JUDGMENT OF THE COURT (Third Chamber)

9 July 2009 *

In Case C-319/07 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 9 July 2007,

3F, formerly Specialarbejderforbundet i Danmark (SID), established in Copenhagen (Denmark), represented by A.P. Bentley QC and A. Worsøe, advokat,

appellant,

the other parties to the proceedings being:

Commission of the European Communities, represented by N. Khan and H. van Vliet, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: English.

Kingdom of Denmark,

Kingdom of Norway,

interveners at first instance,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, A. Ó Caoimh (Rapporteur), J. N. Cunha Rodrigues, U. Lõhmus and A. Arabadjiev, Judges,

Advocate General: E. Sharpston,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 9 July 2008,

after hearing the Opinion of the Advocate General at the sitting on 5 March 2009,

gives the following

Judgment

1 By its appeal, 3F ('the appellant'), formerly Specialarbejderforbundet i Danmark (SID), the general trade union for workers in Denmark, asks the Court to set aside the order of the Court of First Instance of the European Communities of 23 April 2007 in Case T-30/03 *SID* v *Commission* ('the order under appeal') dismissing its application for annulment of Commission Decision C(2002) 4370 final of 13 November 2002 not to raise objections to the Danish fiscal measures applicable to seafarers employed on board vessels registered in the Danish International Register ('the contested decision').

Legal context

2 Article 4(3) and (4) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] of the EC Treaty (OJ 1999 L 83, p. 1) reads as follows:

'3. Where the Commission, after a preliminary examination, finds that no doubts are raised as to the compatibility with the common market of a notified measure, in so far as it falls within the scope of Article [87(1)] of the [EC] Treaty, it shall decide that the measure is compatible with the common market (hereinafter referred to as a "decision not to raise objections"). The decision shall specify which exception under the Treaty has been applied.

4. Where the Commission, after a preliminary examination, finds that doubts are raised as to the compatibility with the common market of a notified measure, it shall decide to initiate proceedings pursuant to Article [88(2)] of the Treaty (hereinafter referred to as a "decision to initiate the formal investigation procedure").'

3 The Community guidelines on State aid to maritime transport (OJ 1997 C 205, p. 5, 'the Community guidelines') aim, in accordance with point 2.2 of the guidelines, entitled 'General objectives of revised State aid guidelines', to increase transparency and to clarify what State aid schemes may be introduced in order to support the Community maritime interest. Point 2.2 states:

'… This policy should:

— safeguard EC employment, …

— preserve maritime know-how in the Community and develop maritime skills, and

— improve safety.

…'

4 Point 3.2 of the Community guidelines, 'Labour-related costs', reads as follows:

'…

Support measures for the maritime sector should … aim primarily at reducing fiscal and other costs and burdens borne by EC shipowners and EC seafarers (i.e. those liable to taxation and/or social security contributions in a Member State) towards levels in line with world norms. They should directly stimulate the development of the sector and employment, rather than provide general financial assistance.

In line with the objective, therefore, the following action on employment costs should be allowed for EC shipping:

— …

— reduced rates of income tax for EC seafarers on board ships registered in a Member State.

…'

Facts of the dispute

5 On 1 July 1988 the Kingdom of Denmark adopted Law No 408, which entered into force on 23 August 1988, establishing a Danish International Register of Shipping ('the DIS register'). That register was in addition to the ordinary Danish register of ships ('the DAS register'). The DIS register is intended to combat the flight from Community flags to flags of convenience. The main advantage of the DIS register is that shipowners whose vessels are registered in it are allowed to employ seafarers from non-member countries on those vessels and pay them wages on the basis of their national laws.

6 On the same date the Kingdom of Denmark adopted Laws Nos 361, 362, 363 and 364, which entered into force on 1 January 1989, introducing various fiscal measures relating to seafarers employed on board vessels registered in the DIS register ('the fiscal measures at issue'). In particular, those seafarers were exempted from income tax, whereas seafarers employed on board vessels registered in the DAS register were subject to that tax.

7 On 28 August 1998 the appellant lodged a complaint with the Commission against the Kingdom of Denmark concerning the fiscal measures at issue, arguing that they were contrary to the Community guidelines and hence to Article 87 EC.

8 In its complaint the appellant submitted that the fiscal measures at issue constituted State aid which was incompatible with the Community guidelines because the tax exemption was granted to all seafarers, not only Community seafarers, and because the measures had not been notified to the Commission.

9 On 13 November 2002 the Commission adopted the contested decision, in which it decided not to raise any objections 'to the fiscal measures that have been applied since 1 January 1989 to seafarers on board vessels registered in Denmark in either the DAS or the DIS register, considering that the arrangements constitute State aid but that they were or still are compatible with the common market in accordance with Article 87(3)(c) EC' (second indent of point 46 of the decision).

Procedure before the Court of First Instance

10 By application lodged at the Registry of the Court of First Instance on 30 January 2003, the appellant sought the annulment of the contested decision and an order that the Commission pay the costs.

11 By separate document lodged at the Registry of the Court of First Instance on 17 March 2003, the Commission raised a plea of inadmissibility under Article 114 of the Rules of Procedure of the Court of First Instance, asking that Court to dismiss the application before it as manifestly inadmissible and to order the appellant to pay the costs.

12 It its observations on the plea of inadmissibility, submitted on 16 May 2003, the appellant contended that the Court of First Instance should reject that plea and order the Commission to pay the costs relating to the plea.

13 By order of 18 June 2003, the President of the Second Chamber (Extended Composition) of the Court of First Instance, after hearing the parties, gave leave to the Kingdom of Denmark and the Kingdom of Norway to intervene in support of the Commission. The interveners waived submission of a statement in intervention limited to the question of admissibility.

The order under appeal

14 In support of its application for annulment of the contested decision, the appellant raised three pleas in law: first, infringement of Article 88(2) EC and the principle of sound administration, in that the Commission had not initiated the review procedure laid down by that provision; second, infringement of Article 87(3) EC, interpreted in the light of the Community guidelines and the principle of the protection of legitimate expectations; and third, manifest error of assessment.

