JUDGMENT OF THE COURT (Grand Chamber)

13 December 2005 *

In Case C-78/03 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 19 February 2003,

Commission of the European Communities, represented by J. Flett and V. Kreuschitz, acting as Agents, with an address for service in Luxembourg,

applicant,

the other parties to the proceedings being:

Federal Republic of Germany, represented by M. Lumma, acting as Agent,

intervener at first instance,

* Language of the case: German.

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

applicant at first instance,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Schiemann and J. Makarczyk, Presidents of Chambers, C. Gulmann (Rapporteur), A. La Pergola, J.-P. Puissochet, P. Kūris, E. Juhász, E. Levits and A. Ó Caoimh, Judges,

Advocate General: F.G. Jacobs,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 24 February 2005,

gives the following

Judgment

1 By its appeal, the Commission of the European Communities seeks to have set aside the judgment of the Court of First Instance of the European Communities of 5

December 2002 in Case T-114/00 *Aktionsgemeinschaft Recht und Eigentum* v *Commission* [2002] ECR II-5121 (hereinafter 'the contested judgment'), which dismissed the objection of inadmissibility raised by it against the action brought by Aktionsgemeinschaft Recht und Eigentum eV (Association for the Protection of Law and Property Rights, hereinafter 'ARE') for annulment of the Commission decision of 22 December 1999 authorising State aid under Articles 87 and 88 (ex Articles 92 and 93) of the EC Treaty (OJ 2000 C 46, p. 2, hereinafter 'the contested decision') and relating to a scheme for the acquisition of land in the new German Länder.

Legal background

2 Under Article 87(1) EC:

'Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.'

3 The first subparagraph of Article 88(2) EC provides:

'If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 87, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.'

4 Article 88(3) EC is worded as follows:

'The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 87, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.'

Facts

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

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

7 Under the Ausgleichsleistungsgesetz (Compensation Act), which constitutes Article 2 of the Entschädigungs- und Ausgleichsleistungsgesetz (Indemnification and Compensation Act, 'the EALG') and entered into force on 1 December 1994, certain agricultural land situated in the former German Democratic Republic and held by

the Treuhandanstalt, the public-law body responsible for restructuring undertakings of the former German Democratic Republic, could be acquired by various categories of persons for less than half its actual market value. The persons falling within those categories, on a priority basis and provided that they were resident there on 3 October 1990 and had, on 1 October 1996, a long-term lease in respect of land formerly owned by the State and to be privatised by the Treuhandanstalt, are those who held a farming lease, the successors to the former agricultural cooperatives, resettled persons who were expropriated between 1945 and 1949 or during the period of the German Democratic Republic and who, since then, have again been farming land, and farmers described as newly settled who did not previously own any land in the new Länder. Those categories also cover, on a secondary basis, former owners expropriated before 1949 who have not benefited from restitution of their property and have not resumed agricultural activity locally. The latter may acquire only land not purchased by beneficiaries on a priority basis.

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

9 Following complaints lodged by German nationals and nationals of other Member States concerning that land acquisition scheme, the Commission initiated, on 18 March 1998, a review procedure under Article 93(2) of the EC Treaty (now Article 88(2) EC) (OJ 1998 C 215, p. 7).

10 By Decision 1999/268/EC of 20 January 1999 on the acquisition of land under the German Compensation Act (OJ 1999 L 107, p. 21, 'the decision of 20 January 1999'), adopted following that formal review procedure, the Commission declared that the land acquisition scheme was incompatible with the common market in so far as the aid that it granted was tied to residence on 3 October 1990 and exceeded the maximum intensity rate for aid for the acquisition of agricultural land, that rate

having been fixed at 35% for agricultural land in areas other than those that were less favoured within the meaning of Council Regulation (EC) No 950/97 of 20 May 1997 on improving the efficiency of agricultural structures (OJ 1997 L 142, p. 1). With regard, in particular, to the condition of residence on 3 October 1990 laid down by the Compensation Act, the Commission found as follows:

'... this law gives natural and legal persons in the new Länder an advantage over persons without a registered office or residence in Germany and is therefore liable to contravene the ban on discrimination under Articles [43 EC] to [48 EC].

