Judgment of the Court of 23 May 2000

Comité d'entreprise de la Société française de production, Syndicat national de radiodiffusion et de télévision CGT (SNRT-CGT), Syndicat unifié de radio et de télévision CFDT (SURT-CFDT), Syndicat national Force ouvrière de radiodiffusion et de télévision and Syndicat national de l'encadrement audiovisuel CFE-CGC (SNEA-CFE-CGC) v Commission of the European Communities

Case C-106/98 P

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In Case C-106/98 P,

Comité d'Entreprise de la Société Française de Production, established in Bry-sur-Marne (France),

Syndicat National de Radiodiffusion et de Télévision CGT (SNRT-CGT), established in Paris,

Syndicat Unifié de Radio et de Télévision CFDT (SURT-CFDT), established in Paris,

Syndicat National Force Ouvrière de Radiodiffusion et de Télévision, established in Paris,

Syndicat National de l'Encadrement Audiovisuel CFE-CGC (SNEA-CFE-CGC), established in Paris,

represented by H. Masse-Dessen, lawyer with right of audience before the French Conseil d'État and Cour de Cassation, with an address for service in Luxembourg at the Chambers of G. Thomas, 77 Boulevard Grande-Duchesse Charlotte,

appellants,

APPEAL against the order of the Court of First Instance of the European Communities (Second Chamber, Extended Composition) of 18 February 1998 in Case T-189/97 Comité d'Entreprise de la Société Française de Production and Others v Commission [1998] ECR II-335, seeking to have that order set aside,

the other party to the proceedings being:

Commission of the European Communities, represented by G. Rozet, Legal Adviser, and D. Triantafyllou, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the Chambers of Carlos Gómez de la Cruz, of the same service, Wagner Centre, Kirchberg,

defendant at first instance,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, D.A.O. Edward, L. Sevón, R. Schintgen (Rapporteur) (Presidents of Chambers), P.J.G. Kapteyn, C. Gulmann, J.-P. Puissochet, G. Hirsch, P. Jann, H. Ragnemalm and M. Wathelet, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 21 September 1999,

after hearing the Opinion of the Advocate General at the sitting on 9 November 1999,

gives the following

Judgment

Grounds

1 By application lodged at the Court Registry on 15 April 1998, the works council of Société Française de Production, a body which represents the staff, and the Syndicat National de Radiodiffusion et de Télévision CGT (SNRT-CGT), the Syndicat Unifié de Radio et de Télévision CFDT (SURT-CFDT), the Syndicat National Force Ouvrière de Radiodiffusion et de Télévision and the Syndicat National de l'Encadrement Audiovisuel CFE-CGC (SNEA-CFE-CGC), trade unions all of which are bodies governed by Book IV of the French Code du Travail, brought an appeal pursuant to Article 168a of the EC Treaty (now Article 225 EC) against the order of the Court of First Instance of 18 February 1998 in Case T-189/97 Comité d'Entreprise de la Société Française de Production and Others v Commission [1998] ECR II-335 (hereinafter the contested order), in which the Court of First Instance dismissed as inadmissible their action seeking the annulment of Commission Decision 97/238/EC of 2 October 1996 concerning aid granted by the French State to the audiovisual production company Société Française de Production (OJ 1997 L 95, p. 19, the decision at issue).

Facts and procedure before the Court of First Instance

2 The facts which gave rise to this appeal, as they appear in paragraphs 1 to 9 of the contested order, are as follows.

3 Société Française de Production (hereinafter SFP) is a company controlled by the French State authorities, whose principal activity is the production and broadcasting of television programmes.

4 By decisions of 27 February 1991 and 25 March 1992 the Commission authorised two payments of aid made by the French authorities to SFP between 1986 and 1991 and amounting to a total of FRF 1 260 million.

5 The French authorities subsequently carried out further aid operations under which it granted SFP FRF 460 million in 1993 and FRF 400 million in 1994. Several competitors claimed to suffer from the low prices charged by SFP as a result of the aid and lodged a complaint with the Commission on 7 April 1994.

