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

5 December 2002 *

In Case T-114/00,

Aktionsgemeinschaft Recht und Eigentum eV, established in Borken (Germany), represented by M. Pechstein, professor,

applicant,

v

Commission of the European Communities, represented by D. Triantafyllou and K.-D. Borchardt, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: German.

supported by

Federal Republic of Germany, represented initially by W.-D. Plessing and T. Jürgensen and subsequently by W.-D. Plessing and M. Lumma, acting as Agents,

intervener,

APPLICATION for the annulment of the Commission's decision of 22 December 1999 relating to proposed State Aid No 506/99,

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

composed of: M. Vilaras, President, V. Tiili, J. Pirrung, P. Mengozzi and A.W.H. Meij, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 7 March 2002,

gives the following

Judgment

Facts

1 The applicant, Aktionsgemeinschaft Recht und Eigentum eV, is an association of groups concerned with issues relating to property ownership in the agricultural and forestry sectors, displaced and expropriated persons, victims of spoliation 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.

2 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.

3 Under the Ausgleichsleistungsgesetz (Compensation Act), which constitutes Article 2 of the Entschädigungs- und Ausgleichsleistungsgesetz (Indemnification and Compensation Act, 'the EALG') and 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. The persons falling within those categories, on a priority basis and provided 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, are 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 again been farming land, and farmers described as newly settled who did not previously own any land in the new *Länder*. Those categories also cover, on a secondary basis, 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 beneficiaries on a priority basis.

4 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.

5 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) (OJ 1998 C 215, p. 7).

6 The review procedure under Article 88(2) EC culminated in Decision 1999/268/EC of 20 January 1999 on the acquisition of land under the German Compensation Act (OJ 1999 L 107, p. 21), 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 having 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 (OJ 1997

L 142, p. 1). With regard, in particular, to the condition of residence on 3 October 1990 laid down by the Compensation Act, the Commission found as follows:

'... this law gives natural and legal persons in the new *Länder* an advantage over persons without a registered office or residence in Germany and is therefore liable to contravene the ban on discrimination under Articles 52 to 58 of the EC Treaty.

Community citizens may perhaps have been able, *de jure*, to meet the requirement that they provide evidence of a principal place of residence in the territory [of the German Democratic Republic] on 3 October 1990. However, *de facto* it was almost exclusively German nationals who met this condition — particularly those previously resident in the new *Länder*.

This 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 distinguishing criterion "residence on 3 October 1990" can only be justified where it is both necessary and appropriate to serve the purpose pursued by the legislator.

...

The purpose was... to include persons who or whose families had lived and worked in the [German Democratic Republic] for decades.

...

However, to achieve this objective, there was no need at all for a qualifying date for residence on 3 October 1990 since, in accordance with Paragraph 3(1) of the Ausgleichsleistungsgesetz, these newly settled legal or natural 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 far the majority of long-term lease agreements had been concluded with east Germans....

Thus it is clear that even if the legitimacy of the objective pursued by the legislator (the participation of east Germans in the land acquisition scheme) is recognised, the object would not, in practical terms, have been defeated if there had been no qualifying date of 3 October 1990.'

7 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. The operative part of that decision is worded as follows:

'*Article 1*

The land acquisition scheme provided for in Paragraph 3 of the Augsgleichsleistungsgesetz does not constitute aid in so far as the measures represent only compensation for expropriation or intervention of equivalent effect by the State authorities, and the benefits awarded are equal to, or less than, the financial loss caused by such State intervention.

Article 2

The aid given is compatible with the common market where it is not tied to local residence on 3 October 1990 and where it complies with the maximum intensity rate of 35% for agricultural land in areas other than less-favoured areas in accordance with Regulation... No 950/97.

Aid tied to local residence on 3 October 1990 and aid exceeding the maximum intensity rate of 35% for agricultural land in areas other than less-favoured areas in accordance with Regulation... No 950/97 is not compatible with the common market.

Germany must cancel the aid referred to in the second paragraph and may no longer grant such aid.