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

This condition therefore had the effect of excluding those persons not meeting the criterion that their (principal) place of residence be in the territory [of the former German Democratic Republic].

...

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

...

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

...

However, to achieve this objective, there was no need at all for a qualifying date for residence on 3 October 1990 since, in accordance with Paragraph 3(1) of the Ausgleichsleistungsgesetz, these newly settled legal or natural persons were allowed to participate in the land acquisition scheme if on 1 October 1996 they had a long-term lease on previously State-owned land to be privatised by the Treuhandanstalt.

In the course of its main examination, the Commission was expressly informed by parties to the procedure that by far the majority of long-term lease agreements had been concluded with east Germans. ...

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

11 By Articles 2 and 3 of the decision of 20 January 1999, the Commission ordered the Federal Republic of Germany to recover the aid declared incompatible with the common market and already granted and not to grant any further aid under that scheme.

12 The operative part of that decision is worded as follows:

'Article 1

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

Article 2

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

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

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

Article 3

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

...'

13 Following the adoption of the decision of 20 January 1999, the German legislature produced the draft Vermögensrechtsergänzungsgesetz (Act supplementing the Law of Property) abolishing and amending some of the detailed rules of the land acquisition scheme. In particular, it is clear from that draft that the requirement of local residence on 3 October 1990 was abolished and that the intensity rate of the aid was fixed at 35% (in other words, the purchase price for the land in question was fixed at the actual value less 35%). The main requirement for the acquisition of land at a reduced price would henceforth be possession of a long-term lease.

14 That new draft law was notified to the Commission and authorised by the contested decision without recourse to the review procedure provided for in Article 88(2) EC. The Commission finds, at point 123, as follows:

'In view of the assurances provided by the German authorities, the Commission has clearly established that sufficient land is available to correct any discrimination without cancelling the contracts concluded under the original EALG. In so far as the

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

15 By that finding, the Commission rejected a number of criticisms which it had received from several parties concerned following the decision of 20 January 1999 to the effect that the land acquisition scheme was still, even in the absence of the requirement of local residence on 3 October 1990, discriminatory by reason of the requirement of possession of a long-term lease, a requirement which would have the effect of maintaining the residence criterion and making the area of land available insufficient.

16 Following authorisation of the land acquisition scheme by the contested decision, the draft Vermögensrechtsergänzungsgesetz was adopted by the German legislature.

Procedure before the Court of First Instance and the contested judgment

17 By application received at the Registry of the Court of First Instance on 2 May 2000, ARE brought an action for annulment of the contested decision.

18 The Commission, by a separate document lodged at the Registry of the Court of First Instance on 20 June 2000, raised an objection of inadmissibility alleging, first, that the contested decision is not of direct and individual concern to ARE and, second, that ARE had engaged in abuse of process.

19 By order of 9 November 2000, the President of the Fourth Chamber (Extended Composition) of the Court of First Instance granted leave to the Federal Republic of Germany to intervene in support of the form of order sought by the Commission.

20 By the contested judgment, the Court of First Instance dismissed the Commission's objection of inadmissibility.

21 In paragraph 45 of the contested judgment it states that the contested decision was taken on the basis of Article 88(3) EC, without the Commission's having initiated the formal review procedure provided for by Article 88(2) EC. The Court of First Instance also stated that ARE should therefore be considered to be directly and individually concerned by the contested decision if, first, it is seeking to safeguard the procedural rights provided for by Article 88(2) EC and, second, if it appears that it has the status of a party concerned within the meaning of that paragraph.

