Opinion of Advocate General Ruiz-Jarabo Colomer delivered on 9 November 1999

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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Opinion of the Advocate-General

I. Introduction

1. Various bodies representing the staff of an audiovisual production company which has received State aid are challenging the legality of the Commission decision which declared that aid incompatible with the common market, and have brought an action under the fourth paragraph of Article 173 of the EC Treaty (now, following amendment, Article 230 EC). I do not consider that a judicial decision is the appropriate way of expressing the social dimension of the Treaties in the context of proceedings. I do think, however, that the present appeal should help to shed light on the interpretation which the Court of Justice gives of the conditions which should be met by persons in order for them to bring an action against a decision addressed to another person which is of direct and individual concern to themselves. It is highly desirable that, as regards a legal interest in bringing proceedings, the present case-by-case approach should be replaced by clearer and more reliable general criteria.

II. Facts

2. According to the order of the Court of First Instance which is being challenged, the background to the present proceedings may be summarised as follows:

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

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 amounting to a total of FF 1 260 million.

The State subsequently carried out further aid operations under which it granted SFP FF 460 million in 1993 and FF 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.

By decision of 16 November 1994, the Commission initiated proceedings under Article 93(2) of the EC Treaty in respect of the last two payments of aid made in 1993 and 1994 and, in Communication 95/C 80/04, 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 prior authorisation. The French authorities submitted their comments by letter dated 16 January 1995.

By decision of 5 May 1996, which gave rise to Communication 96/C 171/03, the Commission extended the proceedings to include further public aid of FF 250 million, which the French authorities had announced on 19 February 1996.

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

On 2 October 1996 the Commission adopted Decision 97/238/EC concerning aid granted by the French State to the audiovisual production company Société Française de Production (hereinafter "the decision" or "the contested decision"). 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 FF 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 exemptions provided for by Article 92(3)(c) and (d) of the Treaty. Accordingly, it 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.

III. The procedure before the Court of First Instance

3. 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 under Article 173 of the EC Treaty against the decision. The Commission raised an objection of inadmissibility pursuant to Article 114(1) of the Rules of Procedure of the Court of First Instance and the applicants submitted their observations regarding that plea.

4. On 18 February 1998 the Court of First Instance issued an order in which it allowed the objection raised by the defendant, dismissed the application as inadmissible and ordered the applicants to pay the costs.

IV. The appeal

5. The organisations which brought the appeal claim, firstly, that the Court of First Instance wrongly interpreted the fourth paragraph of Article 173 EC when it ruled that the recognised bodies representing the employees of an undertaking receiving State aid are not directly and individually concerned by a Commission decision declaring such aid to be incompatible with the common market.

The applicants also consider that the Court of First Instance committed an error in law in ruling that the applicants in the case before it were not directly concerned by the Commission decision of 5 May 1996.

I shall deal with each of these arguments in turn, but first I shall consider an important question raised as a preliminary point by the applicants.

(a) The applicants' preliminary point

6. The applicants state as a preliminary that, unlike concentrations of undertakings where the Commission is acting exclusively in the area of competition, in the context of State aid it should be acting to meet the general objectives of the Community, which must include a high level of employment and of social protection (Article 2 EC). That obligation is the corollary of the Commission's power, in respect of the monitoring of State aid, to prohibit aid or impose general policy choices. By way of example, the applicants quote the case concerning the Fonds National pour lEmploi Français.

7. I agree that it is of crucial importance in this particular case to establish for whom the Community system of State aid is naturally intended. I shall revert to this below when I consider whether the applicants are individually concerned. Be that as it may, the applicants statements, although interesting, are more like proposals for legislative policy than an interpretation de lege lata of the current legal position.

8. There is nothing in either the treaties or the case-law of the Court of Justice which supports the idea that, so far as State aid is concerned, the Commission should act and monitor the legality of such aid in accordance with the general objectives of the Community, in particular the social objectives, to any greater extent than in other areas of Community activity, such as the monitoring of concentrations of undertakings. In both areas the primary objective of Community policy is to maintain an effective level of competition.

