OPINION OF ADVOCATE GENERAL JÄÄSKINEN
delivered on 25 November 2010[1]

1. In its appeal, the Commission of the European Communities asks the Court of Justice to set aside the judgment of the Court of First Instance of the European Communities (now 'the General Court') in Case T-388/02 *Kronoply and Kronotex* v *Commission* [2008] ECR II-305 ('the judgment under appeal'), which declared admissible the action for annulment brought by Kronoply GmbH & Co. KG ('Kronoply') and Kronotex GmbH & Co. KG ('Kronotex') against Commission's Decision C(2002) 2018 final of 19 June 2002 to raise no objections to aid granted by the German authorities in favour of Zellstoff Stendal GmbH for the construction of a production plant for pulp ('the contested decision'). The Commission also seeks a declaration that the action for annulment brought before the General Court against the contested decision is inadmissible.

2. In the context of this case, the Commission invites the Court to depart from its current '*Cook* and *Matra*'[2] case-law, concerning the admissibility of actions brought against decisions adopted by the Commission in the context of the procedure for reviewing State aid under Article 88(3) EC.[3]

3. In that regard, whilst favouring the effective protection of the procedural rights of the parties concerned within the meaning of Article 88(2) EC, I suggest that the Court should expand on its *Cook* and *Matra* case-law in order to clarify the procedure, while adhering to the legal certainty criterion which informs the administration of justice.

1 — Original language: French.

2 — Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487; Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203 and Case-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719.

3 — Since the judgment under appeal was delivered on 10 December 2008, references to the provisions of the EC Treaty use the numbering applicable prior to the entry into force of the Treaty on the Functioning of the European Union.

I — Facts, procedure and the judgment under appeal

A — *Background to the dispute and the contested decision*

4. Kronoply and Kronotex, companies governed by German law, manufacture wood derivatives at their production sites at Heiligengrabe, in Land Brandenburg (Germany).

5. By letter of 9 April 2002, the German authorities notified the Commission of a plan to grant State aid to Zellstoff Stendal GmbH ('ZSG') in order to finance the construction of a production plant for high-quality pulp and to set up a wood supply company and a logistics company in Arneburg in Land Saxony-Anhalt (Germany).

6. By letter of 19 June 2002, the Commission adopted the contested decision. On 28 September 2002, pursuant to Article 26(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1), the Commission published a summary notice in the *Official Journal of the European Communities* which referred to the contested decision. [4]

7. In view of the fact that there was no overcapacity in the sector, and given the number of direct and indirect jobs created (580 direct jobs in the pulp plant and approximately 1 000 indirect jobs in the region concerned or in the neighbouring areas), the Commission decided to authorise the notified measures, which consisted in a non-refundable loan, a tax incentive for investment and a guarantee.

B — *The judgment under appeal*

8. By application lodged at the Registry on 23 December 2002, Kronoply and Kronotex brought an action before the General Court for annulment of the contested decision.

9. By separate document, lodged at the Registry of the General Court on 25 February 2003, the Commission raised two preliminary pleas of inadmissibility, alleging that: (i) the action was brought out of time and (ii) the applicants had no standing to bring proceedings. By order of 14 June 2005, the General Court decided to reserve its decision on the preliminary pleas of inadmissibility for the final judgment.

10. In the judgment under appeal, the General Court rejected the preliminary plea alleging that the action was inadmissible because it had been brought out of time, but upheld the plea that Kronoply and Kronotex had no standing to challenge the merits of the contested decision. On the other hand, the General Court declared that the plea by which

4 — OJ 2002 C 232, p. 2.

the applicants sought to defend procedural safeguards was admissible; nevertheless, it rejected that plea as unfounded.

11. First, the General Court emphasised, in paragraphs 57 to 59 of the judgment under appeal, the distinction — for the purposes of the review undertaken by the Commission to determine whether aid is compatible with the internal market — between the preliminary examination and the formal investigation procedure. In the second place, the General Court relied, in paragraphs 60 and 61 of that judgment, to the case-law whereby an action brought by one of 'the parties concerned' for the purposes of Article 88(2) EC challenging a decision taken by the Commission, upon conclusion of the preliminary examination, to raise no objections must be held must be held admissible where that party seeks thereby to safeguard the procedural rights available to him under that provision.

12. However, after pointing out in paragraph 62 of the judgment under appeal that, when disputing the merits of a contested decision, an applicant must demonstrate its particular status within the meaning of Case 25/62 *Plaumann* v *Commission* [5] case-law, the General Court held in paragraph 63 of that judgment that, by their action, Kronoply and Kronotex were calling in question both the Commission's refusal to initiate the formal investigation procedure and the merits of the contested decision. The Court accordingly went on to consider whether Kronoply and Kronotex had standing to bring proceedings.

5 — Case 25/62 *Plaumann* v *Commission* [1963] ECR p. 95.

13. With regard to question whether Kronoply and Kronotex had standing to challenge the merits of the contested decision, the General Court held that they did not have *locus standi*, in so far as they had failed to establish that they had a particular status within the meaning of *Plaumann*, and, it therefore rejected that element of the plea of inadmissibility in paragraphs 64 to 69 of the judgment under appeal.

14. As regards their standing to defend procedural safeguards, the General Court held in paragraph 77 of the judgment under appeal that Kronoply and Kronotex had established to the requisite legal standard the existence of a relationship of rivalry, as well as a risk that their market position might be adversely affected and, in consequence, they could be regarded as parties concerned for the purposes of Article 88(2) EC. The Court therefore held that their action was admissible to the extent that they were seeking to uphold their procedural rights.

15. On that basis, the General Court went on to examine each plea raised by Kronoply and Kronotex.

16. After pointing out, in paragraph 80 of the judgment under appeal, that only the second plea concerned the decision not to open the formal investigation procedure, the General Court explained in paragraphs 81 to 83 of that judgment that, even though it was not for it, the General Court, to construe the pleas exclusively intended to call in question the merits of a decision as seeking, in reality, to ensure that procedural rights were respected, it could determine whether strands of the substantive arguments on the merits also supported a plea alleging the existence of difficulties so serious as to justify the opening

of the procedure under Article 88(2) EC. The General Court therefore declared the first and second pleas admissible, but rejected the third plea as inadmissible. Lastly, the General Court held that the Commission had been fully entitled not to open the formal investigation procedure.

II — The appeal

A — *The Commission's appeal*

17. The Commission relies on three grounds of appeal.

18. By its first ground of appeal, alleging infringement of Article 88 EC and the fourth paragraph of Article 230 EC, the Commission claims that the General Court based its approach on case-law which is inconsistent with those Treaty provisions. Accordingly, the General Court was wrong in predicating its reasoning on the principle set out in paragraph 60 of the judgment under appeal to the effect that, if, without initiating the formal investigation procedure, the Commission decides, in a decision under Article 88(3) EC, that aid is compatible with the common market, the procedural safeguards provided for under Article 88(2) EC come into play only if the persons intended to benefit from those safeguards are able to challenge that decision before the Community judicature. [6]

19. By its second ground of appeal, alleging that the General Court based its interpretation of the pleas raised by Kronoply and Kronotex on a contradiction, the Commission takes issue with the approach adopted by the General Court, which — in the Commission's view — obscures the difference between pleas relating to procedural rights and pleas going to the merits, which may be invoked solely by 'persons concerned', whose rights are significantly affected by a Commission decision. The interpretation offered by the General Court in paragraphs 82 and 83 of the judgment under appeal thus broadens the concept of *locus standi*.

20. By its third ground of appeal, alleging an error of law in the interpretation of 'party concerned', the Commission claims that the General Court departed from current practice by holding that parties which were rivals of the aid recipient solely on the raw materials supply market had to be recognised as 'parties concerned' for the purposes of Article 88(2) EC.

6 — The Commission is referring to the judgments in *Cook*, *Matra* and *Commission* v *Sytraval and Brink's France*, and criticises paragraph 60 of the judgment under appeal.

III — Response of ZSG

21. The Commission's appeal is supported by ZSG which lodged a response on 23 February 2009 in which it developed its own line of reasoning, albeit largely reflecting the grounds of appeal relied upon by the Commission.

22. ZSG claims, first, that the Court of Justice should set aside the judgment under appeal in so far as it declares the action brought by Kronoply and Kronotex to be admissible and, secondly, that it should dismiss the action for annulment brought by Kronoply and Kronotex as being inadmissible in its entirety.

23. I would note that, in its pleadings, ZSG expressly states that it is simply setting out a number of additional considerations regarding the principal grounds of appeal relied upon by the Commission. It is for the Court, therefore, to identify among the arguments submitted by ZSG those capable of constituting grounds for a cross-appeal.

