OPINION OF ADVOCATE GENERAL
Sharpston
delivered on 5 March 2009 (1)

Case C-319/07 P

3F, formerly Specialarbejderforbundet i Danmark (SID)

(Appeal – State aid – Fiscal relief – Compatibility with common market – Commission decision not to open formal review procedure under Article 88(2) EC – Trade union's application for annulment – Locus standi)

1. In these appeal proceedings, the trade union 3F (2) is requesting that the Court of Justice set aside an order of the Court of First Instance made on 23 April 2007 in Case T-30/03 *SID* v *Commission*, not published in the ECR, in which the Court of First Instance dismissed as inadmissible 3F's application for the annulment, under Article 230 EC, of a Commission decision not to open a review procedure under Article 88(2) EC. (3)

Legal and factual background

Community provisions

The EC Treaty

2. The relevant provisions of Article 87 EC read as follows:

'1. 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 following may be considered to be compatible with the common market:

…

(c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

…'

3. Article 88 EC provides that all systems of aid in the Member States are kept under constant review by the Commission. The Commission may initiate a review procedure under Article 88(2) EC during which the 'parties concerned' by the aid in question may submit comments to the Commission. (4) If it does so, there is a full review of the alleged aid. Conversely, the Commission may – as it did in the present case – decide that it is not necessary to open such a review, because it considers either that the measures in question are not aid, or that they do constitute aid but are clearly compatible with the common market.

4. The fourth paragraph of Article 230 EC provides that any legal person may institute proceedings against a decision which, although addressed to another person, is of direct and individual concern to the former.

The 1997 Community Guidelines

5. State aid in the maritime sector is governed by the 1997 Community Guidelines on State aid to maritime transport ('the 1997 Guidelines'). (5) These Guidelines, inter alia, refer to a number of circumstances where aid granted to shipping companies may be considered to be compatible with the common market. In particular, Section 3.2 establishes the guidelines for determining the compatibility of State aid granted to alleviate labour-related costs.

6. The fifth and sixth paragraphs of Section 3.2 read as follows:

'Support measures for the maritime sector should, therefore, 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.'

7. The seventh paragraph of the section provides that income tax may be reduced to zero under a State aid scheme.

National provisions

8. Denmark has two shipping registers. The first of these registers is an ordinary shipping register, the Danish National Shipping Register (the Dansk Nationalt Skibsregister, or DAS). In 1988, Denmark established a second register, the Danish International Shipping Register (the Dansk Internationalt Skibsregister, or DIS). (6) Shipowners of vessels on this register are permitted also to employ seafarers from outside the EU on the basis of their national wage conditions. (7)

9. Seafarers on board DIS-registered ships were accorded certain fiscal advantages by the Danish Government. (8) In particular, employees registered on board a DIS-registered ship were completely exempt from the obligation to pay income tax. It seems to be generally agreed that the benefit of these

fiscal measures is transmitted to the shipowners, who thus have the flexibility to reduce gross wages without the exempted seafarers seeing a reduction in their net wages.

The contested decision

10. The contested decision was taken as a result of a complaint from 3F, a trade union which represents (amongst others) seafarers. 3F claimed that these fiscal measures, in particular the tax exemption for seafarers on DIS-registered ships, were contrary to the 1997 Guidelines and should be classed as unlawful State aid.

11. In the contested decision the Commission held that the measures did constitute State aid, but that they were compatible with the common market in accordance with Article 87(3)(c) EC. The Commission therefore decided not to open a review procedure under Article 88(2) EC, and to raise no objections to the fiscal measures which formed the subject of 3F's complaint.

The order of the Court of First Instance

12. 3F brought an action before the Court of First Instance in which it sought the annulment of the contested decision. It based its action for annulment on three grounds:

(i) infringement of Article 88(2) EC (in that the Commission failed to open a review procedure despite a four-year delay in answering the complaint, which 3F construed as implying 'serious difficulty' in determining whether State aid was compatible);

(ii) infringement of Article 87(3)(c) EC (in that the Commission held that the aids were compatible, when, as 3F contends, they do not lead to an incentive for employers to favour EC seafarers, as is required by the 1997 and 1989 Guidelines and the principle of legitimate expectations);

(iii) manifest error of assessment (in particular that the Commission failed to take social policy into account and failed to investigate what leads an employer to choose to employ one seafarer over another).

13. In its application before the Court of First Instance, 3F first sought to establish that it had standing to bring its action for annulment. In particular, it argued that it occupied a clearly circumscribed position as a negotiator of collective agreements and that its scope to negotiate such agreements was affected by the aid regime which provided tax breaks not only for EC seafarers but for all seafarers (including those in non-Community trade unions). 3F contended that this placed its members at a competitive disadvantage. 3F also referred to the fact that the contested decision arose as a result of its complaint.

14. The Commission raised an objection to admissibility, which the Court of First Instance upheld in the contested order.