The lessons which may be learnt from the Fonds National pour l'Emploi Français case relied on by the applicants do not permit any other conclusion. In that case the Court merely upheld the legality of a Commission decision, establishing that specific intervention by the State which was funding the redundancy and redeployment costs resulting from a restructuring operation constituted aid but did not qualify for exemption under Article 92(3)(c) of the EC Treaty (now, following amendment, Article 87(3)EC). That provision states that certain aid may be authorised where it is intended to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest. It is apparent from the same judgment that the Commission took as its basis in applying that provision the reduction of capacity resulting from the restructuring of the undertaking, the fact that the laid-off workers were the main beneficiaries of the aid and the limited amount of aid granted. What confirms this conclusion is the wide amount of discretion enjoyed by the Commission when it rules on compatibility on the basis of inter alia social criteria.

9. At all events, even if Article 92(3)(c) of the EC Treaty could be interpreted unequivocally as permitting the authorisation of aid intended to improve the level of employment and social protection, it is doubtful whether on that ground alone it would be necessary for the Community system of State aid to be made subject to social policy considerations; it is even more difficult to see how, as a result, those actually benefiting under that social policy, in particular employees, would, in the context of Articles 92 and 93 of the EC Treaty (now Articles 87 EC and 88 EC), occupy a position similar to that occupied by those actually involved in competition, namely the undertakings. As a result the employees, or their recognised representatives, are not in theory entitled to challenge a decision unless they can provide proof that the authorisation or refusal of aid has not only effects which are limited to a particular undertaking or a particular sector, but also has or may have a negative effect on the level of employment or social protection throughout the Community or in a substantial part thereof.

Thus, although it may be true that the Court has recognised on several occasions that when the Commission assesses the compatibility of a system of aid with the common market it may take into account economic or social considerations, I do not believe, contrary to what the Commission states in its reply, that such considerations are generally open to judicial review. On the one hand, the Commission has wide discretionary powers in this field and on the other, Community law is not at present sufficiently precise to permit the creation of rights, either economic or social, which can be relied on by individuals in court.

10. Finally, I do not think that at present Community law requires that the general objective of a high level of employment and social protection should receive greater attention in the context of the European system of State aid than in the context of the monitoring of concentrations, for example.

(b) Whether the applicants are individually concerned

11. In the first limb of their single plea the applicants claim that the Court of First Instance committed an error in law in considering that the Commission decision was not of individual concern, within the meaning of the fourth paragraph of Article 173 of the EC Treaty, to the bodies representing the employees of an undertaking receiving aid. They allege that the Court of First Instance gave an incorrect definition of persons individually concerned and mis-assessed the circumstances of this case.

12. May I begin by summarising the grounds put forward by the Court of First Instance on the point of whether the applicants are individually concerned.

First, the Court of First Instance considered that the applicants could not properly rely on the reasoning contained in its judgments in Comité Central d'Entreprise de Perrier (hereinafter the Perrier judgment) and Comité Central d'Entreprise de Vittel (hereinafter the Vittel judgment), in which it held that a Commission decision declaring that a transaction bringing about a concentration was compatible with the common market was of individual concern to the recognised representatives of the employees of undertakings who might be affected by that transaction.

The Court of First Instance held that in both judgments it had ruled that the transaction was of individual concern to the recognised representatives of the employees of the undertakings concerned because they are expressly mentioned in Regulation No 4064/89 among the third parties showing a sufficient interest to be heard by the Commission during the administrative procedure, which distinguishes them from all other third parties. The Court of First Instance concluded that there were no comparable provisions as regards State aid.

The Court of First Instance went on to point out that the purpose of the procedure laid down in Article 93(2) of the EC Treaty 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. It is therefore 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. This would not however suffice to distinguish them individually in a similar way to the Member State to which the decision was addressed, since the mere fact of being a party concerned cannot suffice to distinguish the applicants individually from any other third party which is potentially concerned.

The Court of First Instance goes on to say that 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. Moreover, even supposing that they had, that fact alone could also not suffice to distinguish them individually just as in the case of the addressee of the decision, since they have not succeeded in demonstrating either that their position on the market is significantly affected by the aid to which the contested decision relates, within the meaning of the Cofaz judgment, nor that their position as negotiator is affected by that decision, within the meaning of the judgments in Van der Kooy and CIRFS.

It follows from the foregoing that, in the absence of any significant effect on a competitive position and any actual infringement of the entitlement which they 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 cannot claim any prejudice such as to demonstrate that their legal position is significantly affected by the contested decision. They cannot therefore be regarded as being individually concerned for the purposes of the fourth paragraph of Article 173 of the EC Treaty.

