applicant should be affected, rather than substantially affected, has departed from the case-law of the Court of Justice and has erred in law.

106. On my understanding the case-law, as it stands, on the requirements of individual concern when the contested decision is adopted after the preliminary procedure under Article 88(3) EC, distinguishes between two scenarios.

107. The first scenario concerns applications for the annulment of a decision on the ground of the Commission's refusal to open the formal investigation procedure and the protection of the procedural rights guaranteed under Article 88(2) EC. That scenario is governed by the *Cook* and *Matra* case-law. [39]

108. In such a situation, applicants need to show that they qualify as 'parties concerned' for the purposes of Article 88(2) EC. Where competition is the key factor for establishing individual concern, that entails showing that their competitive position is affected by the decision, though not necessarily substantially. [40]

109. It is worth recalling that in his Opinion in *Cook*, Advocate General Tesauro justified the application of a lighter test as regards the effects of the aid measure on the competitive position of the applicant when a decision under Article 88(3) EC was being contested on the ground that 'the only information regarding aid normally at the disposal of undertakings which challenge a decision "to raise no objections" is either communicated to them by the Commission or that resulting from the bare extract published in the C series of the Official Journal. They cannot be required therefore to formulate in the document instituting the proceedings precise submissions regarding the size and the effect of the aid (such as the impact on the recipient's production costs, shifts in the market shares or the effect on trading patterns)'. [41] Thus, in order to gain locus standi to challenge decisions not to raise objections under Article 88(3) EC, Advocate

39 — Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487 and Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203.

40 — See, inter alia, *Cook and Matra*, cited in footnote above; *Waterleiding*, cited in footnote 34; Case T-11/95 *BP Chemicals* v *Commission* [1998] ECR II-3235, as regards the part of the decision adopted on the basis of Article 88(3) EC concerning the third capital injection which was challenged on the basis of *Cook and Matra*, paragraphs 84 to 89; Case T-69/96 *Hamburger Hafen- und Lagerhaus and Others* v *Commission* [2001] ECR II-1037. See, inter alia, *Cook and Matra*, cited in footnote above; Waterleiding, cited in footnote 34; Case T-11/95 BP *Chemicals* v *Commission* [1998] ECR II-3235, as regards the part of the decision adopted on the basis of Article 88(3) EC concerning the third capital injection which was challenged on the basis of *Cook and Matra*, paragraphs 84 to 89; Case T-69/96 *Hamburger Hafen- und Lagerhaus and Others* v *Commission* [2001] ECR II-1037.

41 — Opinion of Advocate General Tesauro in *Cook*, cited in footnote 39 above, at point

General Tesauro considered it sufficient that the applicant should establish that it was competing genuinely and not just marginally with the undertaking in receipt of the aid. [42]

110. With respect to the significance to be attached to the general nature of the aid scheme, the case-law, although not consistently, [43] appears also to impose a stricter test for establishing an effect on the applicant's competitive position when the aid scheme is of a general character.

111. In *Kahn*, [44] the applicant had relied, inter alia, on the *Cook* case-law to challenge the Commission's authorisation under Article 88(3) EC of a general aid scheme which had not yet been applied in practice by means of individual aid decisions. The Court of First Instance found that the facts could be distinguished from the *Cook* and *Matra* situations. Whereas those two cases related to actions brought by actual competitors of the recipient of the aid against decisions authorising individual aid, the decision challenged in *Kahn* referred to a general aid scheme whose potential beneficiaries were defined only in a general and abstract manner. Actual beneficiaries could exist only when the grant of individual aid took place. In those circumstances 'there cannot, 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, be any "competing undertakings" which could invoke the procedural guarantees under [Article 88(2)] of the Treaty' [45] as was the case in *Cook* and *Matra*.

112. The second scenario concerns applications for annulment based on grounds other than those in the *Cook* and *Matra* case-law. Here the distinction operated by the case-law entails the traditional and stricter application of the *Plaumann* test, in line with the restrictive approach to individual concern

42 — Ibid.