15. The Court of First Instance began with a series of preliminary observations, (9) in which it first set out the general test for direct and individual concern established in *Plaumann* (10) and outlined the test for standing for a party seeking annulment of a Commission decision not to initiate an enquiry under Article 88(2) EC where that party seeks to protect its procedural rights, and the test for standing for a party which seeks to call into question the merits of that decision appraising the aid.

16. The Court of First Instance then went on to consider the admissibility of 3F's action for annulment under the test in the *Plaumann* line of case-law. In particular, the Court found, at paragraph 32, that 3F:

'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. [(11)] Second, in so far as the applicant 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 [(12)].' (13)

17. After recalling that bodies representing the employees of an undertaking might, as parties concerned within the meaning of Article 88(2) EC, submit comments to the Commission on considerations of a social nature, the Court of First Instance found, at paragraph 36, that:

'In the present case … it appears that the social aspects arising from the DIS register derive primarily from the establishment of the register … rather than from the accompanying fiscal measures … First, the Commission took the view that the establishment of the DIS register did not constitute State aid, and it limited its examination of the compatibility with the common market of the State measures at issue to the fiscal measures alone … Second, in its observations on the plea of inadmissibility … the applicant expressly stated that its case was based on an infringement of Article 87(3)(c) EC and that it had never claimed that State aid arose from the fact that non-Community seafarers might be subject to different conditions of employment from Community seafarers. It follows that in the present case the social aspects of the DIS register are only indirectly linked to the subject-matter of the contested decision and thus, as the applicant acknowledges, to the present proceedings. The applicant cannot therefore rely on those social aspects to establish that it is individually concerned.' (14)

18. The Court of First Instance then found, at paragraph 37, that:

'[3F] cannot be regarded as individually concerned merely because the aid in question is 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. The contested decision is based on the advantages received by the recipients of the aid, not on the method of transmission of the aid.' (15)

19. The Court of First Instance finally found, at paragraphs 38 to 40, that:

'[3F] has not shown that its own interests as a negotiator were liable to be directly affected by the aid in question.

In this respect, it should be recalled that in *Van der Kooy and Others* v *Commission* and *CIRFS* v *Commission* … the applicants were able to rely on an altogether special, indeed exceptional, position, as having negotiated and signed the agreement establishing the tariff that constituted aid and having participated closely in the procedure before the Commission [(16)] or as having been the Commission's interlocutor with regard to the definition of the discipline concerning aid in the sector in question. [(17)]

In the present case, the mere fact that the applicant made a complaint to the Commission against the aid at issue does not mean that it is distinguished individually. Furthermore, even though the applicant may 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 applicant has not shown that it 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 with the Commission or the Danish Government.' (18)

20. On these grounds, the Court of First Instance held that neither 3F nor its members were individually concerned by the contested decision.

The present appeal

21. 3F is appealing against the decision of the Court of First Instance on four grounds.

22. First, the Court of First Instance erred in law by relying on *Albany* (19) to hold that 3F could not rely on its own competitive position in the negotiation of collective agreements in order to establish that it was individually concerned.

23. Second, the Court of First Instance erred in law by finding that 3F could not rely on social aspects to establish that it was individually concerned.

24. Third, the Court of First Instance misapplied the *Plaumann* and *ARE* (20) case-law by finding that 3F could not be regarded as individually concerned merely because the aid in question was passed to the recipients by means of a reduction in the wage claims of seafarers benefiting from the income tax exemption.

25. Fourth, the Court of First Instance misapplied the *Van der Kooy* and *CIRFS* case-law by finding that 3F's own interests as a negotiator were not affected by the fiscal measures at issue in the contested decision.

Preliminary remarks

26. 3F's application before the Court of First Instance requested the annulment of a Commission decision not to open a review procedure under Article 88(2) EC. (21) There are relatively few cases concerning this particular type of application; (22) and a degree of opacity remains as to the appropriate test for standing. (23) I therefore find it helpful to set out what I understand to be the correct way of assessing standing before the court in applications of this type.

27. As a general rule, Article 230 EC provides a basis for natural and legal persons (which may include trade unions) to bring an action for annulment against a decision of the Commission addressed to a Member State (as the contested decision was) if that decision is nevertheless of direct and individual concern to the party bringing the proceedings.

28. The Court has interpreted the notion of 'direct and individual concern' numerous times in a long line of well-known case-law. In particular, the Court decided in *Plaumann* (24) that parties may claim to be individually concerned only if the decision in question affects them by reason of certain attributes peculiar to them or by reason of circumstances which differentiate them from all other persons, and thus distinguishes them individually.

29. In the context of decisions taken by the Commission in the exercise of its duty to keep under constant review all systems of aid existing in the Member States, (25) the Court has developed a more specific set of tests for assessing the standing of a legal person where that person wishes to bring an action for the annulment of a Commission decision not to initiate a review under Article 88(2) EC.

30. This separate test for standing was first developed in *Cook* (26) and *Matra*. (27) In those two judgments the Court set out a lower threshold for parties who were challenging this type of decision, stating that the persons intended to be the beneficiaries of the procedural guarantees laid down in Article 88(2) EC must be given the right to challenge the Commission's decision not to initiate a review.