Article 3

Germany shall within two months recover all aid granted as referred to in the second paragraph of Article 2. Repayment shall be made in accordance with the procedures and provisions of German law, together with interest from the date on which the aid was granted, using the reference interest rate applied when evaluating regional aid schemes.

...'

8 Following that decision, the German legislature produced the draft Vermögensrechtsergänzungsgesetz (Act supplementing the Law of Property Act) abolishing and amending some of the detailed rules of the land acquisition scheme. In particular, it is clear from that draft that the requirement of residence on 3 October 1990 was abolished and that the intensity rate of the aid was fixed at 35% (in other words, that 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.

9 That new draft law was notified to the Commission and authorised by it, without initiating the review procedure provided for in Article 88(2) EC, by decision of 22 December 1999 ('the contested decision', published as a notice in OJ 2000

C 46, p. 2). In points 55 to 79 of the contested decision, the Commission summarises the draft law notified. The Commission finds, at points 90, 91 and 95 of the contested decision, that aspects held by it in its decision of 20 January 1999 to be incompatible with the common market are not included in the draft law notified. The Commission also finds, at point 123, as follows:

'In view of the assurances provided by the German authorities, the Commission has clearly established that sufficient land is available to correct any discrimination without cancelling the contracts concluded under the original EALG. In so far as the new provisions still contain elements which, with the application of otherwise equal criteria, would favour east Germans, such an advantage falls 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 lived and worked in the German Democratic Republic for decades, can also benefit from those provisions. In its decision of 20 January 1999, the Commission recognised the legitimacy of that objective and did not challenge it.'

10 By that finding, the Commission rejected a number of criticisms which it had received from several parties concerned following the decision of 20 January 1999, to the effect that the land acquisition scheme was still, even in the absence of the requirement of residence on 3 October 1990, 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 (points 97 et seq. of the contested decision).

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

Procedure and forms of order sought by the parties

12 By application lodged at the Registry of the Court of First Instance on 2 May 2000 the applicant brought this action.

13 By a separate document lodged at the Court Registry on 20 June 2000 the Commission raised an objection of inadmissibility under Article 114(1) of the Rules of Procedure of the Court of First Instance. The applicant lodged its observations on that objection on 16 August 2000.

14 By a document lodged at the Registry of the Court of First Instance on 2 October 2000, the Federal Republic of Germany applied for leave to intervene in support of the form of order sought by the Commission. By order of the President of the Fourth Chamber, Extended Composition, of the Court of First Instance of 9 November 2000, that application was granted.

15 The written procedure with respect to the objection of inadmissibility closed on 5 March 2001.

16 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber, Extended Composition) decided to open the oral procedure on the objection of inadmissibility. The parties presented oral argument and replied to questions put to them orally by the Court at the hearing on 7 March 2002.

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

— annul the contested decision;

— order the Commission to pay the costs.

18 The Commission and the Federal Republic of Germany, which has intervened in support of the form of order sought by it, contend that the Court of First Instance should:

— dismiss the application as inadmissible;

— order the applicant to pay the costs.

The objection of inadmissibility

19 The Commission and the Federal Republic of Germany are of the opinion that the action is inadmissible for two reasons: on the one hand, the contested decision is not of individual and direct concern to the applicant; on the other hand, the applicant has committed an abuse of process.

The first plea of inadmissibility, based on absence of individual and direct concern to the applicant

Arguments of the parties

20 The Commission points out that the review of aid is provided for by the rules of the EC Treaty relating to competition and that it is therefore the undertakings competing with the undertakings in receipt of aid which may be regarded as those 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.

21 It follows, according to the Commission, that the right of an association to bring an action for the annulment of a decision authorising aid is very limited. Only associations of economic operators 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. In the absence of such a limitation, any number of third parties could bring actions for the annulment of a decision authorising aid.