15 In paragraph 24 of the order under appeal, the Court of First Instance noted that where, without initiating the formal review procedure under Article 88(2) EC, the Commission finds, by a decision taken on the basis of Article 88(3) EC, that aid is compatible with the common market, the Community judicature declares 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 that person seeks, by instituting proceedings, to safeguard the procedural rights available to him under that provision.

16 In paragraph 25 of the order under appeal, the Court of First Instance stated that 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 aid, in particular undertakings competing with the recipients of the aid and trade associations (Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 16, and Case C-78/03 P *Commission* v *Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737, paragraph 36).

17 In paragraph 26 of the order under appeal, the Court of First Instance observed that if, on the other hand, the applicant calls in question the merits of the decision appraising the aid as such, he must then demonstrate that he has a particular status as defined in the line of case-law following from Case 25/62 *Plaumann* v *Commission* [1963] ECR 95. That is so in particular where the applicant's position in the market is substantially affected by the aid to which the decision at issue relates.

18 In paragraph 28 of the order under appeal, the Court of First Instance held:

'Where an applicant seeks — as the [appellant] does by its first plea — to safeguard the procedural rights available to him under Article 88(2) EC in order to obtain the annulment of a decision not to raise objections, the Community judicature will declare his action admissible if he is a party concerned within the meaning of Article 88(2) EC (*Commission* v [*Aktionsgemeinschaft Recht und Eigentum*], paragraphs 35 and 36).'

19 In paragraphs 30 to 33 of the order under appeal, the Court of First Instance stated as follows:

'30 … it has been held that an action for annulment brought under Article 230 EC against a decision on State aid adopted without initiating the formal review procedure is inadmissible if the applicant's competitive position in the market is not affected by the grant of the aid (Case T-188/95 *Waterleiding Maatschappij* v *Commission* [1998] ECR II-3713, paragraph 62; see also, to that effect, Case T-69/96 *Hamburger Hafen- und Lagerhaus and Others* v *Commission* [2001] ECR II-1037, paragraph 41). Similarly, it has been held that an applicant who is not an undertaking whose competitive position has allegedly been affected by the State measures said to be aid cannot establish a personal interest in relying on the alleged anti-competitive effects of those measures in an action against the Commission's decision not to initiate the procedure provided for in Article 88(2) EC (see, to that effect, Case T-178/94 *ATM* v *Commission* [1997] ECR II-2529, paragraph 63, and the order in [Case T-41/01 *Pérez Escolar* v *Commission* [2003] ECR II-2157], paragraph 46).

31 Neither the [appellant] as a seafarers' trade union nor its members are competitors of the recipients of the aid at issue as identified in the contested decision, namely the owners of ships registered in the DIS register.

32 Thus, as regards the [appellant] itself, it cannot claim that its own competitive position is affected by the aid at issue. First, it has been held that an association of the employees of the undertaking which allegedly benefited from State aid was in no way in competition with that undertaking (*ATM* v *Commission*, … paragraph 63). Second, in so far as the [appellant] relies on its own competitive position in relation to other seafarers' trade unions in the negotiation of collective agreements in the sector in question, it suffices to point out that agreements concluded in the context of collective negotiations do not fall within the scope of competition law (see, for the non-application of Articles 3(g) EC and 81 EC to collective agreements, Case C-67/96 *Albany* [1999] ECR I-5751, paragraphs 52 to 60).

33 Similarly, as regards the [appellant's] members, there is nothing in the case-file to indicate that those seafarers fall outside the definition of a worker within the meaning of Article 39 EC, namely a person who for a certain period of time performs services for and under the direction of another person in return for which he receives remuneration. As workers, they are not therefore themselves undertakings (Case C-22/98 *Becu and Others* [1999] ECR I-5665, paragraph 26).'

20 Further, in paragraph 35 of the order under appeal, the Court of First Instance recalled that it was not excluded that bodies representing the employees of the undertaking in receipt of aid might, as parties concerned within the meaning of Article 88(2) EC, submit comments to the Commission on considerations of a social nature which could be taken into account by the Commission if appropriate, citing in this respect the order in Case T-189/97 *Comité d'entreprise de la Société française de production and Others* v *Commission* [1998] ECR II-335, paragraph 41. However, in paragraph 36 of the order under appeal, it observed that the social aspects of the DIS register derived primarily from the establishment of the register by Law No 408 rather than from the accompanying fiscal measures, and that the Commission had taken the view that the establishment of the DIS register did not constitute State aid, limiting its examination of the compatibility with the common market of the State measures solely to the fiscal measures at issue. The Court of First Instance concluded, also in paragraph 36, that the social aspects of the DIS register were only indirectly linked to the subject-matter of the contested decision and that the appellant could not therefore rely on those social aspects to establish that it was individually concerned.

21 The Court of First Instance also rejected, in paragraph 37 of the order under appeal, the appellant's argument that it could be regarded as individually concerned merely because the aid in question was passed on to the recipients by means of a reduction in the wage claims of the seafarers benefiting from the income tax exemption established by the fiscal measures. It found that the contested decision was based on the advantages received by the recipients of the aid, not on the method of transmission of the aid.

22 Finally, the Court of First Instance held that the appellant had not shown that its own interests as a negotiator were liable to be directly affected by the aid deriving from the fiscal measures at issue. Referring to Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219 and Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, it found, in paragraphs 39 and 40 of the order under appeal, that the mere fact that the appellant had made a complaint to the Commission against the aid at issue did not mean that it was distinguished individually. Even though the appellant might have been one of the negotiators of the collective agreements for seafarers on board ships registered in one of the Danish registers and as such have played a part in the machinery for passing the aid on to shipowners, the appellant had not shown that it had negotiated the drafting of the Community guidelines on State aid to maritime transport, relied on in the present case, with the Commission or the adoption of the fiscal measures at issue with the Commission or the Danish Government.