31. The Court referred to *Intermills* (28) in order to define those persons. Basing itself on the wording of Article 88(2) EC, it concluded that 'parties concerned' could bring actions to protect their procedural guarantees. In order to fall within the category of 'parties concerned', an applicant must show that its interests might be affected by the grant of aid. The Court specified that, in particular, this includes undertakings which are in competition with the recipients of the aid in question.

32. In *ARE* (29) the Court confirmed the distinction between the test for standing for those applicants who sought merely to protect their procedural rights under Article 88(2) EC and the test for those which sought to question the merits of the decision appraising the aid as such.

33. According to the judgment in *ARE*, where an applicant seeks to protect its procedural rights, it need demonstrate only that it falls within the category of 'party concerned' within the meaning of Article 88(2) EC. However, where an applicant questions 'the merits of the decision appraising the aid as such', it must show instead that it meets the test for standing set out in the Court's judgment in *Plaumann*.

34. In its most recent judgment in this area, *BAA*, (30) the Court stated that an applicant must, when calling into question the merits of the decision assessing the aid as such, demonstrate that it has a special or particular status within the meaning of *Plaumann*. (31)

35. The *BAA* case was notable in that the applicant there had challenged a decision not to initiate a review on the grounds both that its procedural rights had been infringed and that the Commission had erred on the merits of the decision. (32) The Court considered together on appeal all the pleas in law raised by the applicant before the Court of First Instance. (33) It seems from that judgment that if a party includes in its challenge a plea as to the merits of the decision itself, the test for standing to be applied is that set out in *Plaumann* and the subsequent line of case-law. Furthermore, this judgment suggests that it would not be possible for the Court of First Instance to sever the pleas in law brought before it so that, were the applicant in question not to meet the *Plaumann* criteria for admissibility in relation to the challenge on the merits, the court might consider admissibility within the category of 'parties concerned' in respect of the procedural pleas. (34)

36. The approach taken so far by the Court has been the subject of a certain amount of academic criticism. (35) I do not intend to undertake a lengthy critique of the Court's approach in this Opinion. I should nevertheless like to comment briefly.

37. First, I would like to echo certain specific comments made by Advocate General Mengozzi in his Opinion in *BAA*. (36) In my view, where an applicant merely asks for the annulment of a Commission decision not to initiate the formal review procedure, the Court of First Instance should confine itself to the question whether the Commission's (procedural) decision was correctly taken. In practice, this may mean a review of the procedures followed by the Commission in reaching its decision. That may include a review of whether the Commission had shown that there were no serious difficulties remaining in establishing that the measure in question either did not constitute aid, or constituted aid which was compatible with the common market. (37)

38. If the Court of First Instance concludes that the Commission's decision not to open a review procedure was not correctly taken, the Court should annul that decision. (38)

39. If the applicant has raised an ancillary argument which relates to the Commission's substantive appreciation of the measure in question, that should not in my view affect the threshold for standing. In practice, ancillary observations which relate to the substance of the case may assist the Court in determining whether the Commission has indeed resolved all serious difficulties in its preliminary assessment of whether the measure in question is either compatible with the common market or is a measure which does not amount to State aid. Such observations may also reveal a procedural error on the part of the Commission.

40. I cannot see why the submission of ancillary substantive observations on the measures in issue should lead to the imposition of a stricter test for standing. This is particularly the case where the applicant seeks not a binding determination of whether the measure in question constitutes lawful State aid but merely a judicial appraisal of whether the Commission was correct to take the preliminary view that it did.

41. Such an approach is unnecessarily formalistic, penalising an applicant who wishes to support its request for judicial appraisal of the Commission's preliminary view with a contention that the Commission erred on the substance of its finding.

42. In particular, under the present approach I find it difficult to see how an applicant can easily avoid being drawn into the merits of a decision when seeking to show that there were still serious difficulties remaining in the Commission's initial assessment of the aid in issue. Through *ARE* and *BAA*, the Court has established a veritable tightrope along which applicants and their advocates must gingerly advance. It is all too easy for them to slip and find that they are either trapped by the stricter *Plaumann* test, or that they have not done enough to satisfy the Court that there were indeed procedural errors in the decision they wish to contest.

43. In my view, it would be better if the Court were to approach the application on the basis of what is *actually sought* rather than on whether the applicant relies on arguments that touch the underlying substance of the Commission's initial appraisal of the alleged State aid.

44. In the present case, although 3F challenged the merits of the Commission's findings on the nature of the aid, it did so in the course of seeking a judicial review of a procedural decision of the Commission. 3F's standing as an applicant would more plausibly be assessed against the criterion of whether it could be considered to be a 'party concerned'.

45. If the Court of First Instance had assessed 3F's standing on that basis, it seems likely that 3F would have qualified, in that the aid in question might affect its interests.

46. However, within the framework permitted by the present case-law, the fact that, in the course of applying to annul the contested decision, 3F called into question the merits of the contested decision means that the *Plaumann* test for standing is to be applied.

47. The Court of First Instance was therefore correct in applying the *Plaumann* test for standing, to the exclusion of any assessment as to whether 3F might have been considered to be a 'party concerned' within the meaning of Article 88(2) EC.