22 In paragraph 47 of the contested judgment, the Court of First Instance states that '[t]he applicant has not expressly alleged infringement by the Commission of the obligation to initiate the [formal review] procedure under Article 88(2) EC, preventing the exercise of the procedural rights provided for thereby. However, the pleas for annulment put forward in support of the present action, and in particular that based on breach of the prohibition of discrimination on grounds of nationality, must be construed as seeking to establish that the measures at issue pose serious

difficulties as regards their compatibility with the common market, difficulties which place the Commission under an obligation to initiate the formal [review] procedure.'

23 The Court of First Instance concluded in that respect, in paragraph 49 of the contested judgment, that 'the action must therefore be construed as alleging that the Commission failed, despite the serious difficulties posed by the assessment of the compatibility of the aid in question, to initiate the formal review procedure provided for by Article 88(2) EC and as seeking, in the final analysis, to safeguard the procedural rights conferred by that paragraph.'

24 As regards the question whether ARE is a party concerned within the meaning of Article 88(2) EC, the Court of First Instance stated, in paragraph 52 of the contested judgment, that '[s]ince the applicant is an association, it must first be considered whether its members have the status of "parties concerned" within the meaning of Article 88(2) EC. An association formed for the protection of the collective interests of a category of persons cannot, in the absence of special circumstances, such as the role which it could have played in a [formal review] procedure leading to the adoption of the measure in question (see paragraph 65 et seq. below), be considered to be individually concerned, for the purposes of the fourth paragraph of Article 230 EC, by a measure affecting the general interests of that category, and is therefore not entitled to bring an action for annulment on behalf of its members where the latter cannot do so individually (Joined Cases 19/62 to 22/62 *Fédération nationale de la boucherie en gros et du commerce en gros des viandes and Others* v *Council* [1962] ECR 491, and Case C-321/95 P *Greenpeace Council and Others* v *Commission* [1998] ECR I-1651, paragraphs 14 and 29; order in Case C-409/96 P *Sveriges Betodlares* [*Centralförening*] *and Henrikson* v *Commission* [1997] ECR I-7531, paragraph 45; [Case T-69/96] *Hamburger Hafen- und Lagerhaus* [*and Others* v *Commission* [2001] ECR II-1037], paragraph 49).'

25 The Court of First Instance found, in paragraph 63 of the contested judgment, that ARE 'must be considered to be entitled to bring the present action for annulment on behalf of such members who, as parties concerned within the meaning of Article 88 (2) EC, could have done so individually.'

26 Paragraphs 65 to 70 of the contested judgment are worded as follows:

'65 Moreover, the applicant can be considered to be individually concerned by the contested decision in another respect, inasmuch as it claims a specific legal interest in bringing proceedings because its negotiating position is affected by that decision (Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219, paragraphs 19 to 25, Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraphs 29 and 30; [Case T-380/94] *AIUFFASS and AKT* [[1996] ECR II-2169], paragraph 50, and Case T-55/99 *CETM* v *Commission* [[2000] ECR II-3207], paragraph 23).

66 The applicant played an active part in the formal review procedure which led to the adoption of the decision of 20 January 1999 and in the informal discussions relating to its implementation, doing so in many different active ways and producing scientific reports in support of its case. The Commission itself conceded that the applicant influenced the decision-making process and that it was a useful source of information.

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

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

69 That being the case, in the light of that connection between the two decisions and of the role of significant consulting partner played by the applicant during the formal procedure concluded by the decision of 20 January 1999, the individual identification of the applicant as regards that decision necessarily extended to the contested decision, even though the applicant was not involved in the examination by the Commission which led to the adoption of the latter decision. That finding is not affected by the fact that, in this case, the decision of 20 January 1999 was not, in principle, contrary to the interests defended by the applicant.

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

Procedure before the Court of Justice and the forms of order sought

27 In its appeal, the Commission claims that the Court of Justice should:

— annul the contested judgment;

— give a final decision on the substance and dismiss the action brought by ARE as inadmissible on the ground that ARE is not individually concerned by the contested decision within the meaning of the fourth paragraph of Article 230 EC, or

— refer the case back to the Court of First Instance with regard to the question of admissibility, and

— order ARE to pay the costs of the proceedings at both instances.