23 The Court of First Instance concluded, in paragraphs 41 and 42 of the order under appeal, that neither the appellant nor its members were individually concerned by the contested decision, so that the application brought by the appellant was inadmissible for want of a legal interest in bringing proceedings as defined in Article 230 EC.

The appeal

24 By its appeal, the appellant claims that the Court should:

— set aside the order under appeal in its entirety;

— declare the application to the Court of First Instance admissible; and

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

25 The Commission contends that the appeal should be dismissed and the appellant ordered to pay the costs.

26 The appellant puts forward four grounds of appeal. The first is that the Court of First Instance applied the *Albany* judgment too broadly in concluding that the appellant's competitive position was not affected by the aid resulting from the fiscal measures at issue. The second is that the Court of First Instance erred in law by finding that the appellant could not rely on the social aspects of the Community guidelines to establish that it was individually concerned by the contested decision. The third is that the *Plaumann* and *Aktionsgemeinschaft Recht und Eigentum* judgments were misapplied in that the Court of First Instance found that the appellant could not be regarded as individually concerned merely because the aid resulting from the fiscal measures at issue was passed on to the recipients by means of a reduction in the wage claims of the seafarers benefiting from the income tax exemption. The fourth is that the Court of

First Instance misapplied the *Van der Kooy and Others* and *CIRFS and Others* line of case-law by concluding that the appellant's own interests as a negotiator were not affected by the fiscal measures at issue.

Preliminary observations

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

28 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 that decision is of direct and individual concern to the former.

29 It is settled case-law that 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 by such a decision (see, inter alia, *Plaumann*, at p. 107; Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, paragraph 20; Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 14; *Aktionsgemeinschaft Recht und Eigentum*, paragraph 33; and Case C-487/06 P *British Aggregates* v *Commission* [2008] ECR I-0000, paragraph 26).

30 As the action at first instance concerned 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 stage of the review under Article 88(2) EC. It is only at the latter stage, which is designed to enable the Commission to be fully informed of all the facts of the case, that the Treaty imposes an obligation on the Commission to give the parties concerned notice to submit their comments (see *Cook*, paragraph 22; *Matra*, paragraph 16; Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 38; *Aktionsgemeinschaft Recht und Eigentum*, paragraph 34; and *British Aggregates*, paragraph 27).

31 It follows that, 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. For those reasons, an action for the annulment of such a decision brought by a person who is concerned within the meaning of Article 88(2) EC is declared to be admissible where that person seeks, by instituting proceedings, to safeguard the procedural rights available to him under the latter provision (*Aktionsgemeinschaft Recht und Eigentum*, paragraph 35 and the case-law cited, and *British Aggregates*, paragraph 28).

32 The Court has had occasion to observe that such parties concerned are any persons, undertakings or associations whose interests might be affected by the granting of aid, that is, in particular, undertakings competing with the recipients of the aid and trade associations (*Sytraval and Brink's France*, paragraph 41; *Aktionsgemeinschaft Recht und Eigentum*, paragraph 36; and *British Aggregates*, paragraph 29).

33 It is not excluded that a trade union may be regarded as 'concerned' within the meaning of Article 88(2) EC if it shows that its interests or those of its members might be affected

by the granting of aid. The trade union must, however, show to the requisite legal standard that the aid is likely to have a real effect on its situation or that of the seafarers it represents.

34 The Court has also held that if, on the other hand, the applicant calls into question the merits of the decision appraising the aid as such, the mere fact that he may be regarded as 'concerned' within the meaning of Article 88(2) EC cannot suffice for the action to be considered admissible. He must then demonstrate that he enjoys a particular status within the meaning of the *Plaumann* judgment. That is the case in particular where the applicant's market position is substantially affected by the aid which is the subject of the decision at issue (Case 169/84 *Cofaz and Others* v *Commission* [1986] ECR 391, paragraphs 22 to 25; *Aktionsgemeinschaft Recht und Eigentum*, paragraph 37; Joined Cases C-75/05 P and C-80/05 P *Germany and Others* v *Kronofrance* [2008] ECR I-0000, paragraph 40; and *British Aggregates*, paragraph 35).

35 It is true that, as appears from Article 4(3) of Regulation No 659/1999, a decision of the Commission not to raise objections is taken where the Commission finds that the notified measure does not raise doubts as to its compatibility with the common market. If an applicant seeks the annulment of such a decision, he is essentially challenging the fact that the decision on the aid was adopted without the Commission initiating the formal review procedure, thereby infringing his procedural rights. For his action to be successful, the applicant may attempt to show that the compatibility of the measure in question should have given rise to doubts. The use of such arguments cannot, however, have the consequence of changing the subject-matter of the application or altering the conditions of its admissibility.

36 It is clear that, in the present case, as is apparent both from the order under appeal and from the case-file at first instance, the appellant's first plea in law in its application was aimed at safeguarding its procedural rights under Article 88(2) EC, by challenging the failure, in the circumstances of the case, to initiate the formal review procedure provided for by that provision, as was expressly acknowledged by the Court of First Instance in paragraph 28 of that order.

37 It is also apparent from paragraph 8 of the order under appeal that the President of the Second Chamber, Extended Composition, of the Court of First Instance, after hearing the parties, stayed the proceedings on the application before the Court of First Instance by order of 16 February 2005 pending the decision of the Court of Justice in the *Aktionsgemeinschaft Recht und Eigentum* case, noting that the application was directed against a decision of the Commission taken without initiating the formal review procedure provided for in Article 88(2) EC.

38 Moreover, after judgment was given in *Aktionsgemeinschaft Recht und Eigentum*, the Court of First Instance, by letter of 24 January 2006, invited the parties to submit observations on that judgment, in particular on the application to the case of the decision in *Cook*, which the Court had referred to in paragraphs 35 and 36 of *Aktionsgemeinschaft Recht und Eigentum*, in relation to the question of admissibility and the appellant's status as a party concerned within the meaning of that paragraph 36.