48. This Court should likewise assess 3F's grounds of appeal on the basis of whether it can establish standing under the *Plaumann* test.

49. Finally, the Court ruled in *ARE* that where an action for annulment is brought by an association set up to promote the collective interests of a category of persons, that association is individually concerned to the extent to which the position in the market of its members is substantially affected. (39) The pleas in law on standing brought by 3F therefore fall to be assessed in this light.

The first ground of appeal

50. The appellant's first ground of appeal is an allegation that the Court of First Instance erred in law when it held, at paragraph 32 of the contested order, that 3F could not claim that its competitive position had been affected by the aid at issue.

51. In the second part of paragraph 32 the Court of First Instance stated that 3F could not rely on a detriment to its competitive position vis-à-vis other trade unions in negotiating collective agreements in the sector in question. To support this finding, the Court of First Instance stated that agreements in the context of collective negotiations do not fall within the scope of competition law and referred to paragraphs 52 to 60 of the judgment of the Court in *Albany* (40) in support of that proposition.

52. 3F argues that the present case should be distinguished from *Albany*. The latter concerned a dispute over whether an employer could be required by a collective agreement to remain affiliated to a particular pension fund. In that instance, the Court held that such an agreement could not fall within the scope of competition law under what is now Article 81(1) EC. By contrast, the present case concerns a review of a Commission decision regarding a fiscal measure which allegedly had an effect on 3F's ability to conclude collective agreements. 3F accepts that collective agreements do not fall under Article 81(1) EC, but argues that the point made by the Court of First Instance in this respect is not pertinent to the outcome of the present case.

53. 3F therefore contends that the Court of First Instance applied *Albany* incorrectly.

54. The Commission makes two arguments in response. Firstly, it argues that 3F's first ground of appeal is vitiated by its failure to contest the first part of paragraph 32, in which the Court of First Instance stated that 3F could not establish standing on the basis that it is in competition with its members' employers. 3F's failure to contest the Court's finding in the first part of the paragraph therefore means that its argument

with regard to the second part of paragraph 32 is inoperative, as the finding of the Court in the first part of paragraph 32 is by and of itself a sufficient ground to declare the action inadmissible.

55. The Commission's first argument may be dealt with summarily. That argument mistakenly assumes that the grounds on which an applicant can claim standing are cumulative, so that if it fails to establish standing on any one of a series of grounds it cannot claim standing at all. The grounds are, however, alternative. If an applicant can establish standing on a single ground, the action is admissible. Furthermore, as 3F pointed out at the hearing, it had not claimed to be in competition with its members' employers.

56. The Commission's first submission on this point should therefore be dismissed.

57. Second, the Commission argues that the Court of First Instance's application of *Albany* is correct.

58. I therefore turn to consider *Albany* in greater detail.

59. The Court in *Albany* held that collective agreements negotiated between management and labour in pursuit of social policy objectives did not fall to be assessed under Article 81(1) EC, because those objectives would be undermined if such agreements were to be subject to assessment under that article. (41)

60. In the present case, 3F sought the review of a Commission decision declining to open a review procedure. That review procedure would have concerned a fiscal provision, not a collective agreement. 3F claims that the contested fiscal provisions constrain its ability to conclude collective agreements. The mere fact that collective agreements cannot be evaluated under Article 81 EC (see *Albany*) cannot properly serve as the basis for concluding that 3F may not advance that claim.

61. Essentially, I agree with that line of reasoning.

62. The Court of First Instance has, in my view, read *Albany* too broadly. In the present case there was no request that the Court assess – as it was asked to in *Albany* – a particular collective agreement in the light of the rules on competition. Instead, 3F alleged that its competitive position, vis-à-vis other trade unions, was affected by the alleged aid. One way in which it sought to show that its position was affected was by stating that the aid in issue had damaged its capacity to conclude collective agreements.

63. Even if collective agreements do not fall within the scope of competition law, the Court of First Instance has drawn a conclusion which does not logically follow from that proposition. The exclusion of a collective agreement from review under competition law principles should not preclude an applicant from showing that its competitive position has been detrimentally affected by reference to its weakened position vis-à-vis other trade unions in the conclusion of collective agreements.

64. The Court of First Instance therefore erred in its appreciation of the effect the aid at issue had on 3F's competitive position. The proper course would have been to examine whether 3F's competitive position in relation to other seafarers' trade unions was indeed affected by the alleged aid.

65. I accordingly conclude that 3F's first ground of appeal is well founded.

The second ground of appeal

66. 3F argues that the Court of First Instance erred in law by finding, at paragraphs 35 and 36 of the contested order, that 3F could not rely on social aspects to establish that it was individually concerned.

67. The Court of First Instance found, at paragraph 36, that there were no social aspects on which 3F could submit comments, because the only social effects arose from the DIS register itself, rather than from the fiscal relief which applied to seafarers on vessels registered under it.