28 ARE contends that the Court of Justice should:

— dismiss the appeal in its entirety, and

— order the Commission to pay the costs of the appeal.

29 By a document received at the Registry of the Court of Justice on 21 May 2003, the Federal Republic of Germany informed the Court that it did not wish to submit any observations additional to those contained in the Commission's appeal and that it waived the right to lodge separate submissions.

The claim for annulment of the contested judgment

30 In support of its appeal, the Commission puts forward seven pleas alleging that the Court of First Instance erred in law by:

— finding that, despite its general scope, the decision is of individual concern to ARE and adversely affects it or certain of its members by reason of attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons;

— basing its findings on the fact that, with regard to the condition that a measure must be of individual concern, the identifying criterion based on the relationship of competition differs according to whether the decision concerned was adopted under Article 88(2) EC or under Article 88(3) EC, so that different criteria apply with regard to admissibility;

— applying a criterion of relationship of competition whereby there must be an adverse effect on ARE's competitive position, which is different and less strict than the test laid down by the Court of Justice, by virtue of which there must be an appreciable adverse effect on such a position;

— raising, on its own initiative and without hearing the views of the Commission, the intervener at first instance or ARE, a plea not contained in the application;

— finding that ARE's position as negotiator was affected and that ARE must therefore be regarded as individually concerned by the contested decision;

— by not indicating with sufficient clarity the reasons on which the contested judgment is based, and

— by finding in a contradictory manner, on the one hand, that in procedures governed by the legislation on aid, ARE was not heard by the Commission and yet, on the other hand, that it was heard to such an extent that it acquired the status of negotiator.

Preliminary observations

31 Before the pleas on which the appeal is based are examined, it is appropriate to refer to the relevant rules concerning the standing to bring proceedings against a Commission State aid decision of a party other than the Member State to which that decision is addressed.

32 Under the fourth paragraph of Article 230 EC, a natural or legal person may institute proceedings against a decision addressed to another person only if it is of direct and individual concern to the former.

33 According to settled case-law, 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 distinguishes them individually just as in the case of the person addressed (see, among others, Case 25/62 *Plaumann* v *Commission* [1963] ECR 95; Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, paragraph 20, and Case C-298/00 P *Italy* v *Commission* [2004] ECR I-4087, paragraph 36).

34 In the case of a Commission decision on State aid, it must be borne in mind that, in the context of the procedure for reviewing State aid provided for in Article 88 EC, the preliminary stage of the procedure for reviewing aid under Article 88(3) EC, which is intended merely to allow the Commission to form a prima facie opinion on the partial or complete conformity of the aid in question, must be distinguished from the examination under Article 88(2) EC. It is only in connection with the latter examination, which is designed to enable the Commission to be fully informed of all

the facts of the case, that the EC Treaty imposes an obligation on the Commission to give the parties concerned notice to submit their comments (*Cook* v *Commission*, paragraph 22, Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 16, and Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 38).

35 Where, without initiating the formal review procedure under Article 88(2) EC, the Commission finds, on the basis of Article 88(3) EC, that aid is compatible with the common market, the persons intended to benefit from those procedural guarantees may secure compliance therewith only if they are able to challenge that decision before the Community judicature (*Cook* v *Commission*, paragraph 23, *Matra* v *Commission*, paragraph 17, and *Commission* v *Sytraval and Brink's France*, paragraph 40). For those reasons, the Court declares to be admissible an action for the annulment of such a decision brought by a person who is concerned within the meaning of Article 88(2) EC where he seeks, by instituting proceedings, to safeguard the procedural rights available to him under the latter provision (*Cook* v *Commission*, paragraphs 23 to 26, and *Matra* v *Commission*, paragraphs 17 to 20).