24. In that connection, I would point out that, according to settled case-law, it follows from Article 56 of the Statute of the Court of Justice of the European Union that parties intervening before the General Court are regarded as parties before the Court of Justice. In consequence, where a judgment of the General Court is under appeal, Article 115(1) of the Rules of Procedure of the Court of Justice applies to those interveners, which means that they are dispensed from having to make a fresh application to intervene before the Court of Justice under Articles 93 and 123 of the Rules of Procedure. [7]

25. Accordingly, the fourth paragraph of Article 40 of the Statute of the Court of Justice of the European Union does not preclude an intervener from raising arguments different from those used by the party which it is supporting, provided that the intervener is thereby endeavouring to support the form of order sought by that party. [8] An intervener who has the right under Article 115 of the Rules of Procedure of the Court to submit a response must, in the absence of any express limitation, be able to rely on grounds relating to any point of law on which the judgment under appeal is based. [9]

26. Consequently, there is nothing to prevent certain arguments put forward by ZSG from being regarded as grounds for a cross-appeal.

IV — General comments on the nature of the right conferred on 'parties concerned' under Article 88(2) EC

27. Before considering the grounds of appeal, I would like to bring back to mind a number of relevant rules governing the system established by the EC Treaty for the control of State aid.

7 — Case C-390/95 P *Antillean Rice Mills and Others* v *Commission* [1999] ECR I-769, paragraph 20.

8 — Case-245/92 P, *Chemie Linz* v *Commission* [1999] ECR I-4643.

9 — *Antillean Rice Mills and Others*, paragraphs 21 and 22.

28. Article 88 EC lays down a special procedure by which the Commission is to keep State aid under constant review and control. New grants of aid proposed by Member States must undergo a procedure before any aid can be regarded as lawfully granted. Under the first sentence of Article 88(3) EC, the Commission is to be notified of any plans to grant or to alter aid before those plans are implemented. The Commission is then to undertake an initial examination of those plans. If, following that examination, it appears to the Commission that the plan is incompatible with the common market, it must immediately initiate the procedure under the first subparagraph of Article 88(2) EC. [10]

29. As Advocate General Mengozzi observed in *British Aggregates* v *Commission*, decisions which the Commission adopts without initiating the formal investigation procedure are acts which are brought into being on conclusion of a brief review, which is conducted within a narrow time frame and, more often than not, in the context of a dialogue exclusive to the Commission and the Member State concerned. The intention of the legislature was to enable the Commission, by means of such acts, to avoid considerable time being taken up by a full investigation in cases where it was already prima facie evident that there was no aid or that the aid was compatible with the common market. [11]

30. It is important to point out that, first, when making its assessment, the Commission is obliged to respect requirements devolving from the fact that its power to declare aid compatible with the common market can be exercised only where the aid measures in question raise no serious difficulties and, accordingly, that is the only test applicable. [12] Secondly, where it encounters serious difficulties, the Commission has no discretion as regards the opening of a formal investigation procedure. [13] Thirdly, the concept of 'serious difficulties' is an objective one. [14]

31. Accordingly, settled case-law has established that the Commission may go no further than the preliminary examination under Article 88(3) EC, in order to give a decision approving aid, only if it is able to satisfy itself after an initial examination that the aid is compatible with the Treaty. If, on the other hand, the initial examination leads the

10 — *Commission* v *Sytraval and Brink's France*, paragraphs 35 and 36.

11 — Opinion of Advocate General Mengozzi in Case C-487/06 P *British Aggregates* v *Commission* [2008] ECR I-10505, point 74.

12 — According to the case-law of the General Court, the Commission *may not decline to initiate the formal investigation procedure in reliance upon other circumstances, such as third party interests, considerations of economy of procedure or any other ground of administrative convenience*: see Case T-73/98 *Prayon-Rupel* v *Commission* [2001] ECR II-867, paragraph 44.

13 — *Prayon-Rupel*, paragraph 45.

14 — Case C-431/07 P *Bouygues and Bouygues Télécom* v *Commission* [2009] ECR I-2665, paragraphs 61 to 63.

Commission to the opposite conclusion or if it does not enable it to overcome all the difficulties involved in determining whether the aid is compatible with the common market, the Commission is under a duty to carry out all the requisite consultations and for that purpose to initiate the procedure under Article 88(2) EC. [15]

32. It is only in connection with the latter procedure, which is designed to enable the Commission to acquaint itself fully with 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. [16]

33. In that regard, I would point out that the nature of the right under Article 88(2) EC to submit comments must not be confused with the nature of the right to a fair hearing, interpreted as one of the rights of defence in the strict sense.

34. Accordingly, the Charter of Fundamental Rights of the European Union ('the Charter') includes among the essential implications of the right to good administration, the right of every person to be heard before any individual measure is taken which would affect that person adversely, the right of every person to have access to the file on that person and the obligation of the administration to give reasons for its decisions. [17]

35. Observance of the right to be heard is, in all proceedings which might culminate in an act adversely affecting a person, a fundamental principle of Community law which must be respected even in the absence of any rules governing the proceedings in question. [18]

36. However, to the extent that decisions adopted by the Commission under Article 88(2) EC are addressed exclusively to Member States, [19] that principle must be narrowly construed for the purposes of applying it in the context of the Commission's formal investigation procedure.

37. It is important to point out that, even though Article 88(2) EC entitles 'parties

15 — See, in particular, Case 84/82 *Germany* v *Commission* [1984] ECR 1451, paragraph 13; Case T-49/93 *SIDE* v *Commission* [1995] ECR II-2501, paragraph 58; *Commissio*n v *Sytraval and Brink's France*, paragraph 39; *Prayon-Rupel*, paragraph 42; Case C-521/06 P *Athinaiki Techniki* [2008] v *Commission* ECR I-5829, paragraph 34, and *Bouygues and Bouygues Télécom*, paragraph 61, *Prayon-Rupel* v *Commission*, paragraph 42.

16 — *Cook* v *Commission*, paragraph 22; *Matra* v *Commission*, paragraph 16; Case C-78/03 P *Commission* v *Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737, paragraph 34, and *Athinaïki Techniki AE*, paragraphs 34 and 35, and the case-law cited.

17 — Charter proclaimed at Nice on 7 December 2007 (OJ 2000 C 364, p. 1). Under Article 41(1) of the Charter entitled 'Right to good administration', 'Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union'.

18 — Case C-32/95 P *Commission* v *Lisrestal and Others* [1996] ECR I-5373, paragraph 21, and Case C-441/07 P *Commission* v *Alrosa* [2010] ECR I-5949.

19 — By way of example, see point 81 of the Opinion of Advocate General Bot in Joined Cases C-75/05 P and C-80/05 P *Germany* v *Kronofrance* [2008] ECR I-6619.

concerned' to submit their comments, that provision is construed in case-law as meaning that 'parties concerned' have the right to be involved in the administrative procedure only to the extent appropriate in the circumstances of the case. [20]

38. In the present proceedings, it is essential, in my view, to stress that Article 88(2) EC brings into play only the right to submit comments and not the rights of the defence. [21]

39. Case-law clearly indicates that, apart from the Member State responsible for granting the aid, 'parties concerned' cannot themselves seek to enter into an exchange of views and arguments with the Commission which is comparable to the *inter partes* procedure available to that Member State. [22] As the Court of Justice held in *SFEI and Others*, '[f]irst, the notification requirement and the prior prohibition on implementing planned aid laid down in Article 93(3) are directed to the Member State. Second, the Member State is also the addressee of the decision by which the Commission finds that aid is incompatible with the common market and requests the Member State to abolish the aid within the period determined by the Commission.' [23]

40. It is important not to lose sight of the fact that the procedure for the review of State aid is administrative, with no quasi-judicial aspects.

V — First ground of appeal

A — *Arguments of the Commission*

41. By its first ground of appeal, the Commission submits that, when assessing whether Kronoply and Kronotex had standing to bring proceedings, the General Court based its analysis on case-law which runs counter to Article 88 EC and the fourth paragraph of Article 230 EC, in that it grants a right of action before the Court to those who, without satisfying the admissibility conditions under

20 — Joined Cases T-371/94 and T-394/94 *British Airways and Others* v *Commission* [1998] ECR II-2405, paragraph 60; Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission* [2003] ECR II-435, paragraph 125; Case T-68/03 *Olympiaki Aeroporia Ypiresies* v *Commission* [2007] ECR II-2911, paragraph 42, and Case T-442/03 *SIC* v *Commission* [2008] ECR II-1161, paragraphs 222 to 225.

21 — See, in particular, *Olympiaki Aeroporia Ypiresies*, paragraph 43. Unlike concerned parties, in the context of this procedure, the Member State has genuine rights of defence in the context of that procedure, and breach of those rights can cause the Commission's decision to be annulled where it is possible to establish that, but for that irregularity, the outcome of the proceedings could have been different, see the Opinion of Advocate General Mengozzi in Case C-290/07 P *Commission* v *Scott* [2010] ECR I-7763, points 53 to 56.