6 By decision of 16 November 1994, the Commission initiated the procedure under Article 93(2) of the EC Treaty (now Article 88(2) EC) in respect of the last two payments of aid made in 1993 and 1994 and, in Communication 95/C 80/04 (OJ 1995 C 80, p. 7), invited the French Government and interested parties to submit their comments. In addition it requested the French Government to supply a restructuring plan and to undertake that no further public financing would be provided to SFP without the Commission's prior authorisation. The French authorities submitted their comments by letter dated 16 January 1995.

7 By decision of 15 May 1996, which gave rise to Communication 96/C 171/03 (OJ 1996 C 171, p. 3), the Commission extended the procedure to include further public aid of FRF 250 million, which the French authorities had announced on 19 February 1996.

8 No comments from other Member States or other interested parties were received by the Commission following the initiation of the procedure.

9 On 2 October 1996 the Commission adopted the decision at issue. In that decision, it stated that the aid in question, resulting from the successive payments made between 1993 and 1996 and amounting to a total of FRF 1 110 million, was illegal since it was granted in breach of the prior notification procedure laid down in Article 93(3) of the Treaty. It considered that aid to be incompatible with the common market, since it did not qualify for one of the derogations provided for by Article 92(3)(c) and (d) of the Treaty (now, after amendment, Article 87(3)(c) and (d) EC). It consequently ordered the French Government to recover the aid, together with interest for the period from the date on which it was granted to the date of repayment.

10 By application lodged at the Registry of the Court of First Instance on 24 June 1997, the works council of SFP, Syndicat National de Radiodiffusion et de Télévision CGT, Syndicat Unifié de Radio et de Télévision CFDT, Syndicat National Force Ouvrière de Radiodiffusion et de Télévision and Syndicat National de l'Encadrement Audiovisuel CFE-CGC brought an action for annulment against the decision at issue.

11 By separate document, registered at the Registry of the Court of First Instance on 30 July 1997, the Commission raised a plea of inadmissibility pursuant to Article 114(1) of the Rules of Procedure of the Court of First Instance. The applicants submitted their observations regarding that plea on 25 September 1997.

Contested order

12 The Court of First Instance dismissed the action for annulment as inadmissible on the ground that the decision at issue was not of direct and individual concern to the applicants within the meaning of the fourth paragraph of Article 173 of the EC Treaty (now, after amendment, the fourth paragraph of Article 230 EC).

13 So far as concerns, first of all, whether the decision at issue was of individual concern to the applicants, the Court of First Instance first recalled, at paragraph 34 of the contested order, that, according to settled case-law, persons other than those to whom a decision is addressed may claim to be individually concerned within the meaning of the fourth paragraph of Article 173 of the Treaty only if the decision at issue affects them by reason of certain attributes peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed.

14 In reply to the applicants' argument based on Case T-96/92 CCE de la Société Générale des Grandes Sources and Others v Commission [1995] ECR II-1213 and Case T-12/93 CCE de Vittel and Others v Commission [1995] ECR II-1247, the Court of First Instance then pointed out, in paragraph 36 of the contested order, that although, in those two judgments, it had considered the recognised representatives of the employees of the undertakings concerned to be individually concerned by the concentration that was because they were expressly mentioned in Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1) among the third parties showing a sufficient interest to be heard by the Commission during the administrative procedure, and this differentiated them from all other third parties.

15 However, the Court of First Instance found, in paragraph 37 of the contested order, that, in contrast to Community control of concentrations, there are, as regards State aid, no legislative provisions comparable to those contained in Regulation No 4064/89 which expressly grant procedural prerogatives to the recognised representatives of the employees. The Court of First Instance inferred from this that the applicants could not properly rely on that fact to claim that they were individually concerned by the decision at issue.

16 Finally, as to the applicants' argument that action by the Commission in respect of State aid is intended to reconcile the competition rules with considerations of a political nature, so that the review of legality must also be carried out in the light of the social objectives of the Treaty, the Court of First Instance held, in paragraph 38 of the contested order, that that argument was not such as to demonstrate that the applicants were individually concerned by the decision at issue.