43 — See for instance *Hamburger Hafen und Lagerhaus*, cited in footnote 40, which concerned an application lodged on the basis of *Cook and Matra* against two Commission decisions adopted under Article 88(3) EC, one concerning an individual aid and another concerning a general aid scheme. The Court of First Instance applied the same reasoning without, however, giving any particular significance to the general or individual character of the contested State aids.

44 — Case T-398/94 *Kahn Scheppvaart* v *Commission* [1996] ECR II-477. See also *ADLU*, cited in footnote 25, paragraphs 42 to 46; and Case C-41/99 P *Sadam Zuccherifici and Others* v *Council* [2001] ECR I-4239, paragraph 29. Although the two latter cases did not concern Commission decisions not to raise objections under Article 88(3) EC, they illustrate a more restrictive approach of the case-law to locus standi when general aid schemes are at stake.

45 — *Kahn Scheppvaart*, cited in footnote above, at paragraph 49.

under the fourth paragraph of Article 230 EC adopted by the Court of Justice in its case-law generally, outside the field of State aid, and confirmed in *UPA* [46] and *Jégo-Quéré*. [47]

113. When applying the *Plaumann* test to State aid cases falling outside the first scenario, the case-law seems to require the applicant to show evidence that its competitive position on the market has been substantially affected. That is so in actions against decisions adopted by the Commission after a formal investigation procedure under Article 88(2) EC. [48] In *Skibsvoerftsforeiningen* the Court of First Instance made clear that the same test should apply when the applicant contests a decision of the Commission under Article 88(3) EC without relying on the *Cook* and *Matra* case-law. [49]

114. To sum up, it follows from the case-law as it stands that, if applicants contest the decision of the Commission under Article 88 (3) EC on the basis of the *Cook* and *Matra* case-law, their access to the Court's jurisdiction is eased. If they challenge the decision of the Commission under Article 88(3) EC on any other grounds, the full weight of the *Plaumann* test falls on them, which, in the case of competitors of recipients of the aid, seems to require that their competitive position must be substantially affected.

115. The present case concerns a decision of the Commission adopted under Article 88(3) EC approving a general aid scheme which was challenged by the applicant on grounds other than those provided for in the *Cook* and *Matra* case-law. It therefore falls within the second scenario described above. The applicant will consequently satisfy the *Plaumann* test only if it can show that its members' competitive position has been substantially affected by the land scheme. That is especially so since the aid scheme has a general character.

116. In the contested judgment, the Court of First Instance, having reinterpreted the subject-matter of the action, and reasoning on the basis that the applicant fell within the first scenario, found that the competitive position on the market of some of the

46 — Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677.

47 — Case C-263/02 P *Commission* v *Jégo-Quéré* [2004] ECR I-3425.

48 — In addition to COFAZ, cited in footnote 38, see, inter alia, Case C-106/98 P *Comité d'entreprise de la société française de production and Others* v *Commission* [2000] ECR I-3659, at paragraphs 40 and 41; Case T-149/95 *Ducros* v *Commission* [1997] ECR II-2031, at paragraphs 34; *BP Chemicals*, cited in footnote 40, as regards the parts of the contested decision concerning the first two capital injections, at paragraphs 77 to 79.

49 — *Skibsværftsforeningen*, cited in footnote 26, at paragraph 47.

applicant's members was affected by the grant of the aid and concluded that they were therefore individually concerned. That conclusion was reached by establishing that the members of the association were economic operators, in particular farmers, foresters and undertakings operating in the agricultural sector. Since the Court had no doubt that the acquisition of agricultural or forestry land constitutes an essential element in the commercial strategy and competitive position of a farmer or forester, the land acquisition scheme at issue necessarily affected them. [50]

117. Whereas the findings of the Court of First Instance in the contested judgment might be sufficient to establish the existence of some sort of competitive relationship between the members of the association and the beneficiaries of the aid scheme, they fail in my view to establish that the former were substantially affected in their market position, as required by a stricter *Plaumann* test. On the basis of the evidence provided, the competitive relationship is in my view not sufficiently defined in the judgment and appears far too tenuous, the members of the association being only potentially and indirectly affected in their market position by the aid measure. Apart from general references to the agricultural and farming sector, no market analysis has been applied to show in which specific product or geographical markets the members of the applicant association would be competing with the beneficiaries other than in their general capacity as farmers or foresters.