68. 3F submits that the Court of First Instance should have explored whether 3F might be entitled to submit comments on the social aspects of the legal framework (namely the protection of EC seafarers under the 1997 Guidelines) under which a fiscal measure such as the one at issue in the contested decision falls to be judged. 3F argues that, as a representative of a group of EC seafarers, it is a party which could have submitted comments on the social aspects of the aid, if a review procedure under Article 88(2) EC had been opened. The Court of First Instance should therefore have held that it was individually concerned by the Commission's decision not to initiate this procedure.

69. I cannot agree.

70. As the Commission correctly submits, the right of parties concerned to submit comments on considerations of a social nature forms part of the procedural rights which such parties enjoy once the review procedure is initiated under Article 88(2) EC. (42)

71. However, 3F has to establish that it meets the test for standing under *Plaumann*. (43) The mere possibility that 3F (as a representative of the employees of the eventual beneficiaries of the aid) could show that its rights to submit comments in the course of a review procedure under Article 88(2) EC were adversely affected by the Commission's decision not to initiate that procedure merely suffices to distinguish it as being a 'party concerned' within the meaning of Article 88(2) EC.

72. An alleged denial of procedural rights does not suffice to distinguish 3F individually under the *Plaumann* test for standing. (44)

73. For that reason, the second ground of appeal should be dismissed.

The third ground of appeal

74. By its third ground of appeal, 3F argues that the Court of First Instance, at paragraph 37 of its order, misapplied the *Plaumann* line of case-law in holding that the fact that aid is passed on to its eventual beneficiaries (the shipowners) through reductions in gross wages is insufficient to demonstrate that 3F was individually concerned.

75. 3F submits that, following the Court's judgment in *ARE*, a trade union is individually concerned to the extent that its members' positions on the market are substantially affected by the fiscal measures. (45) Although the Court in that judgment referred to 'economic operators', (46) which is generally taken to mean undertakings, 3F argues that the workers it represents could also be considered to be economic operators, in view of the special consideration given to them by the 1997 Guidelines.

76. The Commission submits that the present case should be distinguished from *ARE*. The present application concerns a Commission decision not to initiate a review procedure under Article 88(2) EC, whereas *ARE* involved a second decision taken following a review procedure that had resulted in a first decision declaring the initial aid scheme unlawful. Moreover, unlike the facts underlying *ARE*, the facts of the present application do not concern a situation of direct aid and the application for annulment was not brought by the direct competitors of the eventual beneficiaries of the aid.

77. The Commission elaborates the last argument, arguing that 3F's members cannot be regarded as 'economic operators' within the meaning set out in *ARE*, and cannot be said to be in direct competition with the shipowners who eventually benefit from the aid through their ability to reduce gross wages. If they were to be found to be in direct competition, the Commission argues, 3F's members would be in the same position as the farmers in *ARE*, and their application would be inadmissible on much the same grounds, as all EU seafarers could be regarded as competitors of the shipowners (not merely Danish seafarers represented by 3F). (47)

78. In my view, there are two points which may be inferred from the finding of the Court of First Instance at paragraph 37 of the contested order.

79. First, the Court of First Instance considered the seafarers who are represented by 3F not to be in competition with the shipowners who are the eventual beneficiaries of the aid. I can see nothing especially controversial in this statement. If 3F's seafarers were in competition with the shipowners, their position would be analogous to that of the farmers in *ARE* and would be inadmissible for want of individual concern. I therefore agree with the argument of the Commission that 3F cannot establish admissibility on this basis.

80. Second, if the eventual advantage to the shipowners is transmitted to them via the possibility of a reduction in gross wages, then an initial benefit must go to the seafarers themselves. (48)

81. Having recognised this, the Court of First Instance should, in my view, then have gone on to assess whether the competitive position of those seafarers who are members of 3F was adversely affected vis-à-vis seafarers who are not members of 3F. However, it did not do so. (49)

82. Accordingly, I conclude that the third ground of appeal should be upheld insofar as the Court of First Instance did not consider the effect of the aid on the position of 3F's members in comparison with other seafarers.

The fourth ground of appeal

83. At paragraphs 38 to 40 of the contested order, the Court of First Instance found that 3F could not establish standing on the grounds that its interest as a negotiator was liable to be directly affected. In this respect it drew a distinction between 3F's position and the positions of the applicants in *Van der Kooy* (50) (the Landbouwschap) and in *CIRFS* (51) (the International Rayon and Synthetic Fibre Committee).

84. 3F argues that the Court of First Instance erred in drawing this distinction and in concluding that 3F was unable to establish standing on this basis. In this regard, 3F construes those cases not as exceptional instances where individual concern was found, but as two widely differing examples of a broader principle; namely that an association's position is distinguished and individualised if it has played a special role in the grant of the aid or in the determination of the conditions in which aid will be permitted.

85. If the cases establish such a principle, 3F's role as a negotiator of collective agreements – including the negotiation of its members' conditions of employment – with the shipowners who are the eventual recipients of the aid makes it part of the machinery for passing the aid to its eventual recipients. 3F derives three separate arguments from that proposition.