17 First, after recalling, at paragraph 39 of the contested order, that Articles 92 and 93 of the Treaty are intended to prevent intervention by a Member State from resulting in distortion of competition in the common market, the Court of First Instance pointed out, in paragraph 40, that, in order to determine whether or not aid within the meaning of Article 92(1) of the Treaty is compatible with the common market, the Commission may, where appropriate, also take into account considerations of a social nature. The Court of First Instance went on to state that, under Article 92(3) of the Treaty, the possible application of which was considered in the decision at issue, the Commission enjoys a wide discretion, and the exercise of that discretion involves assessments of an economic and social nature which must be made within a Community context (Case C-301/87 France v Commission (the Boussac case) [1990] ECR I-307, paragraph 49, and Case C-355/95 P TWD v Commission [1997] ECR I-2549, paragraph 26).

18 The Court of First Instance concluded, in paragraph 41 of the contested order, that, having regard to the purpose of the procedure laid down in Article 93(2) of the Treaty, which is to enable the Commission, having given the parties concerned notice to submit their comments, to be fully informed of all the facts of the case and to obtain all the requisite opinions in order to determine whether or not the aid under examination is compatible with the common market (Case 84/82 Germany v Commission [1984] ECR 1451, paragraph 13; Case C-225/91 Matra v Commission [1993] ECR I-3203, paragraph 16), it is not excluded that bodies representing the employees of the undertaking in receipt of aid might, qua parties concerned within the meaning of Article 93(2) of the Treaty, submit comments to the Commission on considerations of a social nature which could be taken into account by the latter if appropriate.

19 The Court of First Instance none the less held, in paragraph 42 of the contested order, that the mere fact that there is a possibility that the applicants might be regarded as being parties concerned within the meaning of Article 93(2) of the Treaty does not, however, suffice to distinguish them individually in a similar way to the Member State to which the decision was addressed. In that connection, the Court of First Instance pointed out that the parties concerned, within the meaning of that provision, are not only the undertaking or undertakings receiving aid, but also the persons, undertakings or trade associations whose interests might be affected by the grant of the aid, in particular competing undertakings and also trade associations (Case 323/82 Intermills v Commission [1984] ECR 3809, paragraph 16, and Matra v Commission, cited above, paragraph 18). The Court of First Instance added that, in other words, what is conceived is an indeterminate group of persons to whom notice must be given (Intermills v Commission, cited above, paragraph 16) so that the mere fact of being a party concerned cannot suffice to distinguish the applicants individually from any other third party which is potentially concerned for the purposes of Article 93(2) of the Treaty.

20 Furthermore, the Court of First Instance found, in paragraph 43 of the contested order, that, after publication of the notices concerning the initiation of the procedure under Article 93(2) of the Treaty, the applicants did not intervene at any stage in the procedure to submit their comments to the Commission, qua parties concerned, on possible considerations of a social nature.

21 The Court of First Instance observed, in paragraph 44 of the contested order, that, even supposing that the applicants had submitted comments during the administrative procedure, that fact alone could also not suffice to distinguish them individually in a similar way to the addressee of the decision at issue. It took the view that, in the case of undertakings in competition with the recipient of the aid which have played an active role in the procedure initiated pursuant to Article 93(2) of the Treaty, it is also necessary for them to demonstrate that their position on the market is significantly affected by the aid to which the decision at issue relates, in order to be regarded as being individually concerned, (Case 169/84 Cofaz and Others v Commission [1986] ECR 391, paragraph 25, and Case T-149/95 Ducros v Commission [1997] ECR II-2031, paragraph 34). Similarly, the Court of First Instance pointed out that trade associations which have participated actively in that procedure and group together the undertakings in the sector concerned are individually concerned by a decision to close the procedure initiated under Article 93(2) of the Treaty only if their position as negotiator is affected by that decision (judgments in Joined Cases 67/85, 68/85 and 70/85 Van der Kooy and Others v Commission [1988] ECR 219, paragraphs 21 to 24, and Case C-313/90 CIRFS and Others v Commission [1993] ECR I-1125, paragraphs 28 to 30).