118. Indeed, as the Commission has pointed out, all farmers in the European Union are potentially competitors of the beneficiaries of the land acquisition scheme. That excessively broad approach does not correspond with the strict market analysis applied by the Court of First Instance in cases where evidence of a substantial effect on the applicant's competitive position needs to be shown. [51] It seems moreover contrary to the Treaty, since the criterion of an effect on the applicant's competitive position must be understood in the context of the requirement of individual concern; an effect which in some way individualises the applicant must therefore be established.

119. That is all the more significant in view of the general character of the contested aid scheme. Both parties agree that the contested decision applies to a general aid scheme which had not been implemented by means of individual aid decisions at the time the case was considered at first instance. Since at that time there could be no actual 'competing undertakings' within the meaning of *Kahn*, the applicant would

50 — See point 46 above.

51 — See, inter alia, *Skibsværftsforeningen*, cited in footnote 26, at paragraphs 46 to 48.

also fail the locus standi test laid down in *Kahn*.[52]

120. I therefore conclude that, given the general character of the aid scheme and since the applicant has failed to show that the scheme substantially affects its members' competitive position, as required by the case-law as it stands, the Court of First Instance erred in holding the applicant to be individually concerned by the contested decision on that ground.

The applicant's status as a negotiator

121. In the contested judgment, the Court of First Instance found, in addition, that, as an association, the applicant could be considered to be individually concerned by the contested decision inasmuch as it claimed a specific legal interest in bringing proceedings because its negotiating position was affected by the contested decision. The Court based that conclusion on the *Van der Kooy* [53] and *CIRFS* [54] case-law.

122. In its fifth ground of appeal the Commission argues, first, that the applicant did not put forward that ground at any stage and that therefore the Court of First Instance has erred in law by adding a new plea of its own motion. Secondly, the Commission disputes the Court's finding that the applicant's participation amounted to a negotiating role in accordance with the *Van der Kooy* and *CIRFS* judgments. Lastly, the Commission contests the Court's finding [55] that the decision of 20 January 1999 did not go against the interests of the applicant. In reaching those conclusions the Court of First Instance, in the Commission's submission, erred in law and made a manifest error in its assessment of the facts.

123. In *Van der Kooy*, the applicants had challenged a decision of the Commission under Article 88(2) EC declaring a Dutch preferential gas tariff system for glasshouse growers incompatible with the common market. One of the applicants, the Landbouwschap, a body established under public law to protect the common interests of agricultural undertakings, represented the growers' organisations in tariff negotiations with the supplier of the gas. The Court considered that even though the Landbouwschap could not be individually concerned as a recipient of the aid, its position as

52 — See also cases cited in footnote 44.

53 — Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* [1988] ECR 219.

54 — *CIRFS*, cited in footnote 29.

55 — At paragraphs 67 and 69 of the contested judgment.

a negotiator of gas tariffs in the interest of the growers was affected by the challenged decision and it was in that respect individually concerned.

124. In *CIRFS*, the applicant sought the annulment of a Commission decision finding that an aid in the synthetic fibres sector was not subject to the prior notification procedure provided under Article 88(3) EC since it constituted an existing aid covered by a previous Commission decision. The Court found that CIRFS was individually concerned by the decision since it had taken a very significant role in the Commission proceedings.

125. It appears from the documents in the file in the present case that, at first instance, the applicant relied on the fact that it had played a decisive role in the procedure to support its claim of being individually concerned. However, even if it referred summarily to the relevant case-law, it did not claim a role as negotiator within the meaning of the *Van der Kooy* and *CIRFS* case-law. Only at the oral hearing before the Court of First Instance, and therefore too late, did the applicant raise that plea, and even then only briefly. In the appeal before this Court, and in response to the fifth ground of the appeal, the applicant did not substantially modify that approach. On the contrary, it confirmed that in its view that ground was not necessary to the resolution of the case as its locus standi could be established on other grounds. In view of this, it is arguable that the Court of First Instance should not have accepted the plea and that the Commission's rights of defence were not respected.