86. 3F submits, first, that it thereby plays the same role as the Landbouwschap in *Van der Kooy* and should be recognised as having a similar status, so that it may establish standing on the ground that its role as a negotiator was adversely affected. (52)

87. The Commission contends that 3F is not – unlike the Landbouwschap in *Van der Kooy* – intimately linked with the aid at issue in the contested decision and did not negotiate the way in which the aid was transmitted from the State to its eventual recipients. 3F is simply one of several trade unions with members who are seafarers. It is not in a factual situation which distinguishes it from all other persons.

88. 3F's second argument is that, although it concedes that it played no part in negotiating the 1997 Guidelines, in its application it was acting to protect its members, who are a special group, specifically protected by those guidelines. An erroneous interpretation of the 1997 Guidelines (which, contends 3F, has occurred inasmuch as the aid in issue was considered to be compatible with the common market) will result in an adverse effect on 3F and its members. Thus, although the fact that it lodged a complaint with the Commission cannot suffice to establish standing, 3F (like the applicant in *CIRFS*) has standing to seek to ensure that its members are protected under the 1997 Guidelines.

89. To 3F's second argument, the Commission replies that the applicant's standing in *CIRFS* stemmed from its position as the Commission's interlocutor with regard to aid in the industry in question. The Court

of First Instance was therefore correct to draw a distinction between that case and the present one. The Commission adds that if 3F were deemed to have standing in order to 'police' the 1997 Guidelines, this would seriously undermine the requirement of individual concern.

90. 3F's third argument is that it played a negotiating role, albeit an unsuccessful one, in opposing the Danish Government's introduction of the fiscal measure at issue.

91. The Commission replies that 3F merely objected to the fiscal measures which were put in place by the Danish Government. It did not negotiate them. It cannot therefore be characterised as a negotiator on these grounds.

92. I shall address each of 3F's arguments in turn.

93. 3F first aims to establish that *Van der Kooy* and *CIRFS* are illustrative of a wider rule.

94. Certainly the facts which underpin these two cases are rather different. In *Van der Kooy*, the Landbouwschap acted as a representative of growers' organisations in negotiations with the Netherlands Government over a gas tariff. It was also party to the tariff agreement and took an active part in the review procedure which the Commission pursued under Article 88(2) EC. The International Rayon and Synthetic Fibre Committee in *CIRFS*, by contrast, negotiated not with a Member State but with the Commission, acting as an interlocutor during the process of adopting guidelines. It also pursued actions connected with the policy of restructuring the sector, and – like the Landbouwschap in *Van der Kooy* – submitted observations during the review procedure. Both were found to have standing to challenge the Commission's respective decisions before the Community courts. (53)

95. I am prepared to accept that these two cases are not wholly exceptional, but rather illustrations of a more general principle that standing may be established by an applicant who is able to show that the aid in question has affected its position as a negotiator, (54) irrespective of whether the Commission has or has not initiated a review. To my mind, this particular route to establishing individual concern presents no difficulties of compatibility with the test set out in *Plaumann*. (55) It seems to me, moreover, that considerations of both access to justice and social policy militate strongly in favour of such an approach. I therefore turn to assessing the ways in which 3F claims that its position as a negotiator has been affected by the aid.

96. Although 3F as a negotiator of collective agreements may play a part in the transmission of aid to the shipowners, (56) it exercises no discretion over the fiscal relief granted initially to the tax-paying seafarers. It is not a negotiator in this respect. (57)

97. For these reasons, I do not accept 3F's first argument.

98. Second, in my view 3F cannot be considered to be a 'negotiator' with respect to the 1997 Guidelines. It played no part in negotiating those Guidelines, and therefore cannot establish standing on this ground. Moreover, 3F's argument that it was seeking to protect its members from an erroneous interpretation of the Guidelines does not alter the position. Absent a specific negotiating role in the creation of the 1997 Guidelines themselves, 3F cannot claim that it is seeking to protect itself and its members by asking the Commission to initiate a review procedure under Article 88(2) EC (in order to ensure the proper application of the Guidelines) without first showing that its competitive position, or that of its members, has been adversely affected.

99. 3F's second argument is therefore not an independent ground for standing, but is instead dependent upon 3F showing an adverse effect on its competitive position, or that of its members. As such, it may only be made in the event that 3F can establish such an effect. (58)

100. 3F's final argument in support of its fourth ground of appeal invokes its opposition to the fiscal measure at national level. The Commission argued in its written submissions that diametric opposition to a

measure was inconsistent with a claim to have been involved in the negotiations which led to setting up that measure. However, at the hearing the Commission went further, arguing that no matter how involved with the legislative process at national level a trade union might be, it could never gain standing to challenge a Commission decision not to initiate an evaluation procedure under Article 88(2) EC on this ground. The Commission suggested that a challenge to the aid before the national courts, followed by a reference to this Court under Article 234 EC, was the more appropriate route to take.