22 Consequently, according to the Commission, the applicant is not individually concerned by the contested decision. Even though the applicant participated from 1994 onwards 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, and therefore influenced the decision-making process, it participated in the procedure not as an association of undertakings but as a group representing the property interests of its members. The Commission refers

in this regard to the applicant's statutes, according to which its task is to safeguard the general interests and property rights of its members as owners of houses, plots, lands and farms of all types, including the interests of expropriated persons and persons whose assets were compulsorily collectivised, and to devise means of compensation. The Commission concludes that the action has been brought by a group of former owners and therefore does not concern competition. It points out that associations which do not represent undertakings but which represent other social interests of any kind may not bring an action against a decision authorising aid.

23 The Commission adds, with reference to Article 295 EC, that that applies all the more where, as in this case, aspects are at issue which fall outside the Community sphere of competence, such as the rules in Member States governing the system of property ownership. In that context, it observes that the applicant was unable to influence the Commission's decision since the interests defended by it fall within the sphere of competence of the Member States. It explains that, although the Commission consulted the applicant and considered its advice very carefully, it did so not with the intention of allowing the property interests represented by the applicant to influence its decision, but in order to have at its disposal a useful source of information.

24 Nor did the applicant substitute itself for one or more of its members who could themselves have brought an action for annulment. The applicant's members do not have the status of competitors and could not, therefore, have brought an action for the annulment of the contested decision. Although the applicant's members are, admittedly, 'in competition' with the beneficiaries of the land acquisition scheme at issue, that is not competition within the meaning of the EC Treaty. In that regard, the Commission points out that Article 87 EC refers to undertakings, branches of economic activity and trade, and that its definition of competition therefore relates to the economy and the market.

25 The Commission also considers that the applicant was in any event not in a position to substitute itself for one or more of its members. Its task is to protect not possible 'competition' interests *vis-à-vis* the beneficiaries of the land acquisition scheme at issue, but only the general or property interests of its members.

26 The action is inadmissible *a fortiori* since that land acquisition scheme constitutes a system of aid and therefore the authorisation of that system by the Commission is 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 argues that the applicant represents essentially or even exclusively German interests, whereas its action seeks a declaration from the Court that the land acquisition scheme at issue involves discrimination based on nationality and did not, therefore, qualify for authorisation by the Commission. The Commission concludes that there is no link between its particular interests and the interests which it represents in the present action, which are 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 points out in that regard that the applicant's members are not foreign European Union nationals 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.

28 The Federal Republic of Germany is, like the Commission, of the opinion that the action is inadmissible, in the first place, because the applicant is not individually concerned by the contested decision. No provision of law applicable in this case confers on the applicant any rights of a procedural nature, the applicant does not represent interests of undertakings which would themselves be entitled to bring proceedings and, finally, the applicant was not affected in terms of its own

interests or its position as negotiator. The Federal Republic of Germany points out in that regard that, in order for an association to be individually concerned by a decision authorising aid, it is not sufficient for it to have participated as a mere interested party in the procedure for reviewing that aid.

29 The Federal Republic of Germany shares the Commission's argument that the applicant and its members are 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. It notes that many of the applicant's members do not carry on any agricultural or forestry activity and do not wish to carry on any such activity in the former German Democratic Republic, but seek only to recover their confiscated property. Consequently, the applicant does not represent the interests of 'undertakings'. That conclusion is also to be drawn from the applicant's statutes, according to which it is a union of associations for the protection of property rights.

30 The Federal Republic of Germany also points out that the applicant was not a negotiating partner as referred to in, for example, the judgment in Case T-380/94 *AIUFFASS and AKT* v *Commission* [1996] ECR II-2169, since it was not involved either directly or indirectly in drawing up the contested decision. The applicant was merely a source of information for the Commission.

31 Furthermore, the Federal Republic of Germany shares the Commission's argument that the applicant does not represent its own interests in this case, but the interests of others. Since the applicant relies on grounds which do not concern it personally, it cannot be regarded as individually concerned for the purposes of the fourth paragraph of Article 230 EC. The Federal Republic further points out that, even if the contested decision ought to be annulled on account of

discrimination against Community nationals, that would not have the effect of enabling the former owners to recover their land. The objective of the action cannot therefore be achieved directly on the basis of the pleas raised by the applicant in the present proceedings.