22 In paragraph 45 of the contested order, the Court of First Instance held that, in the absence of any significant effect on a competitive position and any actual infringement of the entitlement which the applicants might have, in their capacity as parties concerned within the meaning of Article 93(2) of the Treaty, to submit their comments during the procedure before the Commission, in which they did not, however, take part, the applicants could not claim any prejudice such as to demonstrate that their legal position is significantly affected by the decision at issue. They cannot therefore be regarded as being individually concerned for the purposes of the fourth paragraph of Article 173 of the Treaty.

23 Secondly, so far as concerns the question whether the applicants are directly concerned by the decision at issue, the Court of First Instance first of all pointed out, in paragraph 47 of the contested order, that a decision declaring aid to be incompatible with the common market and ordering its recovery cannot, in itself, result in the alleged effects on the level and conditions of employment in the undertaking in receipt of the aid at issue. It added that such consequences will be produced only if measures which are independent of the Commission's decision are adopted by the undertaking itself or by the employers and employees. The Court of First Instance concluded that, bearing in mind their margin for negotiation as regards the nature and scale of measures which may be adopted in the context of a possible restructuring of the undertaking, the possibility of such measures not actually being adopted did not appear to be entirely theoretical (Case 11/82 Piraiki-Patraiki and Others v Commission [1985] ECR 207).

24 As regards the public-sector collective wage agreement, the application of which the applicants claimed was directly threatened by the decision at issue, the Court of First Instance found, at paragraph 48 of the contested order, that it is apparent from Article L. 132-8 of the French Code du Travail that, even if notice were given to

terminate the agreement - which would, in any event, be done by one of the signatories - employees of the undertaking concerned would retain the individual benefits that they acquired, pursuant to the agreement, if the latter was not replaced by a new agreement within the time-limits laid down by that Law. The Court of First Instance concluded that it is in no way inevitable that the social benefits enjoyed by employees of SFP will in fact cease to be applied and that that cannot, therefore, be a direct result of the decision at issue. Furthermore, the mere fact that a measure may exercise an influence on the applicants' substantive position cannot suffice to allow them to be regarded as directly concerned (Joined Cases 10/68 and 18/68 Eridania and Others v Commission [1969] ECR 459, paragraph 7).

25 The Court of First Instance further pointed out, at paragraph 49 of the contested order, that the annulment of the Commission's decision in so far as it declares the aid granted to SFP to be incompatible with the common market and requires it to be recovered by the French Government would not constitute a safeguard against the loss of jobs and reductions in social benefits, which demonstrates the independent nature of the measures which could be adopted by the undertaking or the employers and employees to that effect and therefore the absence of any direct causal link between the alleged harm to the employees' interests and the decision at issue (see judgments in CCE de la Société Générale des Grandes Sources and Others v Commission, cited above, paragraph 42, and CCE de Vittel and Others v Commission, cited above, paragraph 55).

26 The Court of First Instance then held, in paragraph 50 of the contested order, that its analysis is confirmed by the case-law of the Court, according to which a trade union has only an indirect and remote interest in the payment of compensation to undertakings, even if the payments in question could have a favourable impact on the economic well-being of those undertakings and consequently on the number of persons employed by them (order in Joined Cases 197/80 to 200/80, 243/80, 245/80 and 247/80 Ludwigshafener Walzmühle v EEC [1981] ECR 1041, paragraphs 8 and 9, and CCE de Vittel and Others v Commission, cited above, paragraph 52).

27 Finally, the Court of First Instance pointed out, in paragraph 51 of the contested order, that the resolution of disputes concerning possible prejudice to employees' interests, such as that alleged in the present case, does not fall within the scope of the review of the legality of Commission decisions adopted pursuant to Articles 92 and 93 of the Treaty, but is covered by provisions of national law relating to the review, by the national courts, of the measures which may be adopted by the undertakings or employers and employees concerned, from which the prejudice directly arises.

28 The Court of First Instance concluded, in paragraph 52 of the contested order, that the decision at issue does not in itself entail direct consequences for the interests of the employees of SFP, so that the applicants also cannot be regarded as being directly concerned for the purposes of the fourth paragraph of Article 173 of the Treaty.

Appeal

29 By their appeal, the appellants claim that the Court should:

- set the contested order aside;

- declare admissible their application at first instance;

- annul the decision at issue;

- order the Commission to pay the costs and to pay each of the appellants ECU 20 000 in respect of the costs they have incurred.