39 It follows that, as regards the first plea in law relied on by the appellant before the Court of First Instance, concerning the failure to initiate the formal review procedure, that Court sought to determine, as was expressly stated in paragraph 28 of the order under appeal, whether the appellant could be regarded as a party concerned within the meaning of Article 88(2) EC.

40 It is therefore in the light of those considerations that the four grounds of appeal put forward by the appellant should be examined.

The first ground of appeal

Arguments of the parties

41 The appellant argues that, by referring to *Albany* to conclude that the appellant could not rely on its own competitive position in relation to other seafarers' trade unions in the negotiation of collective agreements, the Court of First Instance interpreted that judgment too broadly. The Court said nothing to that effect in that judgment, which concerned Article 85 of the EC Treaty (now Article 81 EC) as applied to public undertakings by virtue of Article 90 of the EC Treaty (now Article 86 EC), about any relationship there might be between collective agreements and the application of the rules on State aid in Article 92 of the EC Treaty (now, after amendment, Article 87 EC) and Article 93 of the EC Treaty (now Article 88 EC).

42 The Commission submits that the first ground of appeal should be rejected as inoperative, or alternatively as unfounded. It argues that the case-law cited by the Court of First Instance in the first part of paragraph 32 of the order under appeal, namely the *ATM* judgment, was a sufficient basis for its conclusion that this part of the appellant's application relating to its competitive position was inadmissible. In those circumstances, it submits that the appellant's argument as to the irrelevance of the *Albany* judgment is inoperative and there is no need for the Court to examine the merits of this ground of appeal.

43 In any event, with reference to the second part of paragraph 32 of the order under appeal, the Commission submits that *Albany* and all the judgments confirming it show that the negotiation of collective agreements is not covered by the competition rules of the Treaty, including the rules on State aid. Collective labour agreements are not 'goods' within the meaning of Article 81 EC or of Article 87 EC. Trade unions, when negotiating such agreements, are therefore also not 'undertakings' producing 'goods' within the meaning of those provisions.

Findings of the Court

44 To determine whether the appellant should be regarded as concerned within the meaning of Article 88(2) EC and its application therefore declared admissible, the Court of First Instance began by considering whether the appellant's competitive position in the market was affected by the granting of aid.

45 The Commission's argument that the judgment in *ATM* was sufficient ground in itself for rejecting the appellant's arguments relating to its competitive position cannot be accepted. The first part of paragraph 32 of the order under appeal concerns the alleged competitive position of the appellant in relation to its members' employers, namely the shipowners who benefit from the aid resulting from the fiscal measures at issue, not its alleged competitive position in relation to other trade unions in the negotiation of collective agreements, which is a separate argument referred to in the second part of paragraph 32.

46 Even if the appellant had argued that it was in a competitive position in relation to the shipowners — which it denied at the hearing — it was still open to it, despite the *ATM* judgment, to attempt to show that it had standing to bring proceedings because its interests might be affected by the granting of aid, by reason of the effect of the measures on its competitive position in relation to other trade unions whose members are employed on board vessels registered in the DIS register.

47 As to the Court of First Instance's interpretation of *Albany* in paragraph 32 of the order under appeal, it must be observed that the *Albany* case concerned a collective agreement establishing a supplementary pension scheme managed by a pension fund in the textile industry sector, affiliation to which could be made compulsory by the public authorities. Albany International BV, an undertaking in the textile sector, had refused to pay the fund the contributions for a certain period, on the ground that compulsory affiliation to the fund, by virtue of which those contributions were claimed from it, was inter alia contrary to Article 85(1) of the Treaty.

48 Before concluding that Article 85(1) of the Treaty did not apply in those circumstances, the Court pointed out, in paragraph 54 of *Albany*, that, under Article 3(g) and (i) of the EC Treaty (now, after amendment, Article 3(1)(g) and (j) EC), the activities of the Community are to include not only a 'system ensuring that competition in the internal market is not distorted' but also 'a policy in the social sphere'. Article 2 of the EC Treaty (now, after amendment, Article 2 EC) declares that a particular task of the Community is 'to promote … a harmonious and balanced development of economic activities' and 'a high level of employment and of social protection'.

49 Moreover, it is apparent from the first paragraph of Article 136 EC that the Community and the Member States have as their objectives inter alia the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, and dialogue between management and labour. Under Article 138(1) EC the Commission has the task of promoting the consultation of management and labour at Community level, and that dialogue may, should they so desire, lead to contractual relations. The Commission also takes any relevant measure to facilitate their dialogue by ensuring balanced support for the parties (see, to that effect, *Albany*, paragraphs 55 to 58, with respect to the EEC Treaty and the Agreement on social policy concluded between the Member States of the European Community with the exception of the United Kingdom of Great Britain and Northern Ireland (OJ 1992 C 191, p. 91) before the entry into force of the Treaty of Amsterdam).

50 The Court accepted in *Albany* that some restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment. In those circumstances, the Court found that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of that provision. The Court then considered whether the nature and purpose of the agreement at issue in *Albany* justified its exclusion from the scope of Article 85(1) of the

Treaty, and concluded that, in that case, its exclusion from the scope of that provision was justified (see *Albany*, paragraphs 59 to 64).

51 It thus follows from *Albany*, and from the later judgments which confirmed *Albany*, that it is for the competent authorities and courts to consider, in each individual case, whether the nature and purpose of the agreement in question and the social policy objectives pursued by it warrant its exclusion from the scope of Article 81(1) EC (see, to that effect, inter alia, Case C-222/98 *Van der Woude* [2000] ECR I-7111, paragraph 23).

52 In the present case, as may be seen from paragraph 34 of the order under appeal, the appellant as an organisation representing workers is by definition established to promote the collective interests of its members. According to the observations it submitted to the Court of First Instance, as set out in paragraphs 17 to 20 of the order under appeal, it is an economic operator which negotiates the terms and conditions on which labour is provided to undertakings. It says that the aid resulting from the fiscal measures at issue affects the ability of its members to compete with non-Community seafarers in seeking employment with shipping companies, in other words the recipients of the aid, and the appellant's market position as such is therefore affected as regards its ability to compete in the market for the supply of labour to those companies, and consequently its ability to recruit members.