22 — *Commission* v *Sytraval and Brink's France*, paragraph 59; Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraph 82, and Case T-62/08 *ThyssenKrupp Acciai Speciali Terni* v *Commission* [2010] ECR II-3229, paragraph 162.

23 — Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 73.

the fourth paragraph of Article 230 EC, are contesting a decision taken on the basis of Article 88 EC by invoking the protection of procedural rights allegedly provided for under Article 88(2) EC.

42. After emphasising the difference between the procedures provided for under Article 88(2) EC and under Article 88(3) EC, the Commission states that 'parties concerned' are allowed to put forward their arguments only on the basis of Article 88(2) EC.

43. Furthermore, according to the Commission, in the light of the Treaty, it is certainly not necessary to establish special legal protection warranting a derogation from the fourth paragraph of Article 230 EC in order to respect the principle that the Commission must act lawfully and to ensure full judicial protection, where a decision on compatibility is adopted without the formal investigation procedure being opened. By demonstrating the causal link between the Commission's failure to act (failure to open the formal investigation) and the alleged unlawfulness of its decision, review of the legality of that decision is guaranteed provided that the applicant satisfies those admissibility conditions.

44. Lastly, the Commission argues that it emerges from the judgment under appeal and, in particular, from paragraph 70 of that judgment that the General Court is arguing that standing to bring proceedings in order to safeguard procedural rights does not require the applicant to be directly and individually concerned by the contested decision. For such a position to be tenable, it would be necessary to show that Article 88(2) EC not only places a legal obligation on the Commission but also creates a right for 'parties concerned'.

45. In the first place, Article 88(2) EC is an administrative provision which governs the special procedure for reviewing State aid and not the conditions governing a right of action before the Court. In the second place, since the Community legislature specified the conditions for admissibility in the fourth paragraph of Article 230 EC, it would be absurd to take the view that it wished implicitly to depart from those rules by means of Article 88 EC.

B — *The admissibility of State aid proceedings and the introduction of the Cook and Matra approach*

46. First of all,[24] it must be remembered that, under the fourth paragraph of Article 230 EC, a natural or legal person may institute proceedings against a decision which is addressed to another person only if that

24 — I note that the amendments brought about by the Lisbon Treaty have had no impact on the examination of this case.

decision is of direct and individual concern to the former. [25]

47. In relation to the first condition set out in that provision, it is settled case-law that, for a person to be directly concerned by a Community measure, that measure must directly affect the legal situation of the individual and leave no discretion to the addressees of the measure who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules. [26]

48. Regarding the second condition set out in Article 230 EC, the Court defined the scope of 'individual' concern in *Plaumann*, [27] which makes it clear that natural or legal persons other than those to whom a decision is addressed may claim that a contested provision is of individual concern to them only if it affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons. [28]

49. It is settled law that, in the field of State aid, the Court has developed specific approaches in relation to the admissibility of proceedings brought by third parties, in order to reflect the specific nature of the procedure applicable in that field. Generally speaking, the conditions governing admissibility in that context vary according to whether the contested decision was adopted at the end of the preliminary stage or at the end of the formal investigation stage.

50. With regard to actions for the annulment of a Commission decision not to initiate the formal investigation procedure, the Court's approach — which legal writers have termed liberal — has focused on the protection of the procedural rights of the 'parties concerned' for the purposes of Article 88(2) EC, that is to say, the parties who are entitled to submit comments in the procedure launched under Article 88(2) EC but who were deprived of that opportunity owing to the final decision adopted by the Commission under Article 88(3) EC.

51. In *Cook*, [29] consistently with the approach advocated by Advocate General

25 — Case C-519/07 P *Commission* v *Koninklijke Friesland-Campina* [2009] ECR I-8495, paragraphs 47 to 54.

26 — Case C-386/96 P *Dreyfus* v *Commission* [1998] ECR I-2309, paragraph 43 and the case-law cited, and *Commission* v *KoninklijkeFrieslandCampina*,, paragraphs 47 to 54.

27 — The judgment in *Plaumann* has since been upheld in a consistent line of decisions. See Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2000] ECR I-8855, paragraph 33 and the case-law cited, and *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 33.

28 — Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission* [2006] ECR I-5479, paragraph 59.

29 — *Cook* v *Commission*,.

Tesauro, [30] instead of applying the criteria adopted in *Cofaz*, [31] the Court held that the action brought by a business rival was admissible by deeming the concept of a third 'party concerned' for the purposes of Article 88(2) EC to wield the authority of a rule of case-law, applicable in the context of the Commission decision adopted under Article 88(3) EC, and confirmed that approach one month later in *Matra*. [32]

52. According to the *Cook* and *Matra* approach, where, without opening the procedure under Article 93(2) of the EEC Treaty (now Article 88(2) EC), the Commission finds, on the basis of Article 93(3) EC, that the measure notified does not constitute State aid or constitutes aid which is compatible with the common market, the persons, undertakings or associations whose interests might be affected by the grant of the aid — in particular, competing undertakings and trade associations which, as parties concerned, enjoy procedural guarantees where the procedure under Article 88(2) EC is implemented — must be recognised as having the right to bring an action for annulment of the decision which makes that finding.

53. The admissibility of the action, in accordance with *Cook* and *Matra,* therefore depends on the nature of the pleas, on the one hand, and on the status of the applicant, on the other hand. The conditions governing admissibility are to be verified by establishing a distinction between parties who are challenging the merits of the Commission decision and parties who are invoking protection of their procedural rights. Following the Court's judgment in *Aktionsgemeinschaft Recht und Eigentum*, that fairly clear distinction determines the test to be applied. [33]

54. The solution adopted by the Court in *Cook* and *Matra* is not uniformly supported by legal writers and it is useful at this point to recall the main elements of the ensuing debate. [34]

55. Some writers point out that, in *Aktionsgemeinschaft Recht und Eigentum*, the Court goes beyond the suggestions given by Advocate General Jacobs in *Unión de Pequeños Agricultores* v *Council* [35] to facilitate the right of natural and legal persons to bring an action before the Court. [36]

30 — Opinion of Advocate General Tesauro in *Cook* v *Commission*.

31 — Test stipulating that a party must be 'substantially concerned' by the measure. See Case 169/84 *Cofaz and Others* v *Commission* [1986] ECR 391.

32 — *Matra*.

33 — *Commission* v *Aktionsgemeinschaft Recht und Eigentum,* in which the Court attempted to clarify the reasoning in *Cook* and *Matra*.

34 — For a general commentary, see Winter, J., 'The rights of complainants in State aid cases: judicial review of Commission decisions adopted under Article 88 (ex 93) EC', *Common Market Law Review,* 1999, No 36.

35 — Case C-50/00 P [2002] ECR I-6677.

36 — See Honoré, M., 'The standing of third parties in State aid cases: the lessons to be drawn from the judgment in Case C-78/03 P, *Aktionsgemeinschaft Recht und Eigentum* v. *Commission*', *European state aid law quarterly,* ESTAL, Vol. 5 (2006), No 2, pp. 269 to 284, especially p. 274.

56. Indeed, following the judgments in *Cook* and *Matra*, the category of persons entitled to contest a Commission decision is broader than the category entitled to contest that act under Article 88(2) EC. Thus, all parties concerned within the meaning of Article 88(2) EC are regarded as 'individually concerned' by a Commission decision not to initiate the formal investigation procedure. [37] The General Court has in fact clearly ruled that the very fact that the parties were able to put forward their arguments during the preliminary examination procedure under Article 88(3) EC cannot deprive them of the right to respect for the procedural guarantee expressly conferred on them by Article 88(2) EC. [38]

57. It is settled case-law that, in the context of a decision adopted under Article 88(2) EC, the mere fact that the applicants may be regarded as parties 'concerned' is not sufficient for their action to be admissible because that fact does not in itself confer standing to bring proceedings. On the contrary, since the parties are contesting the Commission's decision concluding the formal investigation procedure, they must possess a particular status within the meaning of the *Plaumann* case-law, which includes, in particular, proof that their position on the market has been substantially affected by aid authorised under the Commission's decision.

58. It follows that, in the current state of case-law, the applicants have a right of action in so far as they are seeking to secure respect for their procedural rights under Article 88(2) EC and are not required to prove that their position on the market concerned has been substantially affected by the adoption of the contested decision. [39]

59. Several advocates general have already expressed serious criticisms concerning the consequences of the *Cook* and *Matra* rulings.