13. The applicants maintain that the case-law of the Court of Justice concerning the right of third parties concerned by a decision to bring proceedings differs depending on whether the third party is a competing undertaking or a trade association. In the first case, according to the judgment in Cofaz, the Court of Justice requires that the applicant undertakings position on the market should have been significantly affected by the aid to which the contested decision relates, whilst in the second case, according to the judgment in Van der Kooy, the trade association concerned should have had their position as negotiator affected by the contested decision. In such circumstances, it is necessary, for the sake of consistency, for the Community court to lay down appropriate criteria for the situation of bodies representing employees. Since the latter are concerned by the decision from the point of view of its social repercussions, in order to ascertain whether they are individually concerned it will be necessary to establish whether the decision has significantly affected their position as regards employment or, rather, since employees representatives are by definition parties to collective wage negotiations, whether it has affected their capacity to negotiate the social consequences of a decision.

14. The Commission for its part claims that the case-law relating to the legal interest of third parties in bringing proceedings in matters of State aid, as contained in the judgments in Cofaz and Van der Kooy, does not apply in this case, which comes under a different system. In both the cases mentioned the applicants intervened as operators or negotiators in the competitive relationships which the Community rules on State aid seeks to protect. To extend the perimeter of the more or less prescribed circle of persons covered by the fourth paragraph of Article 173 of the EC Treaty, by including, for example, the various creditors of the recipient undertaking (banks, suppliers, customers) or its internal representative bodies (representing the management, the staff and the shareholders), would be to treat the proceedings as a popular action, which would have prejudicial consequences as regards both the procedure and the substance. Apart from that, the Commission is in agreement with the content of the Court of First Instances contested order.

15. In order to interpret the fourth paragraph of Article 173 of the EC Treaty, it is appropriate to begin from the basis that the Treaty established a system of restricted access to review of the legality of decisions of the institutions. Only the cumulative conditions that a person to whom the decision is not addressed should be directly and individually concerned confers on that person the right to bring proceedings. Since it is necessary for

both those conditions to be met, the Court of Justice has, in the majority of cases which it has decided, merely verified whether at least one of them is fulfilled in the case before it. If this is not so, on clear grounds of procedural economy, it does not examine to see whether the other condition is fulfilled. In spite of the order of the provisions of the Treaty article concerned, the Court has generally preferred to consider the requirement of individual concern. This is a wise option. The concept of a third party being individually concerned permits in principle greater abstraction than the concept of direct concern. The establishment of criteria on which to base the definition of theoretical categories of individuals concerned by a decision seems to make it easier to achieve the objective of legal certainty that must govern any provision concerning access to judicial review than defining the direct nature of such concern, which depends to a greater extent on the circumstances of each case. Moreover, in the field at issue, the question whether the authorisation or prohibition of a particular State aid is of direct concern to a particular person is by its very nature more hypothetical and, consequently, more difficult to submit to judicial review.

16. The Court has consistently held, since the judgment in Plaumann in 1963, that in order to be entitled to bring proceedings under the fourth paragraph of Article 173 of the EC Treaty, persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision 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 and by virtue of those factors it distinguishes them individually just as in the case of the person addressed.

It has been said, not without reason, that the definition of individual concern given by the Court of Justice moves the crucial question towards the identification of attributes or circumstances which are likely to single out particular individuals. Be that as it may, the way the Court of Justice has preferred to proceed is to analyse the merits of each case in order to ascertain whether the necessary requirements are met. It should be pointed out that when making that analysis the Court tends to base its assessment on factual situations in order to ascertain whether the third party in question is individually concerned, leaving aside the more abstract concept of specific qualities. The Court of Justice uses the latter almost exclusively to dismiss the existence of individual concern, which is probably the reason why its judgments have reflected a case-by-case approach.

17. In the context of Article 93 of the EC Treaty the various third parties which the Court of Justice has acknowledged were individually (and directly) concerned may be classified, for purposes of analysis, into three groups: (a) undertakings currently or potentially in receipt of the State aid in question, (b) competitors of the recipient undertaking and their trade associations, and (c) certain associations of economic operators concerned in their capacity as a negotiator. These are, at all events, persons who are specified, or are at least capable of being specified, in relation to the disputed measure.

18. It is generally acknowledged that an undertaking which is, or is potentially, in receipt of aid whose compatibility with the common market is the subject of a Commission decision is entitled to bring proceedings.