126. I also find it difficult to agree with the finding of the Court of First Instance that the decision of 20 January 1999 was not contrary to the applicant's interests when, as that Court acknowledges, the contested decision, which clearly affects the applicant's members adversely, constitutes a direct implementation of the former decision.

127. I shall not, however, go into a detailed examination of those points as I consider that the issue can be dealt with on other grounds.

128. Although the applicant did participate actively in the procedure leading to the adoption of the decision of 20 January 1999 and, by extension, also in the contested decision, that participation alone is, in my

view, not sufficient to confer locus standi under the *Van der Kooy* and *CIRFS* case-law. [56]

129. The fact that an association intervenes with the Commission during the procedure under the State aid provisions of the Treaty for the purpose of defending the collective interests of its members is not sufficient in itself to establish locus standi for an association under that case-law. [57]

130. The roles played by the applicants in *Van der Kooy* and *CIRFS* in the procedure leading to the adoption of the measures challenged in those cases were substantially more significant than the part played by ARE in the present case.

131. In *Van der Kooy* the Court of Justice found that the Landbouwschap, in its capacity as negotiator of gas tariffs, had taken an active part in the procedure under Article 93(2) by submitting written comments to the Commission and by keeping in close contact with the responsible officials throughout the procedure. It was one of the parties to the contract which established the tariff disallowed by the Commission, and in that capacity was mentioned several times in the Commission decision.

132. The role of the applicant in *CIRFS* was also very substantial. CIRFS was an association whose membership included the main international manufacturers of synthetic fibres. It had pursued, in the interest of those manufacturers, a number of actions connected with the policy of restructuring the sector defined by the Commission. In particular, it had been the Commission's interlocutor with regard to the introduction of the discipline applying to the sector and its extension and adaptation and it had pursued negotiations with the Commission in particular by submitting written representations to it and by keeping in close contact with the responsible departments.

56 — As the Court of First Instance stated in *Kahn*: '[t]he mere fact that the applicant made a complaint to the Commission 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.' *Kahn*, cited in footnote 44 above, at paragraph 42.

57 — *ADLU*, cited in footnote 25, at paragraph 60. The Court of First Instance also found in that case that attendance of the applicant association at several meetings with the national authorities could not confer the role of negotiator within the meaning of *Van der Kooy* and *CIRFS*.

133. That is not the case of the present applicant. The meetings and conversations held with Commission officials and the observations submitted by the applicant took place, as with any other party concerned, in the normal course of the formal examination procedure under Article 88(2) EC. It appears from the file only six letters were addressed to the Commission by the applicant itself, two of which related only marginally to the substance of the proceedings. The applicant was not involved as a negotiator with respect to the land scheme either at national or Community level. Its position is therefore not comparable with that of CIRFS and the Landbouwschap, and it cannot be regarded as individually concerned on the basis of its position as a negotiator.

134. It is settled case-law that in appeal proceedings the Court of Justice has jurisdiction to review the legal characterisation of the facts by the Court of First Instance and the legal conclusions it has drawn from them.[58] Accordingly I conclude that by characterising the role of the applicant as that of a negotiator within the meaning of *Van der Kooy* and *CIRFS* and finding that the applicant was individually concerned on that basis, the Court of First Instance has erred in law.

135. It follows that the Court of First Instance erred in dismissing the Commission's objection to the admissibility of the application, without it being necessary to examine the sixth and seventh grounds of appeal.

Ruling of the Court of Justice

136. Under Article 61 of its Statute, if an appeal is well founded, the Court of Justice must quash the decision of the Court of First Instance, but may itself give final judgment in the matter where the state of the proceedings so permits. In its appeal the Commission has requested the Court of Justice not only to set aside the contested judgment but also to declare the application inadmissible owing to the lack of individual concern within the meaning of Article 230 EC. In my view, the Court has all the necessary information to rule on the issue of admissibility and should do so in the interests of procedural economy and good administration of justice.