60. Advocate General Jacobs described the case-law which emerged from the judgments in *Cook* and *Matra* as unsatisfactory, complex, apparently illogical and inconsistent. [40] Having drawn attention to the confusion created by conflating the test of standing under Article 88(2) and Article 88(3) EC, he also

37 — See, by way of example, the judgments cited above in *Commission* v *Sytraval and Brink's France*, paragraph 41; *Commission* v *Aktionsgemeinschaft Recht und Eigentum,* paragraph 35, and *British Aggregates,* paragraph 28. See Case T-69/96 [2001] *Hamburger Hafen- und Lagerhaus and Others* v *Commission* [2001] ECR II-1037, paragraph 37, and Case T-158/99 *Thermenhotel Stoiser Franz* v *Commission* [2004] ECR II-1, paragraph 73.

38 — Case T-289/03 *BUPA* v *Commission* [2008] ECR II-81, paragraph 76.

39 — See judgment in *Germany and Others* v *Kronofrance*, paragraph 44.

40 — Opinion of Advocate General Jacobs in *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, point 138.

questioned the very existence of the departure from the fourth paragraph of Article 230 EC. The Advocate General therefore suggested, in all cases where the applicant challenges a decision under Article 88(3) EC, applying the test of direct and individual concern, irrespective of the grounds on which an action is brought, whilst not interpreting the test of individual concern as narrowly as it had been in *Plaumann*. [41]

61. Given the nature of decisions adopted under Article 88(3) EC, Advocate General Mengozzi [42] wondered whether it would not be more appropriate for the review of such acts by the Community judicature to be confined in every case — hence regardless of the basis for the applicant's *locus standi* — to verifying whether the conditions justifying non-initiation of the formal investigation procedure are satisfied, or to establishing that there are no serious doubts that the measure does not constitute aid or is, in any event, compatible with the common market. A ruling on the 'substantive issues' would thus, if the decision were to be annulled, be deferred until the examination of any action brought against the final decision subsequently adopted by the Commission on conclusion of the formal investigation procedure.

62. The distinction made by the Community judicature with regard to the conditions for the admissibility of actions brought against a decision adopted on the basis of Article 88(3) EC has also been criticised by Advocate General Bot. [43] In the latter's view, the case-law in *Cook* and *Matra* limits the right of interested parties in the procedure for reviewing State aid. After pointing to the artificial nature of the case-law adopted, Advocate General Bot pointed out that the aim pursued by the applicant is the same whether it invokes the protection of its procedural rights or challenges the merits of the decision appraising the aid in that it seeks the initiation of the formal investigation procedure. He therefore suggested that the Court should acknowledge that, where a person contests the merits of the Commission's assessment, adopted at the end of the preliminary examination, it necessarily calls in question the failure to initiate the formal investigation procedure and therefore seeks to obtain protection of its procedural rights. [44]

63. Finally, in *3F*, [45] Advocate General Sharpston was moved to criticise the unnecessarily formalistic approach which penalises an applicant who has sought to raise ancillary

41 — Ibid., points 139 and 141.

42 — See point 75 of the Opinion in *British Aggregates*.

43 — Opinion of Advocate General Bot in *Germany* v *Kronofrance*, points 106 and 109.

44 — Opinion in *Germany* v *Kronofrance*, point 104 et seq.

45 — Opinion of Advocate General Sharpston in Case C-319/07 P *3F* v *Commission* [2009] ECR I-5963, points 39 to 43.

substantive observations on the measures in issue.

C — *The validity of the Cook and Matra case-law*

64. In the first place, it is necessary, in my view, to start from the premiss that the Treaty clearly confers on interested parties the right to submit observations in the context of the formal investigation procedure.

65. An interested party must be able effectively to make known his point of view regarding the accuracy and relevance of the facts and circumstances investigated by the Commission where it appears to him that the Commission has adopted a decision to raise no objections under Article 88(3) EC without having full knowledge of all matters which could give rise to difficulties in assessing the measure.

66. In my view, this constitutes an autonomous procedural right which calls for specific protection by the courts and which should not be annihilated by a lack of standing to bring proceedings to contest the merits of the decision.

67. That standing to bring proceedings cannot, however, suffice to challenge the merits of the decision as such. In order to do this, it is necessary to possess the particular status defined in *Plaumann*.

68. In the second place, in his Opinion in *British Aggregates*, Advocate General Mengozzi argued that the particularly complex and rather formalistic case-law in *Cook* and *Matra* is explained by the need to ensure that where an action is brought by a person who is simply relying on his status as a concerned party within the meaning of Article 88(2) EC the Community judicature's review of the contested decision does not go beyond what is needed to ensure that the procedural rights conferred by that provision are complied with. [46]

69. In my view, it is essential to heed the administrative nature of the procedure initiated by the Commission, in order to distinguish the matter of *locus standi* to contest the legality of an act of European Union law from the

46 — According to Advocate General Mengozzi, that would be the case where, rather than merely determining whether the conditions justifying non-initiation of the formal investigation procedure were satisfied — namely, the absence of serious difficulties in classifying the measure as aid or in assessing its compatibility with the common market — the Community judicature were to establish the existence of State aid (or of individual elements of State aid which the Commission had found not to exist), or to find that the conditions relied upon by the Commission in declaring the aid compatible with the Treaty were not satisfied. In such circumstances, the applicant would, in fact, secure not only initiation of the formal investigation procedure, where appropriate, but the additional result that the Commission would be bound by those findings on the part of the Community judicature and the substance of the decision to be adopted on conclusion of that procedure would, in part at least, be predetermined; that is to say, the applicant would have brought about the predetermination of a decision which it would not have been entitled to challenge solely by virtue of its status as a concerned party within the meaning of Article 88(2) EC (Opinion in *British Aggregates*, point 71).

question of entitlement to invoke procedural rights before an administrative authority.

70. I would point out that Article 88(2) EC lays down a rule of European administrative procedure whereas Article 230 EC lays down a rule governing European administrative disputes.

71. In this connection it is worth emphasising the relevance of the principle of good administration. That principle established by case-law, which has recently been enshrined in Article 41 of the Charter, is a general principle of Community law. [47]

72. Since that principle requires diligent and impartial examination, [48] I consider that the right to be able to require the initiation of the Article 88(2) EC procedure in order to protect ones procedural rights follows from the Commission's obligation to adopt its decision under Article 88(3) EC in the absence of serious difficulties.

73. The Court of Justice has recently held that participation in an environmental decision-making process under the conditions laid down in Directive 85/337/EEC [49] is separate and has a different purpose from a legal review, since the latter may, where appropriate, be directed at a decision adopted at the end of that procedure. Therefore, participation in the decision-making procedure has no effect on the conditions for access to the review procedure. [50] Without wishing to assimilate the right to take part in the procedure under Article 88(2) EC to the right to participate in an administrative procedure concerning the environment, I would like to point out that the latter has been defined more broadly than the right to bring an action on the merits.

74. In the third place, I would point out that there is no risk that application of the case-law in *Matra* will extend the procedural rights which the Treaty and secondary legislation confer on concerned parties in connection with State aid review procedures.

75. On the contrary, it is a question of upholding a right expressly conferred by the Treaty in the context of the procedure where the concept of party concerned is fully applicable. Thus, the purpose of the case-law in *Matra* is to confirm a right which has been

47 — See the explanations relating to the full text of the Charter: http://www.europarl.europa.eu/charter/pdf/04473_fr.pdf. See the Opinion in *Scott*, point 60 and the case-law cited, for example Case C-141/02 P *Commission* v *max.mobil* [2005] ECR I-1283, paragraph 72. See also Case 179/82 *Lucchini Siderurgica* v *Commission* [1983] ECR 3083, paragraph 27, and Case C-255/90 P *Burban* v *Parliament* [1992] ECR I-2253.

48 — *Commission* v *Sytraval and Brink's France*, paragraph 62, and Case T-54/99 *max.mobil* v *Commission* [2002] ECR II-313, paragraph 48.

49 — Directive 85/337/EEC of the Council of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ 2003 L 156, p. 17).

50 — Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening* [2009] ECR I-9967, paragraph 38.

recognised in the context of the formal investigation procedure and not to recognise a new right in the context of the preliminary procedure.

76. Furthermore, according to the case-law cited above, the nature of the right deriving from Article 88(2) EC is confined to the fact of being associated with the investigation procedure and in no way confers on the parties concerned a status which is capable of undermining the conditions in the fourth paragraph of Article 230 EC.

77. Fourthly, in view of the criticisms voiced in legal literature and the suggestions of several Advocates General, I am inclined to the view that the time has come for the Court to clarify definitively the rules governing the admissibility of actions brought against Commission decisions adopted under Article 88(3) EC, whilst retaining the underlying idea of the protection at law of the rights of interested parties in the context of the formal investigation procedure.

78. It is now settled case-law that the rules governing the standing to bring proceedings of natural and legal persons who wish to contest decisions taken by the Commission under Article 88(3) EC are currently fluid and confused. It seems to me that it is impossible at this point in time, both for the parties concerned and for the General Court, to identify clearly from an amalgam of pleas those which are aimed at protecting procedural rights and those which concern substance.