19. Undertakings, or associations of undertakings, which are in competition with the recipient can demonstrate that the contested decision is of individual concern to them if they have actively participated both in shaping policy in connection with the aid and in the procedure provided for in Article 93(2) of the EC Treaty or if, having taken part in that procedure, their position on the market is significantly affected by the aid , or even where the Commission has considered that aid is compatible with the common market without initiating that procedure, provided that the applicant's interests may be affected by the grant of the aid.

20. Although the Court of Justice has preferred not to give a categorical ruling, I think one may say generally and fairly certainly that any undertaking in genuine competition with an undertaking in receipt of State aid is entitled to bring an action for annulment against a decision relating to such aid where its position on the market might be prejudiced if the aid were granted. Indeed, since within a system of free competition any advantage granted to one undertaking has the effect of prejudicing its competitors, it follows that the latter cannot be any less directly and individually concerned by the aid than the undertaking to which it has been granted.

21. It is true that the Court of Justice seems to require in the majority of cases that the undertaking claiming entitlement to bring proceedings should have taken some part in the preliminary administrative phase, either by applying for proceedings to be instigated or by submitting observations, or at least that it should have been entitled to take part by reason of belonging to the group of "parties concerned" envisaged in Article 93 of the EC Treaty. However, that condition should not, to my mind, be interpreted as an additional requirement in order to be in a position to bring proceedings, which would be contrary to the provisions of the fourth paragraph of Article 173 of the EC Treaty. That would be tantamount to adding a requirement which is not contained in the Treaty. It would be strange to say the least if entitlement to the substantive right to bring specific proceedings were made subject to the granting of certain procedural prerogatives. This is why I think the Court of Justice regards such procedural prerogatives rather as indicators that the persons in whom they are vested are individually concerned in relation to any other undertaking.

22. It is clear that the applicant bodies in this case do not belong, nor do they claim to belong, to categories comparable to those of the recipients of the aid or of competing undertakings. It is necessary therefore to examine the other cases in which the Court of Justice has recognised a legal interest in bringing proceedings under the fourth paragraph of Article 173 of the EC Treaty.

23. Thus, besides the clear rulings referred to above, which quite logically favour the persons who are naturally involved in free competition, the Community judicature, again in the context of State aid, has recognised that there are some situations in which persons who are third parties in relation to the person to whom the decision is addressed may be protected under the fourth paragraph of Article 173 of the EC Treaty, but it is not always easy to bring such situations within a coherent system. The judgments in Van der Kooy and CIRFS in particular demonstrate this.

24. It seems appropriate to point out at this stage of the analysis that the Court of Justice does not in principle recognise a corporate interest in bringing proceedings. An organisation whose purpose is to defend the collective interests of a category of individuals cannot be regarded as being directly and individually concerned by a decision which affects the general interests of that category. When trade associations bring an action for annulment they do not therefore enjoy any greater prerogatives than those of the individual undertakings which they represent. The same applies as regards the employees representative bodies, which do not have a specific legal interest in bringing proceedings even when they have taken part in the discussions which preceded the disputed measure.

25. In the Van der Kooy case, several Dutch horticulturalists as individuals, and a body established under public law representing their common interests, the Landbouwschap, brought an action against the Commission decision which declared aid granted in the form of a preferential tariff on natural gas for use in heated glasshouses incompatible with the common market. Advocate General Sir Gordon Slynn considered that the application should be held to be admissible as regards the horticulturalists since they were significantly affected by the decision which required the aid to be abolished, and inadmissible as regards the Landbouwschap, in respect of which he referred to the case-law concerning a "corporate" interest in bringing proceedings, as mentioned above. The outcome proposed by the Advocate General therefore came within the system of case-law which I described above. The Court of Justice did not share his opinion.

As regards the applicant horticulturalists, the Court of Justice held that the Commission decision concerned them solely because of their objective status as professional horticulturalists established in the Netherlands who were entitled to receive the preferential tariff for gas in the same way as any other horticulturalist in the same situation. The decision was therefore, as far as they were concerned, a measure of general application covering situations which were determined objectively and entailed legal effects for categories of persons envisaged in a general and abstract manner who could not be regarded as being individually concerned by the contested decision. This conclusion inevitably gives the impression that the conditions required in order to be regarded as individually concerned vary according to the number of recipients of the aid, and it seems all the more strange since the case concerned in particular the recovery of aid already granted, which meant it was possible to identify all the recipients.