53 It should also be noted that the appellant opposed the Danish legislation relating to the DIS register, in particular the fiscal measures at issue, on the ground that the DIS register allowed shipowners whose vessels were registered in it to employ seafarers who were nationals of non-member countries, paying them wages on the basis of their national law, and that those fiscal measures, which were the subject of the contested decision, made it possible to exempt from income tax all seafarers employed on board vessels registered in the DIS register without distinguishing between seafarers from Member States and those from non-member countries.

54 It follows that, unlike the *Albany* case, the present case concerns not the competition-restricting nature of the collective agreements concluded between the appellant or other trade unions and the shipowners who benefit from the aid resulting from the fiscal measures at issue but the question of whether the appellant's competitive position in relation to those other trade unions was affected by the granting of that aid, so that it should be regarded as a party concerned within the meaning of Article 88(2) EC, in which case its action for annulment of the contested decision would be admissible.

55 It cannot be deduced from the fact that an agreement could be excluded, by reason of its nature and purpose and the social policy objectives pursed by it, from the scope of the provisions of Article 81(1) EC that collective negotiations or the parties involved in them are likewise, entirely and automatically, excluded from the Treaty rules on State aid, or that an action for annulment which might be brought by those parties would, almost automatically, be regarded as inadmissible because of their involvement in those negotiations.

56 It is difficult to see how the social policy objectives pursed by collective agreements could be seriously undermined — such a risk being the reason for the exclusion of those agreements from the scope of Article 85(1) of the Treaty in *Albany* — by acknowledging that, when it negotiates the terms and conditions of work of its members, a trade union such as the appellant could be in a competitive situation in relation to other trade unions whose members benefit from different wage conditions because of the establishment of a register such as the DIS register.

57 On the contrary, to exclude a priori the possibility, in a case such as the present, that a trade union could show that it is a party concerned within the meaning of Article 88(2) EC, by relying on its role in collective negotiations and the effects on that role of national tax measures regarded by the Commission as aid compatible with the common market, would be liable to undermine the very social policy objectives which induced the Court to exclude the collective agreement at issue in *Albany* from the application of Article 85(1) of the Treaty.

58 That conclusion is supported by the fact that, since the Community has not only an economic but also a social purpose, the rights under the provisions of the Treaty on State aid and competition must be balanced, where appropriate, against the objectives pursued by social policy, which include, as is clear from the first paragraph of Article 136 EC, inter alia improved living and working conditions, so as to make possible their harmonisation while improvement is being maintained, proper social protection and dialogue between management and labour (see, to that effect, with respect to the Treaty provisions on freedom of establishment, Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union* [2007] ECR I-10779, paragraph 79).

59 Admittedly, as stated in paragraph 33 above, the applicant must always show to the requisite legal standard that his interests might be affected by the granting of the aid, which it is possible for him to do by showing that he is in fact in a competitive position in relation to other trade unions operating in the same market. However, that possibility cannot be excluded a priori by reference to the *Albany* line of case-law or to an excessively restrictive interpretation of the concept of 'market' in connection with the question of the status of party concerned within the meaning of Article 88(2) EC of an organisation such as a trade union seeking to argue that its action for annulment is admissible.

60 Since the Court of First Instance interpreted *Albany* wrongly, and consequently failed to address the appellant's argument relating to its competitive position in relation to other trade unions in the negotiation of collective agreements for seafarers, the order under appeal must accordingly be set aside on this point.

The second ground of appeal

Arguments of the parties

61 The appellant submits, as regards paragraphs 35 and 36 of the order under appeal, that the Court of First Instance, after referring to the order in Case T-189/97 *Comité d'entreprise de la Société française de production and Others*, did not examine the social aspects implicit in the legal conditions for authorisation of tax reductions for Community seafarers, namely the Community guidelines, and concluded that the appellant could not rely on the principle stated in that order.

62 According to the appellant, the Community guidelines draw an implicit distinction between 'Community seafarers' and other seafarers. That distinction recognises that there was a social 'quid pro quo' to be met in return for allowing State aid to maritime transport companies. The tax exemption for the remuneration of seafarers was justified by the need to compensate for the higher costs of employing Community seafarers compared with seafarers from non-member countries. In this way, the objective of safeguarding Community employment, which was one of the objectives of the Community guidelines, could be achieved. The social aspects of those guidelines go to the very circumstances in which aid can or cannot be approved. As a representative of Danish seafarers, the appellant could have submitted comments on the social aspects of the aid resulting from the fiscal measures at issue if the Commission had initiated the procedure in accordance with Article 88(2) EC.

63 The Commission submits that, even if the second ground of appeal should not be rejected as inoperative, like the first ground, it is in any event unfounded. The Court of First Instance was quite right to consider that the social aspects were only indirectly linked to the subject-matter of the contested decision. The Commission submits, first, that, as the Court of First Instance rightly found, the DIS register does not grant State aid. Second, the appellant, which is appealing against an order of inadmissibility, is seeking by this ground to argue the substance of the case by making allegations about

the scope of the Community guidelines. The aim of those guidelines is simply irrelevant in determining the admissibility of the action.

Findings of the Court

64 It should be noted, to begin with, that, when assessing the compatibility of State aid in the maritime transport sector such as the aid at issue in the present case, the social aspects of the Community guidelines may be taken into account by the Commission as part of an overall assessment which includes a large number of considerations of various kinds, linked in particular to the protection of competition, the Community's maritime policy, the promotion of Community maritime transport, or the promotion of employment (see, to that effect, Case C-106/98 P *Comité d'entreprise de la Société française de production and Others* v *Commission* [2000] ECR I-3659, paragraph 52).