32 The Federal Republic of Germany argues, secondly, that the applicant and its members are not directly concerned by the contested decision since it relates to a system of aid and therefore constitutes a measure of general scope which applies to objectively determined situations and entails legal effects for a category of persons envisaged in a general and abstract manner. It concedes that a person may be directly concerned by a decision authorising a general system of aid where such a system has already been implemented, but points out that that is not the situation in this case. The beneficiaries of the aid have not yet been distinguished individually and named. On the contrary, only after consideration of each individual case will it be established whether a person is eligible to acquire land. To that end, the legislation sets certain categories of applicants in competition with one another, between which a choice must be made, and to that end the legislature has provided for advisory committees to which any conflicts of interests which arise are referred.

33 The Federal Republic of Germany is of the opinion, moreover, that the applicant cannot be directly concerned for the further reason that there is 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.

34 In order to rebut the objection of inadmissibility, the applicant observes, first, that it represents more than a thousand undertakings operating in agriculture, which satisfy the definition of undertaking in Community law, namely, that which covers any entity carrying on an economic activity, irrespective of the legal status of that entity and its method of financing.

35 The applicant also points out that the land acquisition scheme at issue makes consolidation and economic expansion more difficult for those undertakings because their competitors obtain preferential access on more favourable terms to the land. That constitutes a relationship of competition for the purposes of Community law, since the beneficiaries of the land acquisition scheme and some of the economic operators which it represents operate on the same market.

36 The applicant maintains that its objective is not to secure 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 are competitors of the beneficiaries of aid. The applicant also requests the Court to take account of the fact that there are, among its members, several hundreds of persons who are prevented by the land acquisition scheme from embarking on serious long-term activity as entrepreneurs in the agricultural and forestry sector. Those persons are largely excluded from the market by reason of the fact that leases are awarded on a discriminatory basis.

37 In any event, the concept of association of undertakings in Community law does not imply a requirement that the members of the applicant association be exclusively undertakings. Moreover, an association of undertakings is not obliged to concern itself with all its members' business interests in order to be able to be regarded as an association of undertakings having a legal interest in bringing proceedings. What is decisive, according to the applicant, is that the association represents the business interests of a significant group of its members, in accordance with its statutes.

38 Moreover, both in its representations to the Commission on the land acquisition scheme at issue, which it has been making for a number of years, and in many other activities, the applicant has devoted itself essentially to its members' business interests, and that in accordance with its statutes, which require it to defend the interests, in particular those of an economic nature, of its members in order to protect them against competitive disadvantages.

39 The applicant takes the view that there is no justification in those circumstances for distinguishing property-related interests from business-related interests. Access to the ownership of agricultural or forestry land is of fundamental interest to business because such land is intended for economic use. The fact that the applicant represents mainly German interests is irrelevant from the point of view of its members' competitive position under Community law. The Commission itself found, in the decision of 20 January 1999, that the land acquisition scheme was liable to affect the common market. Moreover, contrary to the argument put forward by the Commission, the applicant has a particular interest in the annulment of the contested decision in that, if the principle of the prohibition of discrimination based on nationality were applied strictly, the land would have to redistributed and the applicant's members would have a better chance of gaining access to it.

40 The applicant adds that, even if the Court takes the view that it is not an association of undertakings or economic operators, it should regard it as being individually concerned by the contested decision by reason of its position as a negotiator with the Commission and its participation in the procedure.

Findings of the Court

41 Under the fourth paragraph of Article 230 EC, any natural or legal person may institute proceedings against a decision addressed to another person only if the decision in question is of direct and individual concern to the former. Since the contested decision was addressed to the Federal Republic of Germany, it must be considered whether it is of individual and direct concern to the applicant.

42 It is settled law that persons other than the addressees of a decision cannot claim to be individually concerned unless they are affected by that decision by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and, by virtue of these factors, distinguished individually just as in the case of the person to whom a decision is addressed (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, 107, and Case 169/84 *Cofaz and Others* v *Commission* [1986] ECR 391, paragraph 22; Case T-11/95 *BP Chemicals* v *Commission* [1998] ECR II-3235, paragraph 71).