30 The Commission contends that the Court should:

- dismiss the appeal as unfounded;

- in the alternative, declare inadmissible the application for annulment of the decision at issue or, in the further alternative, declare it unfounded;

- order the appellants to pay the costs.

31 In support of their appeal, the appellants submit that, by considering that the recognised representatives of the employees of the undertakings directly concerned by the decision at issue are not concerned either individually or directly by that decision, the Court of First Instance committed an error in law. They submit, therefore, that the action must be declared admissible and the merits of the case considered.

32 Relying on the judgments in Cofaz and Others v Commission and Van der Kooy and Others v Commission, cited above, the appellants claim that they are individually concerned by the decision at issue on the ground that the circumstances of the employees of the undertaking concerned are substantially affected by it and that they are negotiators with regard to its social aspects.

33 First, they state that considerations of a social nature, and in particular those relating to employment, are generally taken into account when determining whether or not State aid is compatible with the common market.

34 They observe in that connection that that was specifically the case here, given that, in point VII of the account of the facts in the decision at issue, the Commission stated that the SFP restructuring measures referred to in point V of that account proved not to be sufficient and, in particular, that the public-sector collective wage agreement should no longer be applied since at present SFP does not have a competitive wage-cost structure.

35 Secondly, as the recognised representatives of SFP's employees, the appellants are affected by the decision at issue as negotiators with regard to the social aspects, in particular those concerning employment and the wage structure, within the undertaking in question. Moreover, the undertaking itself cannot defend the interests of the employees, since those interests may be different to those of the undertaking in particular with regard to the rules of competition.

36 The Commission claims that the case-law, as laid down in the judgments in Cofaz and Others v Commission and Van der Kooy and Others v Commission, cited above, cannot be applied to the present case since both the effect on the competitive position of rival undertakings and the effect on the position as negotiator of trade associations would entail their becoming involved in the competitive relationships which the rules on State aid seek to protect.

37 It contends that to consider admissible proceedings brought by the creditors of the undertakings concerned or by classes of persons who are, in some way, an integral part of those undertakings would amount to treating those proceedings is if they were a popular action, liable to give rise to legal uncertainty with regard to the force of res judicata and yet not improve the substantive potential of judicial review.

38 The Commission states, finally, that the Court of First Instance mentions, rightly, that, in the present case, the applicants did not participate in the administrative procedure provided for by Article 93(2) of the Treaty.

Findings of the Court of Justice

39 It must be recalled that, according to settled case-law, persons other than those to whom a decision is addressed may claim to be individually concerned within the meaning of the fourth paragraph of Article 173 of the Treaty only if the decision at issue affects them by reason of certain attributes peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed (Case 25/62 Plaumann v Commission [1963] ECR 199; Case C-198/91 Cook v Commission [1993] ECR I-2487, paragraph 20, and Matra v Commission, cited above, paragraph 14).

40 So far as concerns State aid specifically, in addition to the undertaking in receipt of aid, competing undertakings have been recognised as being individually concerned by a Commission decision terminating a procedure initiated under Article 93(2) of the Treaty with regard to individual aid, where those undertakings have played an significant role in that procedure, provided that their position on the market is significantly affected by the aid which is the subject of the decision at issue (see the judgment in Cofaz and Others v Commission, cited above, paragraph 25).

41 An undertaking cannot therefore rely solely on its status as a competitor of the undertaking in receipt of aid but must additionally show that its circumstances distinguish it in a similar way to the undertaking in receipt of the aid, account being taken of the extent of its possible participation in the procedure and the magnitude of the prejudice to its position on the market.

42 Moreover, certain economic operators which have played a significant role in the procedure under Article 93(2) of the Treaty have been recognised as individually concerned by such a decision, inasmuch as they are affected in their capacity as negotiators (judgment in Van der Kooy and Others v Commission, cited above, paragraphs 21 to 24, and CIRFS and Others v Commission, cited above, paragraphs 28 and 30).