36 The parties concerned, within the meaning of Article 88(2) EC, who are thus entitled under the fourth paragraph of Article 230 EC to institute proceedings for annulment are those persons, undertakings or associations whose interests might be affected by the grant of the aid, in particular competing undertakings and trade associations (see, in particular, *Commission* v *Sytraval and Brink's France*, paragraph 41).

37 On the other hand, if the applicant calls in question the merits of the decision appraising the aid as such, the mere fact that it may be regarded as concerned within the meaning of Article 88(2) EC cannot suffice to render the action admissible. It must then demonstrate that it has a particular status within the meaning of the *Plaumann* v *Commission* case-law. That applies in particular where the applicant's

market position is substantially affected by the aid to which the decision at issue relates (see, to that effect, the judgment in Case 169/84 *Cofaz and Others* v *Commission* [1986] ECR 391, paragraphs 22 to 25, and the order in *Sveriges Betodlares Centralförening and Henrikson* v *Commission*, paragraph 45).

38 It is in the light of those legal factors that the pleas on which the Commission bases its appeal must be examined.

39 It is appropriate to examine the fourth and fifth pleas first.

The fourth plea

Arguments of the parties

40 By its fourth plea, the Commission claims that, in taking the view that ARE seeks by its action to safeguard procedural rights that it derives from Article 88(2) EC, the Court of First Instance introduced a new plea concerning breach of essential procedural requirements. Moreover, the Commission submits that it had no opportunity to exercise its rights of defence on that point.

41 ARE replies that, by construing its application as being directed against the failure to initiate a formal review procedure, the Court of First Instance complied with the principle of economy of procedure. It circumscribed, in a manner favourable to the Commission, the subject-matter of the initial claim made by ARE. ARE also contends that all its arguments concerning the substantive illegality of the contested

decision demonstrate the existence of 'serious difficulties' in finding that the aid in question is compatible with the common market. In any event, the Community judicature is entitled to consider on its own initiative the possibility of a breach of ARE's procedural rights through failure to initiate the formal review procedure provided for in Article 88(2) EC. Accordingly, the Commission's argument that it was deprived of any opportunity to defend itself, in connection with the plea concerning failure to initiate a formal review procedure, is irrelevant. Finally, the Commission fully contested the position of ARE's members as competitors of the beneficiaries of the aid and therefore their status as persons concerned in a formal review procedure, that status being of decisive importance in appraising whether individual harm has been suffered.

Findings of the Court

42 It is clear from paragraphs 3, 6, 8, 9, 66 and 68 of the contested judgment that:

— by its decision of 20 January 1999, following the review procedure under Article 88(2) EC, the Commission declared that the land acquisition scheme provided for by the EALG was incompatible with the common market in so far as the aid which it granted was tied to local residence on 3 October 1990 and exceeded the maximum intensity rate for aid for the acquisition of agricultural land, that rate having been fixed at 35% for agricultural land in areas other than those that are less favoured within the meaning of Regulation No 950/97. With regard, in particular, to the condition of local residence on 3 October 1990 laid down by the Compensation Act, the Commission found in particular as follows:

— that law gives natural and legal persons in the new Länder an advantage over persons without a registered office or residence in Germany and is therefore liable to contravene the prohibition of discrimination under Articles 43 EC to 48 EC;

— all Community citizens may perhaps have been able, de jure, to meet the requirement that they provide evidence of a principal place of residence in the territory of the former German Democratic Republic on 3 October 1990, but de facto it was met almost exclusively only by German nationals previously resident mainly in the new Länder;

— the attainment of the objective set by the legislature, namely the participation of east Germans in the land acquisition scheme, even if that objective is recognised as legitimate, would not, in practical terms, have been jeopardised if there had been no qualifying date of 3 October 1990;