43 In order to determine whether those conditions are fulfilled in this case, it is necessary to recall the purpose of the procedures provided for by Article 88(2) EC and Article 88(3) EC respectively. In the context of supervision of State aid, the preliminary stage of the procedure for reviewing aid under Article 88(3) EC, which is intended merely to enable the Commission to form a prima facie opinion on the classification of the measure concerned as State aid and on the partial or complete compatibility of the aid in question with the common market, must be distinguished from the examination under Article 88(2) EC. It is only in connection with the latter examination, which is designed to enable the Commission to be fully informed of all the facts of the case, that the Treaty imposes an obligation on the Commission to give the parties concerned notice to submit their comments (Case T-188/95 *Waterleiding Maatschappij* v *Commission* [1998] ECR II-3713, paragraph 52, and Case T-69/96 *Hamburger Hafen- und Lagerhaus and Others* v *Commission* [2001] ECR II-1037, paragraph 36).

44 Where, without initiating the procedure under Article 88(2) EC, the Commission finds on the basis of Article 88(3) EC that aid is compatible with the common market, the persons intended to benefit from those procedural guarantees may secure compliance therewith only if they are able to challenge that decision of the Commission before the Court (Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, paragraph 23; Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 17; *Waterleiding Maatschappij*, paragraph 53; Case T-86/96 *Arbeitsgemeinschaft Deutscher Luftfahrt-Unternehmen and Hapag-Lloyd* v *Commission* [1999] ECR II-179, paragraph 49). Therefore, 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 (*Cook*, paragraphs 23 to 26, *Matra*, paragraphs 17 to 20, and *BP Chemicals*, paragraphs 89 and 90).

45 In this case, 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 the light of the foregoing, the applicant must therefore be regarded as directly and individually concerned by the contested decision if, firstly, it is seeking to safeguard the procedural rights provided for by Article 88(2) EC and, secondly, if it appears that it has the status of a 'party concerned' within the meaning of that paragraph (see, to that effect, *Hamburger Hafen- und Lagerhaus*, paragraphs 37 to 39).

46 Consequently, it must first be considered whether by means of this action the applicant is seeking to safeguard procedural rights arising from Article 88(2) EC.

47 The 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. However, 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.

48 According to settled case-law, 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 (Case T-49/93 *SIDE* v *Commission* [1995] ECR II-2501, paragraph 58; Case T-95/96 *Gestevisión Telecinco* v *Commission* [1998] ECR II-3407, paragraph 52, and Case T-73/98 *Prayon-Rupel* v *Commission* [2001] ECR II-867, paragraph 42). It is precisely in order to make its task easier, with the assistance of the parties concerned, that Article 88(2) EC provides for the formal stage of the review to be carried out by the Commission. However, 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.

49 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.

50 It is therefore necessary to consider whether the applicant has the status of a 'party concerned' within the meaning of Article 88(2) EC.

51 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 (Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 16, *Cook*, paragraph 24, *Matra*, paragraph 18, Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 41, and *Hamburger Hafen- und*

Lagerhaus, paragraph 40). 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 (*Waterleiding Maatschappij*, paragraph 62, and *Hamburger Hafen- und Lagerhaus*, paragraph 41).

52 Since the applicant is an association, it must first be considered whether its members have the status of 'parties concerned' within the meaning of Article 88(2) EC. An association formed for the protection of the collective interests of a category of persons cannot, in the absence of special circumstances, such as the role which it could have played in a procedure leading to the adoption of the measure in question (see paragraph 65 et seq. below), be considered to be individually concerned, for the purposes of the fourth paragraph of Article 230 EC, by a measure affecting the general interests of that category, and is therefore not entitled to bring an action for annulment on behalf of its members where the latter cannot do so individually (Joined Cases 19/62 to 22/62 *Fédération nationale de la boucherie en gros et du commerce en gros des viandes and Others* v *Council* [1962] ECR 491, and Case C-321/95 P *Greenpeace Council and Others* v *Commission* [1998] ECR I-1651, paragraphs 14 and 29; order in Case C-409/96 P *Sveriges Betodlares and Henrikson* v *Commission* [1997] ECR I-7531, paragraph 45; *Hamburger Hafen- und Lagerhaus*, paragraph 49).