43 In Van der Kooy v Commission, cited above, the Landbouwschap had negotiated with the supplier a preferential gas tariff challenged by the Commission and was one of the signatories to the agreement establishing that tariff. Likewise, in this respect, it had been obliged to engage in new tariff negotiations with the supplier and to sign a new agreement in order to put into effect the Commission's decision.

44 In CIRFS and Others v Commission, cited above, the Comité International de la Rayonne et des Fibres Synthétiques (International Rayon and Synthetic Fibres Committee) had been the Commission's interlocutor with regard to aid in the synthetic fibre industry and also to its extension and adaptation and had actively pursued negotiations with the Commission during the pre-litigation procedure, in particular by submitting written observations to it and by keeping in close contact with the responsible departments.

45 Van der Kooy v Commission and CIRFS and Others v Commission, cited above, thus concerned particular situations in which the applicant occupied a clearly circumscribed position as negotiator which was intimately linked to the actual subject-matter of the decision, thus placing it in a factual situation which distinguished it from all other persons.

46 The arguments put forward by the appellants against the contested order should be examined in the light of that case-law.

47 As regards, first of all, the argument of the appellants based on point VII of the account of the facts in the decision at issue, it is clear from that decision, taken as a whole, that the Commission in no way based its assessment of the compatibility of the aid on the observation made in point VII of the account of the facts.

48 All that the Commission said at point VII was that it was doubtful whether the new wage agreement announced by the French authorities could be concluded.

49 However, as is clear from point IX of the account of the facts of the decision at issue, the aid was declared incompatible as restructuring aid because it did not fulfil the criteria specified in the Commission's Communication 94/C 368/05 concerning Community guidelines on State aid for rescuing and restructuring firms in difficulty (OJ 1994 C 368, p. 12), in particular in the absence of a restructuring plan capable of restoring the long-term viability of the undertaking within a reasonable period.

50 The passage in the decision at issue mentioned by the appellants cannot therefore suffice to place them in circumstances in which they are differentiated from any other third party which is potentially concerned for the purposes of Article 93(2) of the Treaty.

51 Secondly, it is apparent that, by itself, their status as negotiators with regard to social aspects such as the staffing and salary structure within SFP does not suffice to distinguish them individually just as in the case of the person to whom the decision at issue was addressed.

52 When determining whether or not State aid is compatible, such social aspects are, admittedly, liable to be taken into account by the Commission, but only as part of an overall assessment which includes a large number of considerations of various kinds, linked in particular to the protection of competition, regional development, the promotion of culture or again to the protection of the environment.

53 However, in view of the account of the facts in the decision at issue, the status as negotiators with regard to the social aspects within SFP, relied upon by the appellants, constitutes only a tenuous link with the actual subject-matter of that decision, so that the position of the appellant is not comparable to that in Van der Kooy v Commission and CIRFS and Others v Commission, cited above.

54 Finally, as the Court of First Instance pointed out in paragraph 43 of the contested order, the applicants did not participate in the procedure initiated under Article 93(2) of the Treaty.

55 Since the appellants have not adduced any evidence in support of their claims to show that the decision at issue is of individual concern to them, it must be concluded that the Court of First Instance has not committed an error in law in finding that they cannot be regarded as being individually concerned by that decision.

56 Since that conclusion suffices to justify as a matter of law the operative part of the contested order, the ground of appeal concerning the issue whether the appellants are directly affected is irrelevant, so that it is not necessary to examine it.

57 In those circumstances, the appeal must be dismissed.

Decision on costs

Costs

58 Under Article 69(2) of the Rules of Procedure, which is applicable to the appeal procedure by virtue of Article 118 of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the appellants have been unsuccessful, the appellants must be ordered to pay the costs.

Operative part

On those grounds,

THE COURT

hereby:

1. Dismisses the appeal;

2. Orders the works council of Société Française de Production, Syndicat National de Radiodiffusion et de Télévision CGT (SNRT-CGT), Syndicat Unifié de Radio et de Télévision CFDT (SURT-CFDT), Syndicat National Force Ouvrière de Radiodiffusion et de Télévision and Syndicat National de l'Encadrement Audiovisuel CFE-CGC (SNEA-CFE-CGC) to pay the costs.