— following that decision of 20 January 1999, the German legislature produced an amended version of the draft Vermögensrechtsergänzungsgesetz, from which it is clear in particular that the requirement of local residence on 3 October 1990 was abolished and that the intensity rate of the aid was fixed at 35% (in other words, that the purchase price for the land in question was fixed at the actual value less 35%). The main requirement for the acquisition of land at a reduced price would henceforth be possession of a long-term lease, a requirement already included among the conditions laid down by the EALG;

— that new draft law was notified to the Commission, which, by the contested decision, authorised it without initiating the review procedure provided for in Article 88(2) EC;

— ARE played an active part in the formal review procedure that led to the adoption of the decision of 20 January 1999 and in the informal discussions relating to its implementation, doing so in many different active ways and

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

— the contested decision concerns the implementation of the decision of 20 January 1999.

43 It is therefore common ground that ARE was able to, and did, submit observations in the context of the formal review procedure which led to the adoption of the decision of 20 January 1999 and that it was open to that association to argue, in that context, that the aid scheme set up by the EALG was incompatible with the common market, in particular because the grant of aid was subject to conditions liable to breach the prohibition of discrimination on grounds of nationality. It is also common ground that, by that decision, the Commission declared that the land acquisition scheme provided for by the EALG was incompatible with the common market, in particular in so far as the aid which it granted was conditional upon local residence on 3 October 1990, a condition liable to breach the prohibition of discrimination on grounds of nationality, and that, following that decision, the German legislature's draft law removing among other things the requirement of local residence on 3 October 1990 was authorised by the contested decision, which was concerned with implementation of the decision of 20 January 1999.

44 In those circumstances, there appears to be no objective basis for the findings of the Court of First Instance set out in paragraphs 47 and 49 of the contested judgment to the effect that, even in the absence of a plea expressly alleging breach by the Commission of its obligation to initiate the procedure provided for by Article 88(2) 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.

45 Indeed, such a reinterpretation of the application, which entails reclassification of its subject-matter, cannot be made solely on the basis of a finding of the kind contained in paragraph 47 of the contested judgment to the effect that the pleas in annulment on which the application was based, and in particular the plea alleging breach of the prohibition of all discrimination on grounds of nationality, were in reality seeking a declaration as to the existence of serious difficulties raised by the aid in question regarding its compatibility with the common market, difficulties which placed the Commission under an obligation to initiate the formal procedure.

46 Moreover, the Court of First Instance did not provide any support for its interpretation of the pleas put forward by ARE, which prompted it to identify the subject-matter of the application in the terms that it did.

47 However, an explanation of the basis for such an interpretation of those pleas was particularly necessary since, as the Court of First Instance indicated in paragraph 39 of the contested judgment, ARE claimed, in its application, that it had a particular interest in annulment of the contested decision in that, in the event of strict application of the principle of non-discrimination on grounds of nationality, a redistribution of land would be required and the members of ARE would have a better chance of gaining access to it, giving the impression that the plea alleging breach of the prohibition of all discrimination on grounds of nationality related to the substance of the contested decision and not to the failure to initiate the formal review procedure provided for by Article 88(2) EC.

48 Having regard to the foregoing, it must also be pointed out that the Commission was not in this case given an opportunity to respond to the plea alleging breach of ARE's procedural rights.

49 It follows that the Court of First Instance was wrong to consider that ARE had implicitly put forward a plea alleging failure by the Commission to fulfil its obligation to initiate the formal review procedure provided for in Article 88(2) EC.

50 Accordingly, the fourth plea put forward by the Commission in support of its appeal must be upheld.

The fifth plea

Arguments of the parties

51 As regards paragraphs 65 to 69 of the contested judgment, in which the Court of First Instance found that ARE was individually concerned by the contested decision on the ground that the latter affected its negotiating position, the Commission claims first that the Court of First Instance manifestly erred from the factual point of view, since that association never put forward that argument, and that it also erred in law because it is not entitled to attribute to applicants legal arguments which they themselves have not put forward. Next, the Commission contests the findings of the Court of First Instance to the effect that ARE's participation in the administrative procedure leading to the contested decision meant that ARE became a negotiator

with its own interest in bringing proceedings. Finally, by considering that the decision of 20 January 1999 was not contrary to ARE's interests, the Court of First Instance erred both in fact and in law.