53 Consequently, if at least some of the applicant's members can be considered to be 'parties concerned' within the meaning of Article 88(2) EC, which presupposes that their competitive position on the market is affected by the grant of the aid in question, it will be possible to regard the applicant as being entitled to bring the present action in so far as it is an association formed to promote the collective interests of its members.

54 In the present case, some of the applicant's members are economic operators who can be regarded as direct competitors of the beneficiaries of the aid at issue.

55 In that regard, the applicant's statutes show unambiguously that the persons whose interests it protects, or at least an appreciable proportion of them, are economic operators. Paragraph 2, first indent, of its statutes mentions, among the categories of persons whose interests are protected by the applicant, 'farmers and foresters, owners of... factories and businesses, entrepreneurs, tradesmen and businessmen of all types'. The Commission also made it clear, in reply to a question put by the Court at the hearing, that all farmers in the European Union are potentially competitors of the beneficiaries of the land acquisition scheme. Moreover, the Commission and the Federal Republic of Germany have not disputed the applicant's claim that 25% of its members, that is, 110 persons or families, are farmers and that, taking account of the members of the other associations affiliated to the applicant, it represents more than a thousand undertakings operating in the agricultural sector.

56 There can be no dispute that the acquisition of agricultural or forestry land constitutes an essential element in the commercial strategy and competitive position of a farmer or forester. In the present case, the file shows that the competitive positions of certain farmers and foresters who are members of the applicant are affected by the land acquisition scheme.

57 Reference may be made in that regard, firstly, to the decision of 20 January 1999, in which the Commission took the view that '[t]he distortion of competition or the potential to do so arises from the fact that the parties purchasing land at preferential rates are placed in a better financial position than their competitors who have not received any such support'.

58 Secondly, it is clear that a substantial proportion of the economic operators who are members of the applicant consists of persons whose land was confiscated between 1945 and 1949 and who were subsequently described as 'reinstated farmers without entitlement to restitution'. The file shows that the applicant did, in particular, act in defence of the interests of those persons by drawing the Commission's attention to the fact that it was very difficult for them to obtain long-term leases, so that they were affected unfavourably by the land acquisition scheme. For example, in a letter of 11 August 1998 addressed to the Commission, the applicant pointed out that '[t]he category of persons described as "reinstated without entitlement to restitution" (victims of expropriation carried out between 1945 and 1949) has also been harmed in terms of competition in so far as such persons have only exceptionally had the opportunity to lease land which was formerly owned by the State'.

59 That category of the applicant's members considers itself to have been particularly badly affected by the land acquisition scheme as approved by the contested decision. Thus, a letter of 26 July 2000 sent by a representative of the association Heimatverdrängtes Landvolk e.V., a member of the applicant, to the latter's legal adviser, states:

'The restraints of competition to which the aid to all agricultural undertakings not entitled to compensation, aid which in our view is manifestly illegal, makes the members [of the applicant] and member groups of that association subject also concern a number of the 770 or so members of our association.

Like the undersigned, who is endeavouring to contribute to economic development as an entrepreneur established in the new *Länder*..., other members of our association are not only victims of the arbitrary confiscations which took place during the years from 1945 to 1949 and severely affected them, but are also participating actively in the economic reconstruction process as entrepreneurs.

Despite the adverse effects which we are clearly suffering as a result, for example, of the persistent application of the principle of priority given to local residence... , we are endeavouring... to create private-sector family businesses as "persons reinstated without entitlement to restitution"...

...

The current restraints, such as the unavailability of the land formerly owned by them, prevent many of those affected, who are prepared to invest, from starting up in business.

This problem currently affects at least 20% of our members, that is, approximately 150 "reinstated persons" and persons prevented from investing.'

60 Consequently, the contested decision necessarily affects the competitive position of certain members of the applicant and 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.