So far as the Landbouwschap was concerned, the Court of Justice held that the body in question had taken an active part in the procedure under Article 93(2) of the EC Treaty and was one of the parties to the contract which established the preferential tariff. It was thus entitled to bring proceedings because its position was affected as a negotiator of gas tariffs in the interests of the growers. It is difficult not see this ruling as recognition of a corporate interest in bringing proceedings, which the Court of Justice had expressly rejected.

26. Proof that the Van der Kooy judgment is not persuasive is provided by the Opinion delivered by Advocate General Lenz when similar questions were also raised in the CIRFS case cited above. In that case the CIRFS, the Association of the main international manufacturers of synthetic fibres, and several undertakings in that sector individually, contested the legality of a Commission decision not to initiate the procedure provided for in Article 93(2) in respect of a project to grant aid. The Advocate General suggested that the application by the CIRFS should be ruled inadmissible according to the principles regarding the locus standi of trade associations, and that the action by one of the applicant undertakings which had taken part in the proceedings resulting in the contested refusal should be ruled inadmissible. In the view of Advocate General Lenz, the reason the Court of Justice allowed the action by the Landbouwschap in the Van der Kooy case was that the body concerned could be equated in a certain way to the authority which granted the aid.

The Court of Justice, however, preferred to make clear that the CIRFS had pursued, in the interest of those manufacturers, a number of actions connected with the policy of restructuring that sector. In particular it had been the Commissions interlocutor with regard to the introduction of the discipline and its extension and adaptation. Furthermore, during the pre-contentious procedure CIRFS had actively pursued negotiations with the Commission, in particular by submitting written observations to it and by keeping in close contact with responsible departments. The position of CIRFS in its capacity as negotiator of the discipline was therefore affected by the contested decision.

On grounds of procedural economy, the Court of Justice ruled that there was no need to consider whether the other applicants were entitled to bring proceedings.

27. The Van der Kooy judgment thus consolidated seems to have opened up a new way for third parties to bring actions against decisions of the institutions. In the specific area of State aid, it is not only economic operators whose position on the market is significantly affected by the relevant decision who are entitled to bring an action for annulment, but also persons who have actively participated in the procedure for adopting the decision, or the legal rules relating to it, where their position as negotiator is affected.

28. I admit that I do not understand how the interest of a mere negotiator, who has no connection with the process of free competition, warrants more legal protection than so many other legitimate interests involved. In such circumstances, it is understandable that the applicants who lodged the appeal should consider that the Court of First Instance should define admissibility criteria appropriate to the situation of bodies representing employees. However, if this were so it would be necessary to accept that any legitimate interest should give entitlement to bring an action for annulment, contrary to the provisions of the fourth paragraph of Article 173 of the EC Treaty and the case-law of the Court of Justice. Moreover, the Court could not accept merely ruling on a case-by-case basis without seeking a degree of abstraction in the reasoning, with the attendant risk of depriving judicial decisions of the necessary predictability.

29. In such circumstances, I think it is appropriate to lay down a general criterion common to both the situations giving grounds for admissibility which I have described above: the situation of competing undertakings and the situation of certain persons having authority to negotiate. As we have seen, whilst in the first case the Court has

taken into consideration the protection of procedural rights, in the second case it has focused on the applicants participation in the shaping of the decision. So, as a general rule, the third party individually concerned may be defined according to his objective cooperation in the shaping of the decision which it is his intention to challenge. In other words, the persons whom the institution which drafted the decision takes into account or rather those who in law it should have taken into account, are regarded as being individually concerned by the decision.

This is what Advocate General Lenz thought when, in his Opinion in the CIRFS case, he considered the significance to be given to the applicant's intervention in the case from the point of view of his legal interest in bringing proceedings under the fourth subparagraph of Article 173:

I take the view that, in the first place, this shows a close connection with the examination of the protective aim peculiar to the competition rule of which the procedural guarantees are the expression. In addition, this protection under the applicable provisions must be effectuated precisely through the participation of the party concerned in the administrative procedure. In that event, the Community authority has to take account of that party's arguments - not only in the interest of the proper application of Community law but also in its own interest.

30. The same reasoning may be extended to organisations which are entitled under Community law to participate as negotiators in the preparation of a decision. As in the case of procedural rights, their individual interest does not stem from prior intervention in the procedure, a circumstance which is extraneous to the decision on the merits of the case; the reason why they are individually concerned (and thus are entitled to bring proceedings), and why they are taking part in the rest of the administrative procedure, is that the Community institution is bound by the obligation to consider the situation of particular persons when it adopts a decision.