101. I do not accept that a trade union which participates fully in negotiations concerning an aid scheme at a national level, but is ultimately unsuccessful in preventing that scheme from being enacted, is precluded from challenging a Commission decision not to initiate a review procedure (and is instead obliged to use the more circuitous, and less certain, route of national proceedings and a reference). (59)

102. However, if the trade union in question has merely shown that it lodged formal objections, it has not demonstrated that it was a negotiator. Whether an applicant has produced sufficient evidence to make good its claim to be a negotiator is a matter that falls to be determined by the Court of First Instance.

103. In the present case, the Court of First Instance found as a fact (60) that 3F has not shown that it negotiated the adoption of the fiscal measures with the Danish Government. In the absence of a plea alleging a distortion of the evidence, that finding of fact cannot be disputed.

104. For the above reasons, I would dismiss the appellant's fourth ground of appeal.

Final decision on admissibility

105. Under Article 61 of the Statute of the Court of Justice the Court may, if it quashes the decision of the Court of First Instance, give final judgment in the matter where the state of the proceedings so permits.

106. In my view, 3F has shown that the Court of First Instance erred in law in its failure to consider whether the position of 3F's members was adversely affected by the aid in question.

107. Has 3F done enough to establish that it should have been granted standing as an applicant before the Court of First Instance?

108. It seems to me, from reviewing the materials before the Court and before the Court of First Instance, that 3F's argument that its competitive position was thus adversely affected is flawed.

109. The contested measures take the form of fiscal relief.

110. A seafarer can only obtain fiscal relief if he is also liable to pay income tax. Therefore it is only tax-paying seafarers who benefit from the measures which 3F wishes the Commission to subject to a review procedure.

111. The 1997 Community Guidelines specifically define 'EC seafarers' as those who are liable to taxation in an EC Member State. The group of seafarers who benefit from the measures at issue is therefore, as the Commission has correctly pointed out, the same as the group of seafarers which the Community Guidelines seek to protect.

112. It follows that the competitive position of the seafaring members of 3F, vis-à-vis seafarers who are not EC seafarers within the meaning of the EC Guidelines, cannot be adversely affected by the aid measure in question.

113. Thus, although I consider that the first and third grounds of appeal are well founded, the Court should nevertheless in my view dismiss the application as inadmissible.

Costs

114. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

115. The Commission has applied for costs. Since I have taken the view that the appellant should be unsuccessful, these should be granted.

Conclusion

116. I therefore suggest that the Court should:

– set aside the contested order;

– dismiss the application as inadmissible;

– order 3F to pay the costs.

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1 – Original language: English.

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2 – Formerly known as SID, and referred to as such in the order of the Court of First Instance. However, the trade union was known as 3F by the time it brought the present appeal and for the sake of clarity I shall refer to the appellant as '3F' throughout.

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3 – C (2002) 4370 final; 'the contested decision'.

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4 – The procedures for the examination of State aid are set out in Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ 1999 L 83, p. 1). Article 93 of the Treaty is now, after renumbering, Article 88 EC.

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5 – OJ 1997 C 205, p. 5. These Guidelines replaced the 1989 Guidelines (SEC (89) 921 final), which had as their two basic objectives the maintenance of ships under Community flags and the employment, to the highest possible degree, of Community seafarers.

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6 – Law No 408 of 1 July 1988, which entered into force on 23 August 1988 (*Lovtidende*, Part A, 22 July 1988).

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7 – In other words, wage conditions that pertain in the third countries, which in practice usually means a lower remuneration than that which would be granted to seafarers from EU Member States.

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8 – Laws No 361 to 364 of 1 July 1988, which entered into force on 1 January 1989 (*Lovtidende*, Part A, 2 July 1988).

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9 – Paragraphs 21 to 26 of the contested order. I address these observations below in points 26 to 49.

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10 – Case 25/62 *Plaumann* v *Commission* [1963] ECR 95.

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11 – Here the Court referred to Case T-178/94 *ATM* v *Commission* [1997] ECR II-2529, paragraph 63.

12 – For the non-application of Articles 3(g) EC and 81 EC to collective agreements, the Court of First Instance referred to Case C-67/96 *Albany* [1999] ECR I-5751, paragraphs 52 to 60.

13 – This paragraph constitutes the basis for the appellant's first ground of appeal, see below, point 22.

14 – This paragraph forms the basis for the appellant's second ground of appeal, see below, point 23.

15 – This paragraph forms the basis for the appellant's third ground of appeal, see below, point 24.

16 – The Court here referred to Joined Cases 67/85, 68/85 and 70/85 *Van der Kooy and Others* v *Commission* [1988] ECR 219, paragraphs 21 to 24, and Case C-106/98 P *Comité d'entreprise de la Société française de production and Others* v *Commission* [2000] ECR I-3659, paragraph 43.

17 – The Court here referred to Case C-313/90 *CIRFS* v *Commission*, [1993] ECR I-1125 paragraphs 29 and 30, and *Comité d'entreprise de la Société française de production*, cited at footnote 16 above, paragraph 44.

18 – These paragraphs form the basis for the appellant's fourth ground of appeal, see below, point 25.

19 – Cited at footnote 12 above.

20 – Case C-78/03 P *Aktionsgemeinschaft Recht und Eigentum* ('*ARE*') [2005] ECR I-10737.