65 Moreover, as stated in paragraph 33 above, it is not excluded that a trade union may be regarded as 'concerned' within the meaning of Article 88(2) EC if it shows that its interests or those of its members might be affected by the granting of aid.

66 In paragraph 36 of the order under appeal, the Court of First Instance held that the social aspects of the DIS register were only indirectly linked to the subject-matter of the contested decision and the appellant's action for annulment. It therefore concluded that the appellant could not rely on those social aspects to establish that it was individually concerned.

67 It is not disputed that the DIS register does not itself constitute State aid. As may be seen from Joined Cases C-72/91 and C-73/91 *Sloman Neptun* [1993] ECR I-887, a system such as that established by the DIS register, which enables contracts of employment

concluded with seafarers who are nationals of non-member countries and have no permanent abode or residence in the Member State concerned to be subjected to working conditions and rates of pay which are not covered by the law of that Member State and are considerably less favourable than those applicable to seafarers who are nationals of that Member State, does not constitute State aid within the meaning of Article 87(1) EC.

68 That is why the action for annulment brought by the appellant was directed not against the DIS register but against the fiscal measures at issue, which apply to seafarers employed on board vessels in that register.

69 Instead of examining, as it did in paragraph 36 of the order under appeal, whether there was a sufficiently direct link between the social aspects of the DIS register and the subject-matter of the contested decision, the Court of First Instance should have examined the social aspects of the fiscal measures at issue with regard to the Community guidelines — which contain the legal conditions for assessing the compatibility of the Danish tax system, as the appellant submitted — in order to assess whether the appellant's arguments based on those guidelines sufficed to establish its status of a party concerned within the meaning of Article 88(2) EC.

70 Since it cannot be ruled out that organisations representing the workers of the undertakings benefiting from aid may, as parties concerned within the meaning of that provision of the Treaty, submit observations to the Commission on considerations of a social nature which it can take into account if appropriate, the circumstance that the Court of First Instance did not in fact address the appellant's argument relating to the social aspects of the fiscal measures at issue with regard to the Community guidelines means that the order under appeal must be set aside on this point.

The third ground of appeal

Arguments of the parties

71 By its third ground of appeal, the appellant submits that the Court of First Instance erred in law, in paragraph 37 of the order under appeal, by dismissing as irrelevant the manner in which the aid resulting from the fiscal measures at issue is passed on, namely that it is transmitted to shipowners via the members of the appellant.

72 The appellant argues that in *Aktionsgemeinschaft Recht und Eigentum* the Court held that an association set up to promote the collective interests of a category of persons can be regarded as individually concerned in the *Plaumann* sense only in so far as the position of the association's members in the market is substantially affected by the aid scheme which is the subject of the decision in question. It submits that the Court analysed the expression 'position on the market' from the point of view of 'economic operators'. In the appellant's view, there is no reason in principle why workers should not also be regarded as economic operators if national legislation or the Community guidelines accord them special consideration in determining the conditions in which aid may be held to be compatible with the common market within the meaning of Article 87(3)(c) EC.

73 The Commission submits, first, that the judgment in *Aktionsgemeinschaft Recht und Eigentum*, which was given in a case concerning direct aid granted to farmers, has nothing to do with the finding of the Court of First Instance, in paragraph 37 of the order under appeal, that the contested decision is based on the benefits received by the recipients of the aid, namely the shipowners, not on the manner in which the aid is passed on. Next, that judgment is not relevant to the present case, since it concerned a

State aid decision adopted by the Commission after opening the procedure under Article 88(2) EC. Finally, even if that judgment were relevant in the present case, the Commission observes that that does not mean that workers are individually concerned by a Commission decision authorising aid. Paragraph 72 of the judgment was expressly based on the proposition that 'certain of [the] members [of Aktionsgemeinschaft Recht und Eigentum] are economic operators who may be regarded as direct competitors of beneficiaries of the aid'. By contrast, the members of the appellant are seafarers who cannot be regarded as direct competitors of the shipowners and are not 'economic operators' within the meaning of that judgment.

74 In those circumstances, the Commission submits that the third ground of appeal should be considered unfounded.

Findings of the Court

75 In paragraph 37 of the order under appeal, the Court of First Instance found that the appellant could not be regarded as individually concerned merely because the aid in question was passed on to its recipients by means of a reduction in the wage claims of the seafarers enjoying the exemption from income tax introduced by the fiscal measures at issue. According to the Court of First Instance, the contested decision was based on the advantages received by the recipients of the aid, not on the method of transmission of the aid.

76 In contrast to the appellant's action for annulment before the Court of First Instance, complaining that the Commission failed to initiate the formal review procedure provided for in Article 88(2) EC and ultimately aiming at safeguarding the procedural rights conferred by that provision, the application for annulment in *Aktionsgemeinschaft Recht und Eigentum* concerned a Commission decision terminating such a procedure.

77 It follows that the Court was seeking in that case to determine whether the market position of the members of Aktionsgemeinschaft Recht und Eigentum, an association set up to promote the collective interests of a class of persons, was substantially affected by the aid scheme which was the subject of the decision in question.

78 In the present case, as is apparent from paragraph 28 of the order under appeal, the appellant had to establish before the Court of First Instance that it was a party concerned within the meaning of Article 88(2) EC, and the application of the *Plaumann* line of case-law, as in *Aktionsgemeinschaft Recht und Eigentum*, was prima facie not relevant.

79 Even if the Court of First Instance ought to have considered the manner in which the aid resulting from the fiscal measures at issue was passed on and the part played in this respect by the shipowners' employees who were members of the appellant, it should be recalled that in paragraphs 31 to 33 of the order under appeal the Court of First Instance had already found that neither the appellant as a trade union of seafarers nor its members as workers employed by the recipients of the aid were competitors of those recipients. As regards in particular the members of the trade union, the Court of First Instance found that, since they appeared to be persons falling within the definition of a worker within the meaning of Article 39 EC, they were not themselves undertakings.