58 — See, inter alia, Case C-312/00 P *Commission* v *Camar and Tico* [2002] ECR I-11355, paragraph 69; Case C-7/95 P *John Deere* v *Commission* [1998] ECR I-3111, paragraph 21, and Case C-449/99 P *EIB* v *Hautem* [2001] ECR I-6733, paragraphs 44 and 45.

137. Indeed it follows, in my view, from the above analysis of the issues that the applicant does not satisfy the requirements of individual concern, and that the application must be rejected as inadmissible.

Re-considering the case-law

138. I must, finally, add a comment on the present state of the law governing the standing of natural and legal persons seeking to challenge Commission decisions under Article 88(3) EC. The case-law on this topic is plainly unsatisfactory, being complex, apparently illogical, and inconsistent. The difficulties have been amply pointed out by commentators,[59] and are apparent from the relatively brief account set out in this Opinion. A full exposition of the difficulties would have required an Opinion of inordinate length.

139. It must, I think, be acknowledged that the difficulties seem to have their origin in the decisions of the Court of Justice in *Cook* and *Matra*. Those decisions were intended to give fuller protection to competitors where the Commission decides not to initiate the Article 88(2) procedure — a protection considered to be justified on the ground that in such cases the applicant might have insufficient information to establish individual concern. The aim was apparently to compensate for the applicant's lack of procedural status under Article 88(3) by giving it the procedural rights of 'parties concerned' under Article 88(2). The result however has been, somewhat confusingly, to conflate the test of standing under Article 88 (2) and 88(3), and thus to confer standing on a very wide category of persons; clearly, many persons could claim that they would have been 'parties concerned' if the Article 88(2) procedure had been initiated. The door which was thus opened too wide under Article 88(3) then had to be partially closed by various subsequent refinements of the case-law which made that case-law increasingly complex and incoherent.

140. Moreover it is not clear, in my view, that the departure from the terms of the

59 — See above, footnote 37

fourth paragraph of Article 230 EC is justified in these cases. It is of course true that, because the decision under Article 88 (3) is taken at an early stage, a person potentially affected by the proposed aid may have little information about its likely effect. He may therefore not have sufficient information, when challenging a decision under Article 88(3), to establish individual concern in the application which initiates proceedings before the Court of First Instance. But in the course of those proceedings sufficient information will surely be produced by the Commission (and possibly by the Member State concerned, if it intervenes), if necessary in response to inquiries made and questions put by the Court, to enable the Court to decide whether the requirement of individual concern is satisfied.

141. The best solution in my view would be to revert to the terms of Article 230(4) EC and to apply, in all cases where the applicant challenges a decision under Article 88(3), the test of direct and individual concern, irrespective of the grounds on which the action is brought. The test of individual concern does not, however, have to be interpreted as narrowly as it was in *Plaumann*, especially since the Community Courts have rightly taken a somewhat broader view of the test for standing of complainants in other related areas, namely under the competition rules applying to undertakings (Articles 81 and 82 EC) and in cases of dumping. Nevertheless, the requirement of individual concern is different from the notion of 'parties concerned'.

142. An applicant challenging a decision under Article 88(3) EC should thus be required to show that the decision is both of direct concern and, in some way, of individual concern to it. That individual concern may, of course, be more difficult to show where the aid scheme itself is of a general character. Moreover, an association of applicants will be no better (and no worse) placed than the applicants it represents, who must themselves be in some way individually concerned. Those consequences, which follow squarely from the Treaty, do not seem inherently unreasonable. Such an approach would in my view resolve many of the difficulties which have resulted from the case-law.

143. How then would the proposed approach apply in the present case? On that basis, also, it seems clear, for the reasons already given, that the application would be inadmissible. The applicant has not established the individual concern either of itself or of its members.

Conclusion

144. For all the above reasons, I am of the opinion that the Court should:

(1) set aside the contested judgment;

(2) declare the action by Aktionsgemeinschaft Recht und Eigentum inadmissible;

(3) order Aktionsgemeinschaft Recht und Eigentum to bear the costs both at first instance and on appeal, with the exception of the costs at first instance of the Federal Republic of Germany, which as intervener must bear its own costs.