21 – Although the application before the Court of First Instance sought merely the annulment of the contested decision, the applicant's first plea in law was a procedural one and the Court of First Instance took this as an application inter alia to safeguard 3F's procedural rights. For the purposes of this appeal, I shall do likewise.

22 – In contrast to the rather more weighty line of case-law concerned with establishing standing where the Commission has opened the review procedure under Article 88(2) EC and the decision at the end of that procedure is being challenged.

23 – Indeed there is some ambiguity in the contested order itself over which test for standing should be applied; compare paragraph 28 with paragraphs 27 and 30.

24 – Cited at footnote 10 above, paragraph 107. This formulation was most recently repeated in Case C-487/06 P *British Aggregates* v *Commission* ('*BAA*') [2008] ECR I-0000, paragraph 27.

25 – Article 88(1) EC.

26 – Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, paragraph 23 et seq.

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27 – Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 17 et seq.

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28 – Case C-323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 16.

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29 – Cited at footnote 20 above, paragraphs 34 to 37.

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30 – Cited at footnote 24 above.

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31 – See in particular paragraphs 25 to 30 and 35.

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32 – The applicant in this respect relied upon a very similar set of pleas in law as 3F did before the Court of First Instance.

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33 – Paragraph 37 of the judgment.

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34 – See, in particular, paragraph 37 of the judgment, where – in the course of considering the proper test of standing to apply to the applicant – the Court found that 'BAA was not merely seeking to challenge the Commission's refusal to initiate the formal review procedure but was *also* calling into question the merits of the contested decision' (my emphasis). Point 76 of the Opinion of Advocate General Mengozzi appears to support this interpretation.

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35 – See, for example, Fridensköld, E., 'Locus Standi in Article 88(2) EC cases: No cure for the Plaumann blues I', and Schmauch, M., 'Locus Standi and Article 88(3): No cure for the Plaumann blues II', *European Law Reporter* 1/2008, p. 17. To my knowledge there is as yet no published commentary on *BAA*.

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36 – Points 68 to 76.

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37 – Point 71 of the Opinion of Advocate General Mengozzi in *BAA*.

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38 – The Commission could then retake the decision, without being bound as to its preliminary appraisal of the measure at issue. If the decision were annulled because of difficulties remaining in the Commission's appraisal of the aid, the Commission, although free to decide not to open the examination procedure, would be obliged to show that the remaining difficulties had been overcome.

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39 – *ARE*, cited at footnote 20 above, paragraph 70.

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40 – Cited at footnote 12 above.

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41 – Paragraphs 59 and 60.

42 – This is a logical reading of the Court of First Instance's ruling (upheld by the Court of Justice) in *Comité d'entreprise de la Société française de Production*, cited at footnote 16 above, in which it stated that bodies representing the employees of an undertaking might, *as parties concerned within the meaning of Article 88(2) EC*, submit comments to the Commission on considerations of a social nature.

43 – A test which has a markedly higher threshold, see above, points 28 and 31.

44 – See *Comité d'entreprise de la Société française de Production*, cited at footnote 16 above, paragraphs 50 to 53, adopting the judgment of the Court of First Instance at paragraphs 41 and 42.

45 – Paragraph 70 of the judgment.

46 – Paragraph 72 of the judgment.

47 – Paragraph 72 of the judgment.

48 – In that, in being able to demand lower gross wages for the same net benefit to themselves, the seafarers in question are rendered more competitive.

49 – This approach was consistent with the Court of First Instance's finding in paragraph 32 of the contested order. However, 3F contested this finding in its first ground of appeal, which in my view should be upheld. See above, points 62 to 65.

50 – Cited at footnote 16 above.

51 – Cited at footnote 17 above.

52 – 3F also seeks to distinguish itself from the position of the applicant in *Comité d'entreprise de la Société française de Production*, on the basis that the competitive position of 3F's members is actually affected by the aid. I consider this argument below at points 105 to 113.

53 – See *Van der Kooy,* cited at footnote 16 above, paragraph 25, and *CIRFS,* cited at footnote 17 above, paragraph 30.

54 – As the Court of First Instance suggests at paragraph 38 of the contested order.

55 – If, a contrario, the Court does not consider this to be a general principle, the differences between 3F's position and the circumstances in both *Van der Kooy* and *CIRFS* would in my view prevent 3F from establishing standing by way of analogy with these cases.

56 – Via the opportunity afforded to shipowners under the fiscal measures in question to make reductions in gross wages while preserving net wages.

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57 – 3F's contention that its role as a negotiator of collective agreements was adversely affected by the aid is considered below, at points 105 to 113.

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58 – See, likewise, below at points 105 to 113.

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59 – In this respect I would like strongly to endorse the comments made by Advocate General Jacobs at points 37 to 49 of his Opinion in Case C-50/00 P *Unión de Pequeños Agricultores* [2002] ECR I-6677; access to the Court via the national court and a reference under Article 234 EC is not a perfect substitute for access under Article 230 EC.

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60 – At paragraph 40 of the contested order.