80 Apart from the incorrect application of *Albany* in the present case in the second part of paragraph 32 of the order under appeal — the target of the first ground of appeal — the appellant has not contested the conclusions of the Court of First Instance in paragraphs 31 to 33 of the order. In those circumstances, it cannot submit that its members are economic operators whose position in the market is affected in order to challenge the conclusion of the Court of First Instance in paragraph 37 of the order under appeal that the application is not admissible merely because the aid is passed on to the shipowners by means of the reduction in those members' wage claims as a result of their exemption from income tax introduced by the fiscal measures at issue.

81 In those circumstances, the third ground of appeal must be rejected as unfounded.

The fourth ground of appeal

Arguments of the parties

82 The appellant submits that, by concluding that it had not been shown that its own interests as a negotiator were liable to be directly affected by the aid resulting from the fiscal measures at issue and by distinguishing its situation in the present case from that of the Landbouwschap, a body governed by public law acting as the representative of the interests of the glasshouse horticulture sector in the Netherlands, in the *Van der Kooy* case and that of the International Rayon and Synthetic Fibres Committee (CIRFS) in the *CIRFS* case, the Court of First Instance interpreted those judgments too narrowly.

83 The appellant submits that its role is that of a negotiator with maritime transport companies and, as such, it negotiates the conditions of employment of its members, and hence the conditions in which the aid granted is transmitted from the Danish State to the recipients. In that sense, the appellant fulfils a function similar to that of the Landbouwschap, which negotiated the conditions in which aid was to be transmitted from the Dutch State to the horticultural producers, as the Court of First Instance recognised, in paragraph 40 of the order under appeal, by stating that the appellant played 'a part in the machinery for passing the aid on to shipowners'. Similarly, although the appellant did not negotiate the conditions in the Community guidelines, it nevertheless represents a clearly identified group of Community seafarers which has a special position under those guidelines.

84 The Commission submits that the fourth ground of appeal should be rejected as unfounded. It argues in particular that the Court of First Instance was right to consider that the situation at issue in the present case was not comparable to those in the *Van der Kooy* and *CIRFS* cases. In those cases the applicant occupied a clearly circumscribed position as negotiator which was intimately linked to the actual subject-matter of the decision at issue, thus placing it in a factual situation which distinguished it from all other persons. Contrary to what the appellant alleges, it in no way negotiated the conditions in which the aid resulting from the fiscal measures at issue is transmitted from the Danish State to the recipients of the aid, and it also did not negotiate the conditions in the Community guidelines.

Findings of the Court

85 It should be recalled that in *Van der Kooy* the Landbouwschap had negotiated with the supplier of gas the preferential tariff challenged by the Commission and was also one of the signatories to the agreement establishing that tariff. Similarly, on that basis, it had been obliged to engage in new tariff negotiations with the supplier and to sign a new agreement in order to put into effect the Commission's decision.

86 In the *CIRFS* case, CIRFS had been the Commission's interlocutor with regard to the introduction of a 'discipline' concerning aid in the synthetic fibre sector, and also to its extension and adaptation, and had actively pursued negotiations with the Commission during the pre-litigation procedure, in particular by submitting written observations and by keeping in close contact with the responsible departments of the Commission.

87 According to the Court's case-law, the *Van der Kooy* and *CIRFS* cases thus concerned particular situations in which the applicant occupied a clearly circumscribed position as

negotiator which was intimately linked to the actual subject-matter of the decision, thus placing it in a factual situation which distinguished it from all other persons (Case C-106/98 P *Comité d'entreprise de la Société française de production and Others*, paragraph 45).

88 The Court has had occasion to contemplate the application of that case-law in actions seeking the annulment of a Commission decision terminating a procedure initiated under Article 88(2) EC. It has held that certain associations of economic operators which have played a significant role in the procedure under that provision must be recognised as individually concerned by such a decision, in so far as they are affected in their capacity as negotiators (see, to that effect, Case C-106/98 P *Comité d'entreprise de la Société française de production and Others*, paragraphs 40 to 42).

89 It also held, when considering the admissibility of the application for annulment brought by CIRFS, that that application should be understood as seeking the annulment of the Commission's refusal to initiate the procedure provided for in Article 88(2) EC.

90 It follows that that case-law could be applicable, within the limits specified by the Court, to actions for annulment either of a Commission decision closing the procedure initiated under Article 88(2) EC or of a decision not to raise objections and hence not to initiate the formal review procedure under that provision.

91 As to the question whether the Court of First Instance erred in law by applying that case-law to the situation of the appellant in the present case, it must be recalled that the contested decision concerned tax measures adopted by the Danish legislature relating to seafarers employed on board vessels registered in the DIS register, that that registration, as appears from paragraph 5 above, allows those seafarers to be paid wages on the basis of their national laws, and that the appellant's complaint to the Commission

concerned the compatibility of those tax measures with the Community guidelines which had been adopted by the Commission without any particular participation of the appellant.

92 In view of those circumstances, the Court of First Instance did not err in law by considering that the appellant's situation was not comparable to that of Landbouwschap or CIRFS, situations which it rightly described as altogether special or indeed exceptional. The appellant, which is only one of the many trade unions in the European Union representing seafarers, and only one of the many trade unions operating in Denmark, and is not the only representative of seafarers, did not occupy a clearly circumscribed position as negotiator which was intimately linked to the actual subject-matter of the contested decision. It was not directly involved in the adoption by the Danish legislature of the fiscal measures at issue to which the Commission decided not to raise objections, its opposition to those measures not being enough for it to be classified as a negotiator within the meaning of *Van der Kooy* and *CIRFS*.

93 Nor was the appellant closely involved in the process by which the Commission adopted the Community guidelines, from which the incompatibility with the common market of the fiscal measures at issue, according to the appellant, is apparent.

94 The appellant admittedly made a complaint to the Commission against those fiscal measures, but that fact alone, as it admits itself in its appeal, does not enable it to establish a position of negotiator within the meaning of *Van der Kooy* and *CIRFS*.