61 Secondly, the applicant's statutes show that it was established to protect the interests and property rights of its members. The exercise of property rights is of particular importance for an operator's economic situation. Even though, according to Paragraph 2, first indent, of its statutes, the applicant has a more far-reaching objective, it is not precluded from having the objective of taking care of the interests of its members as economic operators. It is apparent from a schematic interpretation of Paragraphs 1 and 2 of the applicant's statutes, read in conjunction, that it does in fact have such an objective.

62 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 is in fact defending the commercial and competitive interests of those members. For that reason, the Commission's argument that the applicant does not represent interests of undertakings but general social interests and that the present case concerns only aspects relating to property law which fall outside the Community framework under Article 295 EC (see paragraph 22, above) cannot be accepted. It is also apparent from the decision of 20 January 1999 and from the contested decision that the Commission itself 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, it cannot reasonably deny that an association which objects to that land acquisition scheme and which includes among its members many farmers who are in an unfavourable position compared with the potential beneficiaries of that scheme is in essence defending the competitive interests of its members.

63 Consequently, since the applicant is, 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 are farmers and foresters, it must be considered to be entitled to bring the present 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.

64 It should be added that a collective action brought by an association has procedural advantages, since it makes it unnecessary to bring numerous separate actions against the same decision (Joined Cases T-447/93, T-448/93 and T-449/93 *AITEC and Others* v *Commission* [1995] ECR II-1971, paragraph

60). That is especially true in the case of the applicant, one of whose objectives, under Paragraph 2, third and fifth indents, of its statutes, is specifically to defend the interests of its members *vis-à-vis* the German and supranational authorities and to adopt positions on measures taken, in particular, by the Treuhandanstalt.

65 Moreover, the applicant can be considered to be individually concerned by the contested decision in another respect, inasmuch as it claims a specific legal interest in bringing proceedings because its negotiating position is affected by that decision (Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219, paragraphs 19 to 25, Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraphs 29 and 30; *AIUFFASS and AKT*, paragraph 50, and Case T-55/99 *CETM* v *Commission* [2000] ECR II-3207, paragraph 23).

66 The applicant 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 active ways and producing scientific reports in support of its case. The Commission itself conceded that the applicant influenced the decision-making process and that it was a useful source of information.

67 The applicant would therefore have been entitled, as a person individually concerned for the purposes of the case-law cited in paragraph 65 above, to bring an action for annulment of the decision which concluded that formal procedure, if such a decision had been unfavourable to the interests represented by the applicant.

68 However, as the Commission confirmed at the hearing, the contested decision concerns 'exclusively and directly the implementation of a Commission decision which had already been delivered beforehand', namely, the decision of 20 January 1999. Thus, the contested decision is directly connected with the decision of 20 January 1999.

69 That being the case, in the light of that connection between the two decisions and of the role of significant consulting partner played by the applicant during the formal procedure concluded by the decision of 20 January 1999, 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. That finding is not affected by the fact that, in this case, the decision of 20 January 1999 was not, in principle, contrary to the interests defended by the applicant.

70 It follows from all the foregoing that the applicant is individually concerned within the meaning of the case-law cited in paragraph 42, above.

71 That conclusion is not contradicted by the fact, relied on by the Commission (see paragraph 26 above), that the land acquisition scheme constitutes a system of aid and that, therefore, the authorisation of that system by the Commission is a measure of general scope which applies to objectively determined situations and entails legal effects for a category of persons envisaged in a general and abstract manner. In that regard, it must be 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 (Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR I-2501, paragraph 13, Case C-309/89 *Codorniu* v *Council* [1994] ECR I-1853, paragraphs 19 and 20, and Case C-41/99 P *Sadam Zuccherifici and Others* v *Council* [2001] ECR I-4239, paragraph 27). That is the situation in this case, as was stated in paragraphs 43 to 70, above.

72 In addition, contrary to the argument put forward by the Federal Republic of Germany (see paragraph 32, above), the fact that the contested decision relates to a system of aid does not preclude the applicant from being directly concerned.