52 ARE observes that, in its application to the Court of First Instance, it claimed that it had standing to bring proceedings in its own right and not by virtue of a right derived from that of its members, as a result of its position as an autonomous party, namely a professional association, with an interest in the formal review procedure that was not initiated by the Commission. ARE also contends that the Court of First Instance interpreted in a reasonable manner the concept of negotiator within the meaning of the case-law by considering that its active participation in the formal review procedure preceding the decision of 20 January 1999 fell within the scope of that concept.

Findings of the Court

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

54 However, according to the Commission, ARE never invoked its standing as negotiator with a view to securing recognition of its standing to bring an action against the contested decision. Moreover, that aspect of the Commission's argument is not explicitly contested by ARE.

55 In any event, it is important to note that the factors identified by the Court of First Instance as rendering ARE capable of being regarded as a person individually concerned by the contested decision, in that the decision affected its negotiating position, are not sufficient to establish any such standing.

56 In that connection, it must be pointed out that the fact that ARE participated actively in the formal review procedure leading to the adoption of the decision of 20 January 1999 and in the informal discussions concerning implementation of that decision, doing so in many different active ways and producing scientific reports in support of its case, that it had an important role as interlocutor during the procedure, that the contested decision is directly connected with the decision of 20 January 1999 and that the Commission itself conceded that ARE influenced the decision-making process and was a useful source of information, cannot be a basis for regarding ARE as a negotiator of the same kind as the Landbouwschap in *Van der Kooy and Others* v *Commission* or the International Rayon and Synthetic Fibre Committee (CIRFS) in *CIRFS and Others* v *Commission*.

57 The Landbouwschap had negotiated gas tariffs with NV Nederlandse Gasunie de Groningen (Netherlands) on behalf of market gardeners and was among the signatories to the agreement that established those tariffs, which were treated by the Commission decision at issue in that case as aid incompatible with the common market, and that decision was the subject of an action brought in particular by the Landbouwschap itself. As for the CIRFS, which was an association of the main international producers of synthetic fibres, it had been the Commission's interlocutor and had negotiated with it the establishment of 'discipline' in relation to aid for the synthetic fibre sector, under which the Commission had adopted a decision in which it found that certain aid granted by a Member State to a given company was not required to be notified in advance, and that decision was contested by the CIRFS.

58 ARE's role in the formal review procedure leading to the adoption of the decision of 20 January 1999, which goes no further than exercise of the procedural rights granted to parties concerned by Article 88(2) EC, cannot be assimilated to the role of the Landbouwschap or the CIRFS in the cases mentioned in paragraph 56 of the present judgment, which is sufficient for an association, as such, to have standing to attack a decision adopted by the Commission under Article 88(2) EC or Article 88(3) EC, addressed to a person other than that association.

59 In view of the foregoing, it must be held that the Court of First Instance erred in law by stating that ARE is individually concerned by the contested decision in that it is acting in pursuance of its own interest in bringing proceedings because its negotiating position was affected by that decision.

60 Accordingly, the fifth plea in law must be upheld.

61 Since the fourth and fifth pleas in law have been upheld in this appeal, it is apparent that the condition for the admissibility of the action brought by ARE against the contested decision, on the basis that ARE is individually concerned by that decision, is not fulfilled, or at the very least has not been shown to have been fulfilled, and therefore the contested judgment must be set aside.

62 It follows that it is unnecessary to examine the other five pleas in law.

The admissibility of the action

63 In accordance with the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice, if the Court quashes a decision of the Court of First Instance it may itself give final judgment in the matter where the state of the proceedings so permits.