79. There are many instances in case-law where uncertainty has been expressed regarding the outcome of the investigation and how it should be treated. [51] Moreover, the most recent judgments of the General Court, such as those in *Kronoply*, [52] *Deutsche Post* [53] and *Scheucher-Fleisch*, [54] have raised doubts among legal writers regarding respect for legal certainty in that the General Court has tended to select from the arguments relating to substance those which, in its view, relate to pleas for the protection of procedural rights. [55] Furthermore, in its appeal, the Commission maintains that such an approach affects its rights of defence and the principle of equality of arms.

80. In this connection, I would point out that, according to the case-law referred to in

51 — See the comparative analysis of cases, Honoré, M., p. 275 et seq.

52 — Case T-388/02, under appeal here.

53 — Case T-388/03 *Deutsche Post and DHL International* v *Commission* [2009] ECR II-199, which formed the subject-matter of the appeal in Case C-148/09 P *Belgium* v *Deutsche Post*.

54 — Case T-375/04 *Scheucher - Fleisch and Others* v *Commission* [2009] ECR II-4155.

55 — Maitrepierre, A., 'Aides d'État — Qualité et intérêt à agir: Le TPICE admet la recevabilité d'un recours mixte contre une décision de la Commission de ne pas soulever d'objections à l'encontre d'une prétendue mesure d'aide d'État, dès lors que les requérantes ont la qualité de concurrentes directes du bénéficiaire de cette mesure (Deutsche Post AG - DHL)', *Concurrences,* No 2-2009, No 25983, pp. 154 to 155; Peytz, H., Mygind, T., 'Direct Action in State Aid Cases — Tightropes and Legal Protection', *EStAL*, 2/2010, p. 331 et seq.

points 30 and 31 of this Opinion, the Commission may only determine that aid is compatible where it entertains no doubts as to its compatibility. An applicant must therefore attempt to establish that the Commission faced serious difficulties when assessing the measures in question. The aim of an applicant who is contesting a Commission decision adopted at the conclusion of the preliminary investigation procedure is the initiation of the formal phase under Article 88(2) EC. Even though the applicant's objective may be annulment as regards the substance of the Commission decision, in terms of procedural logic, the applicant is seeking to oblige the Commission to undertake a more thorough investigation which might lead it to revise its assessment.

81. I accept that applying the concept of serious difficulties is complex and even artificial, because the real question is whether the Commission would have reached a different decision on the basis of the formal investigation procedure. However, it is common ground that the general approach of the provisions governing the review of State aid is without doubt markedly formalistic. This formalistic element, which has been criticised by legal writers [56] and which is reflected in *Cook* and *Matra*, can, paradoxically, help to clarify the applicable rules and to reinforce the legal certainty of individuals when formulating pleas before the Community judicature.

82. In my view, the plea raised before the General Court regarding the safeguard of procedural guarantees must be explicitly procedural, that is it must claim that the Article 88(2) procedure should have been initiated, but the arguments adduced in support of that plea may relate to the facts or evidence which should have led the Commission to entertain serious doubts. Those elements are necessarily of a material nature in that they form the substance of the administrative procedure. The *Plaumann* test comes into its own where an applicant seeks the annulment of the decision on the ground that the measure constitutes illegal aid or aid which is incompatible with the common market.

83. That was the approach taken by the Court in *3F*. [57] In that case the Court held that '[i]t is true that, as appears from Article 4(3) of Regulation No 659/1999, a decision of the Commission not to raise objections is taken where the Commission finds that the notified measure does not raise doubts as to its compatibility with the common market. If an applicant seeks the annulment of such

56 — Opinion of Advocate General Mengozzi in *Scott*, point 55.

57 — See *3F*, paragraph 35. In that connection see Haasbeek, L., 'A Step in the Right Direction', *EStAL*, 1/2010, p. 147.

a decision, he is essentially challenging the fact that the decision on the aid was adopted without the Commission initiating the formal review procedure, thereby infringing his procedural rights. For his action to be successful, the applicant may attempt to show that the compatibility of the measure in question should have given rise to doubts. The use of such arguments cannot, however, have the consequence of changing the subject-matter of the application or altering the conditions of its admissibility.'

84. Finally, from the constitutional point of view, I consider that, where a supreme court offers individuals a means of protection before the courts over and above the wording of a legislative act, that protection, which came into being through the case-law, may only be withdrawn definitively by the legislature itself. The Court should therefore try to clarify the rules for implementing the right conferred by its case-law but it cannot deny the remedy itself. Only the '… Treaties' can close the doors opened by the *Cook* and *Matra* case-law.

85. In the light of the foregoing, the Court has various options for adjusting its *Cook* and *Matra* case-law.

86. As regards the admissibility test to apply, the Court can determine explicitly that irrespective of the nature of the plea, only one condition must be satisfied, either the strict *Plaumann* test or the much more flexible criterion of the party concerned. [58] Application of the *Plaumann* case-law would quite simply invalidate the solution which confers on parties concerned within the meaning of Article 88(2) EC the standing to bring proceedings against Commission decisions adopted under paragraph 3 of that article.

87. As regards the nature of the grounds to be relied on, the Court could abandon the distinction between procedural pleas and pleas relating to the merits.

88. In terms of the circle of potential applicants, the Court could limit the concept of party concerned in such a way as to preclude the risk of a proliferation of actions under Article 88(3) EC.

D — *The judgment under appeal*

89. In this case, after highlighting, in paragraphs 57 to 59 of the judgment under appeal, the distinction between the preliminary investigation phase and the formal investigation procedure which characterises the review, by the Commission, of the compatibility of a State aid with the common market,

58 — Buendia Sierra, J. L., 'Standing before the Community Courts in the context of State aid litigation', *EStAL*, November 2007, p. 11.

the General Court ruled, in paragraph 60 of that judgment, that an action for annulment by a concerned party within the meaning of Article 88(2) EC, which is directed against a Commission decision to raise no objections at the conclusion of the preliminary phase must be declared admissible provided that, by bringing that action, that party is seeking to safeguard its procedural rights under that provision.

90. After stating, in paragraph 62 of the judgment under appeal, that the status of party concerned could only justify the right to bring proceedings in an action limited to safeguarding procedural rights, since the right of an applicant to contest the substance of a decision had to satisfy the *Plaumann* test cited above, the General Court held that the pleas raised by the applicants in the case in point challenged not only the Commission's refusal to initiate the formal investigation procedure but also the merits of the contested decision.

91. To the extent that I support the legality of the solution adopted by the Court in its judgments in *Cook* and *Matra* regarding recognition of the need to safeguard procedural rights, I suggest that the Court should dismiss the Commission's first ground of appeal in that the reasoning of the General Court applies that case-law correctly. However, it is clear that if the Court were to decide to depart from that case-law, the reasoning of the General Court would be vitiated by an error of law.

92. Finally, the second and third grounds of the appeal need only be examined if the case-law in *Cook* and *Matra* is upheld. On the other hand, if the first ground of appeal were to be upheld, the judgment of the General Court should be annulled and the Court could rule on the admissibility of the action brought by Kronoply and Kronotex.

VI — Second ground of appeal

A — *Arguments of the Commission*

93. The Commission, supported by ZSG, claims that, although the General Court stated in paragraph 81 of the judgment under appeal that it was not for that court to interpret the applicants' pleas in order to determine to what extent the latter were challenging the merits of the contested decision or seeking to safeguard their procedural rights, the General Court nevertheless undertook such an interpretation in paragraph 82 of its judgment.

94. In this connection, the Commission cites the judgment in *Stadtwerke Schwäbisch*

Hall [59] which clearly indicates that the General Court was not entitled to reframe the subject-matter of the action, as it did in paragraph 51 of the judgment under appeal. In so doing, the General Court is exceeding its jurisdiction, to the extent that it is bound by the action as set out in the pleadings submitted to it. Such an approach would also favour the applicants and would therefore breach the principle of equality of arms of the parties to the proceedings before the General Court.

95. The Commission draws particular attention to the fact that, in the light of paragraph 83 of the judgment under appeal, the General Court intended to consider the various pleas together, thereby negating any difference between reliance on procedural rights and reliance on substantive pleas.

96. ZSG adds that, by proceeding in this way, the General Court is erroneously anticipating the examination which it would make of a Commission decision taken at the conclusion of a formal investigation procedure.