73 Where there is no doubt that the national authorities wish to act in a certain way, the possibility of their not making use of the option afforded by the Commission decision is purely theoretical, with the result that the applicant may be directly concerned (Case 11/82 *Piraiki-Patraiki and Others* v *Commission* [1985] ECR 207, paragraphs 9 and 10; Case T-435/93 *ASPEC and Others* v *Commission* [1995] ECR II-1281, paragraphs 60 and 61; Case T-442/93 *AAC and Others* v *Commission* [1995] ECR II-1329, paragraphs 45 and 46; Case T-266/94 *Skibsværftsforeningen and Others* v *Commission* [1996] ECR II-1399, paragraph 49, and *AIUFFASS and AKT*, paragraphs 46 and 47).

74 In this case, the German authorities gave sufficient indication of their intention to apply the land acquisition scheme as approved by the Commission. That intention can be inferred, in particular, from the fact that, following the contested decision, the Vermögensrechtsergänzungsgesetz was adopted (see paragraph 10, above). The applicant must therefore be considered to be directly concerned by the contested decision.

75 It follows from all the foregoing that the applicant is individually and directly concerned by the contested decision.

76 Finally, contrary to what is argued by the Commission and the Federal Republic of Germany, there does exist a connection between the particular interests of the applicant and its members and the interests represented by the applicant in this action.

77 The present action, which seeks the annulment of the Commission's authorising decision, serves the interests of the applicant's members and, thus, those of the applicant itself. The applicant's members are, in particular, persons who do not have priority access to land under the system of aid approved by the Commission. Annulment of the decision authorising that system would benefit the applicant's members inasmuch as it would help to put an end to the priority access to land enjoyed by their competitors.

78 In those circumstances, it cannot be argued that in the present case the applicant is defending interests which are not its own. That conclusion is not affected by the fact that the applicant relies, in its action, on breach of the principle of the prohibition of discrimination on grounds of nationality in order to demonstrate the illegality of the contested decision. Since the present action for annulment serves the interests of the applicant and of its members and the applicant is individually and directly concerned by the contested decision for the reasons set out in paragraphs 42 to 75, above, it is 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. It should be pointed out, moreover, that the applicant does not plead exclusively, in support of its action, discrimination on grounds of nationality but also infringement of Article 88(3) EC.

79 It follows from all the foregoing that the first plea of inadmissibility must be rejected.

The second plea of inadmissibility, based on abuse of process

Arguments of the parties

80 The Commission argues that the applicant does not oppose the grant of the aid in itself, but merely alleged discrimination in the grant of the aid, which does not concern it as such. That approach constitutes an abuse of process and, in particular, a breach of the principle of the separation of legal remedies. Discrimination such as that relied on by the applicant is not covered by the review of aid, but can only be the subject-matter of proceedings under Article 226 EC. Moreover, in seeking the annulment of the contracts of sale already concluded in order to eliminate the alleged discrimination of which it is a victim and to enable its members and other European Union nationals to acquire land, the applicant also committed a breach of the principle of the separation of legal remedies by using the action for annulment as an action for failure to act.

81 The applicant disputes the Commission's argument that the present action constitutes an abuse.

Findings of the Court

82 As was held in the course of examining the first plea of inadmissibility, the purpose of the present action for annulment serves the interests of the applicant and the applicant fulfils the conditions laid down in the fourth paragraph of Article 230 EC. Accordingly, it cannot 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.

83 The second plea of inadmissibility must therefore likewise be rejected.

84 It follows from all the foregoing that the objection of inadmissibility must be dismissed.

Costs

85 Under Article 87(1) of the Rules of Procedure, a decision as to costs is to be given in the final judgment or in the order which closes the proceedings. Since the objection of inadmissibility is dismissed and the present judgment is therefore not the final one, the costs of the present proceedings are reserved.

On those grounds,

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

hereby:

1. **Dismisses the objection of inadmissibility;**

2. **Reserves costs.**

Vilaras Tiili Pirrung

Mengozzi Meij

Delivered in open court in Luxembourg on 5 December 2002.

H. Jung
Registrar

M. Vilaras
President