64 That is the position in this case.

65 It is common ground that ARE did not expressly seek annulment of the contested decision on the ground that the Commission had failed to fulfil its obligation to initiate the formal review procedure provided for in Article 88(2) EC or that the procedural guarantees provided for by that provision had been infringed. It is also common ground that the association did not at any point in the various phases of the proceedings before the Court of First Instance raise the question of initiating such a procedure or refer to the case-law relating to that issue.

66 Moreover, it is important to note that ARE itself acknowledges, in its response to the appeal, that the Court of First Instance circumscribed the subject-matter of its initial claim in order to remedy a legal error on the part of ARE regarding the proper procedural classification of the contested decision. In fact, ARE initially contested that decision on the basis that it was a confirmatory decision closing the earlier formal review procedure, granting definitive authorisation for the amended aid scheme. It accepts that the Court of First Instance properly regarded the contested decision as bringing to an end the preliminary review procedure for examining aid under Article 88(3) EC. Accordingly, it was consistent with the principle of economy of procedure for the Court of First Instance to interpret its claim as being directed against the failure to initiate a formal review procedure.

67 In those circumstances, it must be held that, by the action brought before the Court of First Instance for annulment of the contested decision, ARE was not seeking to contest the failure to initiate the procedure provided for in Article 88(2) EC and thereby safeguard its procedural rights under that provision.

68 In reality, ARE sought, by its action, to have the contested decision annulled on substantive grounds.

69 Accordingly, the mere fact that ARE might be regarded as concerned within the meaning of Article 88(2) EC cannot suffice to render the action admissible. ARE must go on to demonstrate that it has a particular status within the meaning of the *Plaumann* v *Commission* case-law.

70 In this case, ARE, which is an association set up to promote the collective interests of a category of persons, can only be regarded as being individually concerned within the meaning of the *Plaumann* v *Commission* case-law to the extent to which the position of its members in the market is substantially affected by the aid scheme covered by the contested decision (see, to that effect, *Cofaz and Others* v *Commission* [1986] ECR 391, paragraphs 22 to 25, and the order in *Sveriges Betodlares Centralförening and Henrikson* v *Commission*, paragraph 45).

71 However, that is not the position in this case.

72 Even if, as is apparent from paragraphs 54 and 60 of the contested judgment, certain of ARE's members are economic operators who may be regarded as direct competitors of beneficiaries of the aid provided for by the Compensation Law and, therefore, their competitive position is necessarily affected by the contested decision, it does not follow that their position in the market could be substantially affected by the grant of such aid since it appears to be accepted, as is apparent from paragraph 55 of the contested judgment, that all farmers in the European Union may be regarded as competitors of the beneficiaries of the land acquisition scheme.

73 Consequently, ARE cannot be regarded as being individually concerned by the contested decision.

74 Accordingly, the objection of inadmissibility raised before the Court of First Instance by the Commission against the action brought by ARE must be upheld and, consequently, that action must be dismissed.

Costs

75 Pursuant to the first paragraph of Article 122 of the Rules of Procedure, where the appeal is unfounded or where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs. Under the first subparagraph Article 69(2) of the Rules of Procedure, which applies to appeals pursuant to Article 118 thereof, 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 ARE has been unsuccessful, it must be ordered to pay the costs of the proceedings at both instances.

On those grounds, the Court (Grand Chamber) hereby:

1. **Sets aside the judgment of the Court of First Instance of 5 December 2002 in Case T-114/00 *Aktionsgemeinschaft Recht und Eigentum* v *Commission*;**

2. **Dismisses as inadmissible the action brought by Aktionsgemeinschaft Recht und Eigentum eV before the Court of First Instance of the European Communities for annulment of the Commission decision of 22 December 1999 authorising State aid under Articles 87 and 88 (ex Articles 92 and 93) of the EC Treaty;**

3. **Orders Aktionsgemeinschaft Recht und Eigentum eV to pay the costs of the proceedings at both instances.**

[Signatures]