95 Even if an action for annulment of a Commission decision not to raise objections and hence not to initiate the formal review procedure under Article 88(2) EC is held to be admissible where the applicant shows that he is a party concerned within the meaning of that provision (the stricter criteria defined in the line of case-law following from *Plaumann* not being applicable in that case), to interpret the case-law cited in the preceding paragraph as referring to any person who has made a complaint to the Commission would amount to depriving of substance the case-law considered in

connection with the first ground of appeal and cited in paragraph 30 of the order under appeal, relating to the effect on an applicant's competitive position.

96 In the light of the foregoing, the fourth ground of appeal must be rejected as unfounded.

The action at first instance

97 In accordance with the second sentence of the first paragraph of Article 61 of the Statute of the Court of Justice, if the decision of the Court of First Instance is set aside the Court of Justice may give final judgment in the matter where the state of the proceedings so permits.

98 While the Court is not in a position at this stage of the proceedings to give judgment on the substance of the action before the Court of First Instance, it does, on the other hand, have the necessary information to give final judgment on the plea of inadmissibility raised by the Commission in the proceedings at first instance.

99 In the light of the particular circumstances of the case, that plea must be rejected.

100 As regards the adequacy of the elements adduced by the appellant to show, in the circumstances of the case, that the contested decision was liable to have a specific effect on its situation or that of the seafarers it represents, it must be recalled that the appellant is an organisation representing workers which negotiates the terms and

conditions on which labour is supplied to undertakings, including the shipowners whose vessels are registered in the DIS register.

101 According to the appellant, the tax exemption for the seafarers' wages is justified by the need to offset the greater cost of employing Community seafarers compared to seafarers from non-member countries. In that way the objective can be achieved of preserving Community employment, which was one of the objectives of the Community guidelines. The social aspects of those guidelines affect the very conditions on which aid may be approved or not approved.

102 As may be seen from paragraph 70 above, it cannot be ruled out that, as a representative in particular of Danish seafarers, the appellant may be able to submit observations to the Commission on considerations of a social nature which it can take into account, if appropriate, if it initiates the formal review procedure provided for by Article 88(2) EC.

103 The Community guidelines themselves acknowledge, in the specific context of the reduction of employment costs in the maritime sector, the particular part played by trade union representatives in wage negotiations. According to the sixth paragraph of point 3.2 of the guidelines, '[t]he alleviation of fiscal burdens would not remove the interest of the shipowner in negotiating an appropriate salary package with potential crew members and their labour representatives. Seafarers from Member States with lower wage levels would still, therefore, have a competitive advantage over those from other Member States with higher wage expectations. In any event, EC seafarers will continue to be more expensive than the cheapest available in the global market.'

104 Since the appellant has explained how the fiscal measures at issue could affect its position and that of its members in collective negotiations with shipowners whose vessels are registered in the DIS register, and since the Community guidelines acknowledge the part played by trade unions such as the appellant in those

negotiations, it must be concluded that the appellant has shown, to the requisite legal standard, that its interests and those of its members could be affected by the contested decision.

105 It must also be recalled that the appellant had, in the present case, lodged a complaint with the Commission against the Kingdom of Denmark in respect of the fiscal measures at issue, arguing that they were contrary to the Community guidelines and hence to Article 87 EC. While lodging such a complaint with the Commission does not in itself suffice to establish the status of party concerned within the meaning of Article 88(2) EC, it is none the less the case that those measures were not notified to the Commission by that Member State and it was the bringing of the appellant's complaint which enabled the Commission to examine their compatibility with the common market. Furthermore, the Commission took nearly four years to conclude that the measures were compatible, and throughout that time the appellant was in close contact with the Commission.

106 It must also be pointed out that the present case differs from Case C-106/98 P *Comité d'entreprise de la Société française de production and Others*. In the latter case the applicants brought an action against a decision of the Commission, which, after initiating the procedure provided for in Article 93(2) of the Treaty, had declared the aid to be incompatible with the common market. By contrast, the present action is directed against a decision of the Commission in which, without initiating the formal review procedure provided for in Article 88(2) EC, it found aid compatible with the common market. Similarly, in Case C-106/98 P *Comité d'entreprise de la Société française de production and Others* the applicants did not take part in the procedure initiated under Article 93(2) of the Treaty, whereas in the present case the Commission did not initiate the formal review procedure, despite the complaint lodged by the appellant and the contact the appellant maintained with the Commission up to the date of the Commission's conclusion that the measures were compatible.

107 The situation described with reference to the present case indicates that the interests both of the appellant itself and also of its members may be liable to be affected by the granting of the aid.

108 In view of the above considerations, the plea of inadmissibility raised by the Commission against the appellant's application to the Court of First Instance must be rejected. The appellant may, in the particular circumstances of the case, be regarded as a party concerned within the meaning of Article 88(2) EC, and its action must consequently be declared admissible.

109 In those circumstances, the case should be remitted to the Court of First Instance to rule on the appellant's claim that the contested decision should be annulled.

On those grounds, the Court (Third Chamber) hereby rules:

1. **The order of the Court of First Instance of the European Communities of 23 April 2007 in Case T-30/03 *SID* v *Commission* is set aside in part, in so far as it did not address the arguments of 3F relating, first, to the competitive position of 3F in relation to other trade unions in the negotiation of collective agreements applicable to seafarers and, second, to the social aspects of the fiscal measures in relation to seafarers employed on board vessels registered in the Danish International Register of Shipping.**

2. **The plea of inadmissibility raised by the Commission of the European Communities before the Court of First Instance of the European Communities is rejected.**

3. **The case is remitted to the Court of First Instance of the European Communities for it to rule on the claim by 3F for the annulment of**

Commission Decision C(2002) 4370 final of 13 November 2002 not to raise objections to the Danish fiscal measures applicable to seafarers employed on board vessels registered in the Danish International Register.

4. Costs are reserved.

[Signatures]