B — *The judgment under appeal and the problem of reframing the initial application at first instance*

97. In the first place, as Advocate General Mengozzi pointed out in his Opinion in *British Aggregates*, it should be emphasised that the Court rules out any possibility of remedying the failure to raise pleas expressly alleging infringement of the procedural guarantees recognised by Article 88(2) EC, or breach of the Commission's duty to initiate the formal investigation procedure. Furthermore, the Court rules out practically any possibility of remedying the failure to raise such pleas by reframing pleas which have actually been raised. [60]

98. Therefore, even though the purpose of the forms of order sought before the General Court and of all the pleas relied on in support of those pleas was to obtain the annulment of the contested decision as to its merits, the Court considered that the General Court had committed an error of law by reframing the actual subject-matter of the application before it and hence ruling, incorrectly, that the applicants were seeking to safeguard the procedural guarantees which they should have enjoyed. [61]

99. Moreover, such a reinterpretation of the application, which amounts to reclassifying its subject-matter, was criticised by the Court of Justice in *Aktionsgemeinschaft Recht und Eigentum*. The Court held that there appeared to be no objective basis for the findings of the General Court to the effect that, even in the absence of a plea expressly alleging a breach by the Commission of its obligation to initiate the procedure provided for by Article 88(2)

59 — Case C-176/06 P *Stadtwerke Schwäbisch Hall and Others* v *Commission* [2007] ECR I-170.

60 — Opinion of Advocate General Mengozzi in *British Aggregates*, point 70.

61 — *Schwäbisch Hall*, paragraph 25.

EC, the application must, having regard to the pleas in annulment on which it is based, be construed as criticising the Commission for failing, despite the serious difficulties in appraising the compatibility of the aid at issue, to initiate the formal review procedure under that provision, the ultimate purpose of which is to safeguard the procedural rights conferred by that provision. [62]

100. In this case, having correctly drawn attention to the case-law governing the examination of an application by the General Court, the latter held in paragraph 82 of the judgment under appeal that this limit on its power to interpret pleas does not have the effect of preventing it from examining substantive arguments put forward by an applicant in order to ascertain whether they also contain elements in support of a plea, also raised by the applicant, expressly alleging the existence of serious difficulties such as to justify initiation of the procedure under Article 88(2) EC.

101. Furthermore, in paragraph 83 of the judgment under appeal, the General Court held that, in order to give a decision on the admissibility of the second plea, it is necessary to examine all the other pleas raised by the applicants against the contested decision, in order to ascertain whether the arguments invoked in relation to the first and third pleas could be linked to the plea concerning failure to respect procedural guarantees, in that they seek to identify a serious difficulty which would have required the Commission to open the formal investigation procedure.

102. It goes without saying that, in so doing, the General Court sought, in all the other pleas raised before it which challenge the merits of the contested decision, to find elements which could provide the basis for a plea of failure to respect procedural guarantees.

103. Although the approach adopted in this case is not identical to that followed in *Stadwerke Schwäbisch Hall*, it is, in my view, open to criticism and may constitute, in my view, an error of law in the light of the case-law cited above. [63]

104. In this connection, I would point out that, pursuant to established case-law, the Community judicature must interpret the pleas of an applicant in terms of their substance rather than their legal classification, [64] and that the General Court has already

62 — *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraphs 44 and 45.

63 — Infringement of the case-law in *Schwabisch Hall*, on the one hand, and in *Cook* and *Matra*, on the other hand.

64 — Joined Cases 19/60, 21/60, 2/61 and 3/61 *Fives Lille Cail and Others* v *High Authority* [1961] ECR p. 559, p. 588.

adopted that approach in order to verify whether an applicant is also providing elements in support of a plea of serious difficulties which would have justified the opening of the procedure referred to in Article 88(2) EC. [65]

105. It is settled case-law that the General Court is required to apply the well-known adage '*da mihi factum, dabo tibi jus*'. [66] However I wonder whether, having invoked its status as a party concerned and a failure to respect its procedural rights, a party can simply provide a brief description of the allegedly incorrect findings of fact made by the Commission without also explaining why and to what extent those findings might justify not only the unlawfulness of the contested decision, but also the existence of serious difficulties within the meaning of established case-law. In this case, the General Court examined whether the arguments put forward in the third plea of the application could be linked to the plea of failure to respect procedural guarantees, although the content of the second plea cannot be interpreted as referring, not just to the first plea, but also to the third plea of the application lodged before the General Court.

106. I would like to emphasise that, in terms of applying the *Cook* and *Matra* case-law, it is necessary to establish a clear distinction between, on the one hand, the recognition of a right for parties concerned, namely the possibility of invoking a plea to safeguard procedural rights and, on the other hand, *ex officio* legal protection, namely the duty of the General Court to try to discern among the arguments of fact seeking to challenge the merits of the contested decision elements which could also justify the plea based on a procedural right recognised in case-law. It seems clear to me that the Court of Justice has not conferred a judicial protection measure of this kind on concerned parties within the meaning of Article 88(2) EC.

107. In such a case, therefore, the court should rule only upon application by the parties, who must define the scope of the case and identify clearly the factual arguments which seek to demonstrate the existence of serious difficulties in terms of applying Article 88(3) EC, thus justifying the opening of the formal investigation procedure by the Commission. It is not for the General Court to substitute itself for the parties for the purpose of seeking in the application elements which are capable of justifying the plea of infringement of procedural rights.

65 — *Thermenhotel*, paragraphs 148, 155, 161 and 167, and Case T-254/05 *Fachvereinigung Mineralfaserindustrie* v *Commission* [2007] ECR II-124, p. 124.

66 — The maxim 'Give me the fact(s), I will give you the law' whereby the court must apply the rules of law appropriate to the facts as presented by the parties. That adage flows from the general principle '*jura novit curia*', enshrined in continental law. See the Opinion of Advocate General Jacobs in Joined Cases C-430/93 and C-431/93 *van Schijndel and van Veen* [1995] ECR I-4705, point 33.

108. I therefore consider that it is for the applicant clearly to raise a 'procedural' plea by detailing the nature of the serious difficulties which could have justified the opening of the formal investigation procedure by the Commission and thereby setting out facts which constitute matters of substance.

109. Finally, it should be noted that the General Court has, in several recent cases, adopted the approach of reinterpreting pleas. This calls for a clear response on the part of the Court of Justice regarding the legality of such an approach. [67]

110. In the light of the foregoing, it must be held that the General Court has committed an error of law and, therefore, that the Commission's second plea must be upheld.

VII — The third plea

A — *Arguments of the Commission*

111. By this plea, alleging an error of law in interpreting the concept of party concerned, the Commission maintains that the General Court departed from customary practice when it ruled that the competitors of an aid recipient operating purely on the raw materials supply market should be accorded the status of parties concerned within the meaning of Article 88(2) EC.

112. The interpretation advocated in the judgment under appeal is tantamount, in the Commission's view, to authorising a form of popular action against State aid decisions, by means of the concept of party concerned. The Commission stresses that the fact of granting a right of action to alleged competitors on markets other than those on which the aid beneficiary operates threatens to cause a proliferation of Community legal actions.

113. ZSG states in this connection that its activity mainly requires wood pulp but that it uses other components in its manufacturing process. Since water or electricity consumers should also be regarded as parties concerned, the judgment under appeal has the effect of excessively widening the circle of undertakings which can contest a State aid decision. Therefore, that concept must be restricted to the direct competitors of a recipient of State aid who are active on the market on which the aid recipient operates.

67 — *Scheucher Fleisch* and *Deutsche Post and DHL International* v *Commission*.

B — *Assessment*

1. Concept of 'party concerned'

114. In its case-law, the Court's concept of parties 'concerned' [68] has evolved over time. In particular, in the field of competition, concerned parties have been given fairly extensive possibilities for contesting decisions of the Commission. [69]

115. Mention must first be made to the judgment in *Eridania*, [70] in which the Court ruled that the mere fact that a measure may exercise an influence on the competitive relationships existing on the market in question cannot suffice to allow any trader in any competitive relationship whatever with the addressee of the measure to be regarded as directly and individually concerned by that measure. Thus, only the existence of specific circumstances may enable a person subject to Community law and claiming that the measure affects his position on the market to bring proceedings under Article 173 of the EEC Treaty (now, after amendment, Article 230 EC).

116. The concept of party concerned within the meaning of Article 88(2) EC was clarified in *Intermills*. [71] At the present time, it is settled case-law that parties concerned within the meaning of Article 88(2) EC, who may therefore bring an action for failure to respect their procedural rights under the fourth paragraph of Article 230 EC, are those persons, undertakings or associations whose interests might be affected by the grant of the aid, in particular competing undertakings and trade associations. [72]

117. The concept of 'party concerned' within the meaning of Article 88(2) EC has therefore been interpreted very broadly by the Court. It follows that any undertaking which invokes a competitive relationship, even a potential one, may be accorded the status of 'party concerned' within the meaning of Article 88(2) EC and, in that capacity, may

68 — On the role of parties concerned in the context of the administrative procedure initiated under Article 88(2) EC, see Article 20 of Regulation No 659/1999 and Case 70/72 *Commission* v *Germany* [1973] ECR 813, paragraph 19; Case 84/82 *Germany* v *Commission* [1984] ECR 1451, paragraph 13; *Commission* v *Sytraval*,, paragraph 59, and Case C-276/03 P *Scott* v *Commission* [2005] ECR I-8437, paragraph 34.