31. I think that this is how the two relevant judgments in Perrier and Vittel, cited above, delivered by the Court of First Instance in 1995 should be interpreted. Although they were delivered in a different legal context, that of control of concentrations, they provide criteria which are useful in the present analysis.

In both cases it was a matter of ascertaining whether the recognised representatives of the employees of the undertaking which was taken over were entitled to challenge a Commission decision concerning the compatibility of the take-over in question with the common market.

The Court of First Instance stated that the instrument governing Community review of concentrations, Regulation No 4064/89, on the one hand requires the Commission to make an economic assessment of the concentration in question, which may involve social considerations (thirteenth recital) and, on the other hand, expressly affirms the right of representatives of the employees of the undertakings concerned to be heard (Article 18(4)). In those circumstances, the situation of the employees of undertakings which are the subject of a concentration may be taken into consideration by the Commission when it adopts its decision. As regards the monitoring of concentrations, the express inclusion of the recognised representatives of the employees among the third parties who are sufficiently concerned to be heard by the Commission is sufficient therefore to single them out in relation to any other third party without the need for them to establish for the purposes of assessing the admissibility of the action whether, at least prima facie, the concentration is likely to conflict with the social objectives of the Treaty.

The Court of First Instance concludes by stating, correctly, that the locus standi of third parties who have sufficient interest in bringing proceedings is not necessarily dependent upon their participation in the administrative procedure. Such participation would at most imply a presumption in favour of the admissibility of the action.

32. It is apparent therefore that in the case of concentrations the Commission is required, under Regulation No 4064/89, to take into consideration in particular the situation of the staff of the undertakings affected. That group of persons is, for that reason, singled out in the same way as the one to which the addressee of the Commission decision belongs. In each of the Commissions fields of action, in fact, persons who, during the procedure which led up to the decision have the right to be heard as regard its content, according to an express provision of the Treaty or of secondary legislation, are thereby distinguished from any other person whose legal situation might be affected by the decision concerned. They may therefore, under the fourth paragraph of Article 173 of the EC Treaty, seek review by the Community judicature not only in order to establish that their procedural rights have been observed but also that the decision adopted following that procedure is not vitiated by any manifest error of assessment or misuse of powers.

33. None of those conditions is met in the present case. As far as State aid is concerned, the scant legislation in force (essentially Articles 92 and 93 of the EC Treaty), unlike the situation as regards concentrations of undertakings, does not confer any particular right on employees representatives to be heard. Moreover, there is no provision obliging the Commission, when it assesses whether aid is compatible with the common market, to take specifically into consideration the situation of the employees, their interests and, more generally, any social considerations.

34. In those circumstances, the Court of First Instance acted in accordance with the law when it concluded that, in the absence of any significant effect on a competitive position or of any infringement of the entitlement which they have as parties concerned within the meaning of Article 93(2) of the Treaty to submit their comments during the procedure before the Commission, the applicants cannot claim any prejudice such as to demonstrate that their legal position is significantly affected by the contested decision, and they cannot therefore be regarded as being individually concerned for the purposes of the fourth paragraph of Article 173 of the EC Treaty.

(c) Whether the applicants are directly concerned

35. In the second limb of their single plea, the applicants claim that the Court of First Instance committed an error in law when it held that the contested decision did not concern them directly. In their opinion, the

withdrawal of aid and the restructuring of the undertaking that was to accompany it would inevitably lead to loss of jobs or social benefits which would in any event prejudice the rights of the employees who are collectively represented by the applicants.

36. I shall begin by restating the arguments of the Court of First Instance and summarising very briefly the main arguments of the parties. I shall not fail to point out to the Court of Justice, however, that if it considers, as I do, that the applicants cannot in this case claim to be directly concerned by the decision which they seek to challenge it will not be necessary, in the interest of procedural economy, to analyse also whether the conditions for direct prejudice are met.

37. In its order, the Court of First Instance observes firstly that the contested decision will have the consequences which the applicants claim only if measures which are independent of the Commission's decision are adopted by the undertaking itself or by the employers and employees, and they have a margin for negotiation to do so. As regards the public-sector collective wage agreement, even if notice were given to terminate the agreement, employees of the undertaking concerned would retain the individual benefits that they acquired under the agreement if the latter was not replaced by a new agreement within the time-limits laid down by the law. In any event, the mere fact that a measure may exert an influence on the applicants' substantive position cannot suffice to allow them to be regarded as directly concerned.