69 — See, in connection with developments regarding Articles 81 and 82 EC, Kapteyn & VerLoren van Themaat, *The Law of the European Union and the European Communities*, Kluwer 2008, p. 462.

70 — Joined Cases 10/68 and 18/68 *Eridania and Others* v *Commission* [1969] ECR 459, paragraph 7.

71 — Case 323/82 *Intermills* v *Commission* [1984] ECR 3809.

72 — *Commission* v *Sytraval*, paragraph 41, and *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, paragraph 36.

enjoy procedural guarantees which allow it to lodge its observations. [73]

118. The case-law arising from *Intermills* has been enshrined in Article 1(h) of Regulation (EC) No 659/1999. [74]

119. I should point out that case-law places certain limits on the concept of party concerned in that a natural or legal person must, in order to be accorded the status of party within the meaning of Article 88(2) EC, [75] be able to claim a legitimate interest in the aid measures at issue being implemented, not implemented or maintained where they have already been granted. In the case of an undertaking, a legitimate interest of this kind may consist in the protection of its position on the market, to the extent that it might be affected by the grant of the aid measures. [76]

120. According to the General Court, to recognise any person having a purely general or indirect interest with regard to the State measures to which objection is taken as having the status of a party concerned within the meaning of Article 88(2) EC would lead to an interpretation which is clearly incompatible with the provisions of Article 88(2) EC and would have the effect of depriving the concept of a person individually concerned for the purposes of the fourth paragraph of Article 230 EC of all legal significance, [77] by transforming that remedy into a sort of *actio popularis*.

121. However I note that *Waterleiding*, which was implicitly confirmed in *BP Chemicals*, [78] advocates a broad interpretation of the concept of party concerned, in contrast to *Kahn*, [79] which entailed the inadmissibility of an application due to the general nature of the measure approved by the Commission. This general nature does not however prevent operators concerned within the meaning of Article 88(2) EC from being entitled to institute proceedings against a Commission decision approving, without having opened the

73 — Opinion of Advocate General Bot in *Germany* v *Kronofrance*, point 89.

74 — This regulation provides that the concept of parties concerned is to include 'any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations'.

75 — *Cook* v *Commission*, paragraph 23; *Matra* v *Commission*, paragraph 17; *Commission* v *Sytraval*, paragraph 47, and Case T-95/96 *Gestevisión Telecinco* v *Commission* [1998] ECR II-3407, paragraph 64.

76 — See, in this connection, *Cook* v *Commission*, paragraph 25; *Matra* v *Commission*, paragraph 19, and *Gestevisión Telecinco* v *Commission*, paragraph 66.

77 — Case T-188/95 *Waterleiding Maatschappij* v *Commission* [1998] ECR II-3713, paragraph 68, and the order in Case T-41/01 *Pérez Escolar* v *Commission* [2003] ECR II-2157, paragraph 36.

78 — Case T-184/97 *BP Chemicals* v *Commission* [2000] ECR II-3145, paragraphs 33 to 40.

79 — Case T-398/94 *Kahn Scheepvaart* v *Commission* [1996] ECR II-477.

formal investigation procedure, aid measures which are contained in national legislation.

122. As regards the most recent case-law, the General Court held that in order for the applicant to be considered to be a party concerned within the meaning of Article 88(2) EC, it does not have to show that it is in actual and direct competition with each beneficiary of the contested aid. It is sufficient for it to show that there is such a competitive relationship with beneficiaries of the aid. [80] Therefore, even a future or simply a potential competitor of the beneficiary of the contested aid must be deemed to be a party concerned within the meaning of Article 88(2) EC. [81]

123. Finally, with regard to the case-law of the Court of Justice, the latter recognised in *3F* that organisations representing the workers of undertakings benefiting from aid may be regarded as parties concerned within the meaning of Article 88(2) EC. [82]

80 — Case T-167/04 *Asklepios Kliniken* v *Commission* [2007] ECR II-2379, paragraph 55.

81 — Ibid., paragraph 50.

82 — *3F*, paragraph 70.

2. The judgment under appeal

124. First of all, I would point out that the answer to this plea depends on the answer given to the first plea.

125. Therefore, if the Court were to support the view that the *Cook* and *Matra* case-law should be overturned — a view with which I do not concur — that would automatically lead to the adoption of the narrower definition of a party having standing to bring proceedings. The view which subjects parties concerned to the classic criteria in *Plaumann*, in accordance with the requirements of Article 230 EC, in order to be able to defend their procedural rights will significantly reduce the number of applicants whose actions will be admitted.

126. Conversely, I do not consider that the reasoning of the General Court conflicts with the case-law adopted by the Court of Justice concerning the concept of party concerned. Rather, it appears to me that the General Court's reasoning to some extent constitutes a natural and logical development of the very broad approach adopted by the case-law of the Court and, as a study of it shows, seems logical in terms of the economic realities.

127. After pointing out, in paragraph 74 of the judgment under appeal, that there may

be quite considerable effects on competition on the upstream and downstream markets, and that the position of the undertakings operating on those markets could therefore be affected, the General Court sets out, in paragraphs 75 and 76 of the judgment under appeal, the factual elements which led it to the view that the market position of Kronoply and Kronotex could potentially be affected. It therefore held that the situation of the applicants was covered by the concept of party concerned and that their action to safeguard their procedural rights was admissible.

128. Although it is settled case-law that the Court has pushed back the boundaries when defining the concept of party concerned, the fact that in this case the General Court has taken the upstream market into account does not from the outset appear to me to be entirely unfounded.

129. Indeed, the underlying logic of this approach is based on the concept of 'might be affected'. Therefore, it cannot be ruled out that the raw materials market could play a role for the purposes of such an analysis in economic sectors where the profitability of the activity depends on continuous long-distance supply. In the forestry sector, a pulp producer is active on several markets, both upstream and downstream. In that sector, the supply of wood is heavily dependent on distance and on access to reliable sources of energy at competitive prices.

130. It seems to me that the approach adopted by the General Court is justified in paragraph 75 of the judgment under appeal from which it appears that the applicants and the beneficiary of the aid are certainly not in competition on the same product markets, either currently or potentially, but that they use the same raw materials in their production processes, materials which are not in unlimited supply in the region where the investment project in question is to be carried out. Since this availability must be assessed in the light of the respective supply zones of the various operators who are active in the region and also on the basis of the transport costs of those raw materials, it must be held that there is a relationship between the respective market positions of the applicants and of ZSG.

131. Nonetheless, I would like to make several comments on the consequences of such an assessment by the General Court.

132. Having taken the view that the applicants and the beneficiary of the aid were not actually or potentially competing on the same product markets, the General Court nonetheless considered that competition existed in terms of access to raw materials. It therefore considered that there was competition not in terms of product sales but in terms of their purchase.

133. However, to extend potential competition in this way is clearly to extend the right of action under Article 88(3) EC. The question

is therefore to define the scope of the concept of competition in the case-law relating to a party concerned within the meaning of Article 88(2) EC, that is to say, whether the competition is direct or indirect and whether only the competition on the market concerned by the measure may be taken into account?

134. Case-law provides us with very little clarification of the above question. It follows that there is no necessity for the General Court to require a party which invokes its status of party concerned on the market in question to prove that it has been substantially affected by the contested decision. [83] Moreover, the case-law of the General Court inclines towards the existence of potential competition. [84]

135. It is sufficient to indicate in a general manner that direct competition shows that the undertakings are operating on the same market and that the products sold are in competition. [85] However, direct competition may also exist between purchasers, which explains the existence of purchasing cartels. [86] Indirect competition proceeds from undertakings active on markets which are distinct even if those markets are closely neighbouring. [87] Moreover, there may also be justification for taking the overall competition situation into account to the extent that, in order to assess an undertaking's competition position, the Commission may have to take into account the 'portfolio effect'. [88]

136. However, for the purpose of examining the concept of 'party concerned', it seems to me that the sales and purchases markets are not radically different from one another as far as competition is concerned. [89] Competition can exist on the product purchasing

83 — Judgment in *Germany* v *Kronofrance*, paragraph 44: the Court held that there was no necessity for the General Court, particularly in view of the judgments in *Cook* v *Commission* and *Matra* v *Commission*, to require in addition proof that the position of Kronofrance on the market concerned was substantially affected by the adoption of the contested decision. See Quigley, C., *European State Aid Law and Policy*, Hart Publishing, Oxford 2009, p. 522.

84 — Case T-395/04 *Air One* v *Commission* [2006] ECR II-1343, and *Asklepios Kliniken*.