The Court of First Instance goes on to say that, even in the absence of the contested Decision, the employees would not be protected by any guarantee against loss of jobs or benefits, which shows that there is no direct link between the contested Decision and the alleged damaged to the interests of those employees.

Finally, 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.

38. In their appeal to the Court of Justice the applicants maintain that the margin for negotiation which the undertaking and the employers and employees have exists as regards any measure of an economic nature. Undertakings competing with another undertaking which is in receipt of aid may also react by reducing their production costs, for example, without that having any effect on the fact that they are directly concerned. As regards the collective wage agreement and the possibility of terminating it, the applicants state that under French law only rights acquired individually may be retained, and then only for one year.

The applicants therefore consider that the Court of First Instance committed an error in law in considering that the contested decision does not impose any conditions directly prejudicing the interests of the employees.

39. According to the Commission, its decision cannot be of direct concern to employees since it by no means prejudges provisions of a social nature which are to be adopted by the SFP, and merely regrets the absence of a restructuring plan. The many options which could be chosen in order to draw up that plan make it a separate decision from the one adopted by the Commission. The defendant adds that the applicants cannot be directly concerned since they are not in a position to point to what specific consequences it might involve that would affect them directly. As to whether or not the advantages contained in the collective wage agreement are to be retained, the Commission states that the contested decision does not require them to be withdrawn.

40. For my part, I take the view that the conclusion which the Court of First Instance reached on the plea, that the applicants are directly concerned, is in accordance with the law. It is not inappropriate to point out once again that the Treaty generally prohibits any State aid which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods. Under Article 93(2) of the EC Treaty the Commission is competent, when it has found that aid is incompatible with the common market, to decide that the State concerned must abolish or alter it within a specified period of time. This power to alter or abolish, in order to have legal effect, may include an obligation to require repayment of aid granted in breach of the Treaty.

In this particular case, however, the Commission merely declared, in Articles 1 and 2 of its decision of 2 October 1996, that the aid of FF 1 110 million granted to the SFP was illegal and incompatible with the common market and ordered the French Government to recover it from SFP, together with the relevant interest. The legal effects of the contested decision are limited to those terms. The Commission did not require any staff reduction or the withdrawal of social benefits from the undertakings employees, nor was it empowered to require such measures. The Commission merely established, in accordance with the guidelines to which it had itself decided to use to govern its action, that the conditions required in order to apply the exemption contained in Article 92(3)(c) of the EC Treaty concerning aid which may be granted to undertakings in difficulty were not met and, in particular, that no restructuring plan had been drawn up which would enable the States financial contribution to be removed from the category of operating aid. The other observations contained in the decision (concerning, for example, the need to abolish the collective wage agreement or to seek new partners) do not therefore constitute additional obligations on the person to whom the decision is addressed, since the Commission, as has been said, does not have any powers in this respect. They are more akin to economic recommendations and have no legal effect. Even if they were able to contribute to the formation of the Commissions wishes, those observations come within the wide margin of discretion which the Commission must be allowed in connection with the monitoring of State aid.

41. In those circumstances it seems unnecessary to analyse in detail each of the alleged consequences, since it is clear that the applicants have not demonstrated, or even adduced any appropriate evidence, that the Commission directly affects the interests of the employees. The loss of jobs or the renegotiation of the collective wage agreement are dictated in some cases not as a result of the Commission's decision but as a consequence of the undertakings position in a competitive market. It must therefore be said, to paraphrase the terms of the Alcan judgment, that the annulment of the contested decision cannot confer on the applicants the benefits which

they seek, in that authorisation of the aid in the absence of a restructuring plan would not dispel the risk of the loss of jobs and social benefits.

42. The Court of First Instance therefore interpreted the fourth paragraph of Article 173 correctly when it held 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.

V. Costs

43. Under the second subparagraph of Article 69(3) of the Rules of Procedure, which applies to an appeal under Article 118, the unsuccessful party is to be ordered to pay the costs. Consequently, if, as I propose, the plea relied on by the applicants is dismissed, they should be ordered to pay the costs of the proceedings.

VI. Conclusion

44. In the light of the foregoing I propose that the Court should dismiss the appeal against the Order of the Court of First Instance of 18 February 1998 which dismissed as inadmissible the action for the annulment of Commission Decision 97/238/EC and expressly order the applicants to pay the costs.