85 — See, in connection with competition in the context of a decision under Article 88(2) EC, the Opinion of Advocate General Kokott, in Case C-260/05 P *Sniace* v *Commission* [2007] ECR I-10005, point 34 et seq.

86 — 'Purchase or selling prices' are referred to as being the subject of restrictions of competition in Article 81(1) EC (now Article 101(1) TFEU) and in Article 82(2) (now Article 102(2) TFEU).

87 — Opinion of Advocate General Tizzano in Case C-12/03 P *Commission* v *Tetra Laval* [2005] ECR I-987, point 152.

88 — Case T-114/02 *BaByliss* v *Commission* [2003] ECR II-1279, paragraph 343: 'in order to assess an undertaking's competition position, the Commission may have to take into account its portfolio of brands or the fact that it has large market shares in numerous product markets ("the portfolio effect").'

89 — For example, the abuse of a dominant position on the raw materials market, namely an 'upstream monopoly' was recognised by the Court in the 1970s. See Joined Cases 6/73 and 7/73 *Istituto Chemioterapico Italiano and Commercial Solvents* v *Commission* [1974] ECR 223, according to which 'an abuse of a dominant position within the market in raw materials may have effects restricting competition in the market on which derivatives are sold, and these effects must be taken into account in considering the effects of an infringement, even if the market for the derivatives does not constitute a self-contained market.'

market (competing purchasers on the upstream market). [90] On the wood market in particular, there are examples in American and Finnish competition law. [91]

137. Direct competition is not the same issue as the direct effect of a measure likely to constitute State aid. Purchasers are the direct competitors of other purchasers and sellers are the direct competitors of other sellers. Purchasers or sellers of product A may be indirect competitors of the purchasers or sellers of product B if A and B are interchangeable.

90 — Joined Cases T-185/00, T-216/00, T-299/00 and T-300/00 *M6* v *Commission* [2002] ECR II-3805, paragraph 63, which states: 'As regards the effects of the Eurovision system on competition, the contested decision shows (paragraphs 71 to 80) that there are two types of restrictions. First, the joint acquisition of television rights to sporting events, their sharing and the exchange of signal restricts or even eliminates competition among EBU members which are competitors on both the upstream market, for the acquisition of rights, and for the downstream market, for television transmission of sporting events. In addition, that system gives rise to restrictions on competition as regards third parties since those rights, as set out in paragraph 75 of the contested decision, are generally sold on an exclusive basis, so that EBU non-members would not in principle have access to them.'

91 — In relation to Finland, see the judgment of the Supreme Administrative Court (Korkein hallinto-oikeuden) of 20 December 2001 (KHO 20.12.2001/3179) concerning a wood purchasing cartel between three major forestry undertakings. The same type of cartel was examined by the Competition Tribunal (Markkinaoikeus) on 3 December 2009 (MAO: 614/09). In terms of American law, see the judgment of the Supreme Court of 20 February 2007, *Weyerhaeuser Co.* v. *Ross-Simmons Hardwood Lumber Co.*, No 05-381. Commentary on the Supreme Court website: http://www.oyez.org/cases/2000-2009/2006/2006_05_381 and on: http://www.calt.iastate.edu/predatorybuying.html.

138. In the light of the case-law cited, it is important to underline the fact that the concept of party concerned in Article 88(2) EC is not restricted to competitors but that it can also include a range of organisations or public authorities which might have an interest in the administrative procedure even though they would not have standing to bring proceedings as to the substance of the case.

139. Therefore, as the case-law now stands, the Commission's plea could only be upheld, in my view, if the Court were to opt for a narrower interpretation of the concept of party concerned.

140. In the light of the foregoing, and since the Commission does not complain that the General Court has misinterpreted the facts in order to establish that there is competition between the applicants and the beneficiary of aid, I suggest that the Court should reject the third plea as unfounded.

VIII — The response of ZSG

141. In its response, in addition to several general comments, ZSG raised a number of arguments in support of the Commission which can be regarded as independent pleas but which seem to me to be in part inadmissible and in part to cover the same problems that the Commission raised.

142. In this connection, according to settled case-law, it follows from Article 225 EC, the first paragraph of Article 58 of the Statute of the Court and Article 112(1)(c) of the Rules of Procedure that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal. [92]

143. An appeal which merely repeats or reproduces verbatim the pleas in law and arguments previously submitted to the General Court does not satisfy the requirements to state reasons under those provisions. In reality, such an appeal amounts to no more than a request for a re-examination of the application submitted to the General Court, a matter which falls outside the jurisdiction of the Court of Justice. [93]

144. However, provided that the appellant challenges the interpretation or application of Community law by the General Court, the points of law examined at first instance may be discussed again in the course of an appeal. If an appellant could not thus base his appeal on pleas in law and arguments already relied on before the General Court, an appeal would be deprived of part of its purpose. [94]

92 — See, in particular, Case C-240/03 P *Comunità montana della Valnerina* v *Commission* [2006] ECR I-731, paragraph 105.

93 — *Comunità montana della Valnerina* v *Commission*, paragraph 106.

94 — *British Aggregates*, paragraph 121 et seq.

145. In the first place, therefore, as regards the arguments relating to the applicants' lack of standing to bring proceedings because they are not individually concerned within the meaning of the fourth paragraph of Article 230 EC, I would point out that the Commission, supported by ZSG, has already raised an objection of inadmissibility in connection with this problem. It follows in particular from paragraph 37 of the judgment under appeal that those parties had jointly invoked the benefit of the *Plaumann* test, a matter to which the General Court responded clearly by declaring the application of Kronoply and Kronotex inadmissible as to its substance in paragraph 69 of the judgment under appeal. The arguments concerning standing to bring proceedings must therefore be regarded as inadmissible.

146. In the light of the points made in relation to the Commission's third plea, there is no need to examine the broad interpretation of the concept of competitors for the purpose of clarifying the concept of party concerned within the meaning of Article 88(2) EC.

147. In the second place, whilst pointing out that the General Court did not merely assess the applicants' procedural rights, ZSG claims that the Court reframed an application challenging the substance of the contested decision as an application to safeguard procedural rights. Finally, it claims that the *Cook* and *Matra* case-law should be interpreted restrictively.

148. In that regard, I consider that, in the light of the answer given to this problem in the context of my examination of the second plea, to the effect that the General Court had committed an error of law, there is no need to examine the matter separately.

IX — Costs

149. With regard to the forms of order sought on appeal, the Commission claims that the Court should order Kronoply and Kronotex to pay the costs of the proceedings. ZSG, for its part, claims that Kronoply et Kronotex should be held jointly and severally liable for the costs.

150. I would therefore like to make a comment about the judgment on costs in an appeal brought by an institutional appellant which has already been successful on the merits at first instance and aimed solely at that part of the judgment under appeal which concerns the admissibility of the action. In these particular circumstances, I wonder about the degree of legal protection before the Court to be afforded to a party which has been unsuccessful on the merits at first instance and which does not wish to take part in the appeal proceedings.

151. In this case, pursuant to the operative part of the judgment of the General Court, Kronoply and Kronotex were ordered to bear not only their own costs but also those incurred by the Commission and the other two parties to the proceedings.

152. Following the appeal by the Commission, Kronoply and Kronotex are automatically joined to a procedure before the Court which merely seeks to clarify or to amend case-law relating to the admissibility of applications concerning State aid, and not to contest the operative part of the judgment of the General Court.

153. Therefore, in the event that, as in this case, the Commission is acting 'in the interest of the law', it would appear sensible to me for the Court to exempt the party which neither seised the Court nor submitted observations in connection with the appeal from paying the costs of the Commission and the other parties to the appeal, whatever the outcome of the appeal.

154. In my view, this solution, which may be inferred from the wording of Article 69(3) of the Rules of Procedure, would appear most appropriate in terms of respecting the requirements of the right to a fair trial.

X — Conclusion

155. In the light of the foregoing considerations, and since I suggest that the Court of Justice should uphold the *Cook* and *Matra* case-law:

'I propose that the Court should reject the first and third pleas in the European Commission's main appeal.

However, I propose that the Court of Justice should uphold the second plea of the main appeal and set aside the judgment of the General Court in Case T-388/02 *Kronoply and Kronotex* v *Commission* in so far as it held the second plea concerning protection of the procedural guarantees of the applicants to be admissible when they had failed to indicate clearly and in accordance with settled case-law why the European Commission should have initiated the formal investigation procedure under Article 88(2) EC. Since it can be recognised that the applicant companies did not bring any action which was likely to be admissible in terms of protecting their procedural rights, it seems to me that the Court has jurisdiction to give a final decision on the dispute and so, in the interests of procedural economy, I propose that it should declare the initial application at first instance to be inadmissible without referring the case back to the General Court.

As to costs, I propose that the European Commission and *Zellstoff Stendal GmbH* should bear their own costs.'