JUDGMENT OF THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)
27 April 1995 *

In Case T-96/92,

Comité Central d'Entreprise de la Société Générale des Grandes Sources, an employees' representative institution governed by Book IV of the French Code du Travail, based in Paris,

Comité d'Etablissement de la Source Perrier, an employees' representative institution governed by the said Code,

Syndicat CGT (Confédération Générale du Travail) **de la Source Perrier,** a trade union organization governed by the said Code,

Comité de Groupe Perrier, an employees' representative institution governed by the said Code,

all based in Vergèze, France,

represented by Jean Méloux, of the Montpellier Bar, during the written procedure and by Hélène Masse-Dessen, Avocat with right of audience before the French Court of Cassation and Conseil d'État, during the oral procedure, with an address for service in Luxembourg at the Chambers of Guy Thomas, 77 Boulevard Grande-Duchesse Charlotte,

* Language of the case: French.

applicants,

v

Commission of the European Communities, represented by Francisco Enrique González Diaz, of its Legal Service, and Géraud de Bergues, a national civil servant seconded to the Commission, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of Commission Decision 92/553/EEC of 22 July 1992 relating to a proceeding under Council Regulation (EEC) No 4064/89 (Case No IV/M.190 — *Nestlé/Perrier*, OJ 1992 L 356, p. 1),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Second Chamber, Extended Composition),

composed of: B. Vesterdorf, President, D. P. M. Barrington, A. Saggio, H. Kirschner and A. Kalogeropoulos, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 5 October 1994,

gives the following

Judgment

Facts and procedure

1 On 25 February 1992 Nestlé SA (hereinafter 'Nestlé') notified the Commission in accordance with Article 4(1) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1, hereinafter 'Regulation No 4064/89') of a takeover bid relating to the shares of Source Perrier SA (hereinafter 'Perrier'). The bid had been launched on 20 January 1992 by Demilac SA (hereinafter 'Demilac'), a jointly controlled subsidiary of Nestlé and Banque Indosuez. Nestlé and Demilac were stated to have agreed to sell Volvic, one of Perrier's subsidiaries, to the BSN group if the bid was successful.

2 After examining the notification, the Commission decided on 25 March 1992, pursuant to Article 6(1)(c) of Regulation No 4064/89, to initiate proceedings on the ground that the concentration notified raised serious doubts as to its compatibility with the common market. In the Commission's opinion, the concentration was liable to bring about a dominant position either for the Perrier/Nestlé entity on its own or for Perrier/Nestlé and BSN taken together.

3 On 25 May 1992 Nestlé and BSN were heard by the Commission as 'interested parties'.

4 By letter of 19 June 1992 Syndicat CGT de la Source Perrier (hereinafter 'CGT Perrier') asked the Commission for information on the investigation in progress relating to the takeover of Perrier by Nestlé-Demilac. Following that letter, the Commission stated that it was prepared to arrange an information meeting, which

took place on 2 July 1992. At that meeting the representatives of CGT Perrier informed the Commission of their concern as to the social consequences of the concentration notified, and submitted a file which included *inter alia* minutes of the meetings of the Perrier works council and group works council, documents on the approaches made to the French judicial and administrative authorities, and also trade union statements and articles from the press. On the following day CGT Perrier forwarded to the Commission, which had asked to be supplied with figures on the social consequences of the acquisition of Perrier by Nestlé, the annual report of Perrier for 1991.

5 On 22 July 1992, in view of the commitments entered into by Nestlé, the Commission adopted Decision 92/553/EEC relating to a proceeding under Regulation No 4064/89 (Case No IV/M.190 — *Nestlé/Perrier*) (OJ 1992 L 356, p. 1, hereinafter 'the Decision'), declaring the concentration compatible with the common market. The Decision makes that declaration of compatibility subject to full compliance with all conditions and obligations contained in Nestlé's commitments (see point 136 and Article 1 of the operative part of the Decision). Those conditions and obligations, the purpose of which is to facilitate the entry to the French bottled water market of a viable competitor with adequate resources for effective competition with Nestlé and BSN, may be summarized as follows:

— Nestlé is to sell to that competitor the Vichy, Thonon, Pierval and Saint-Yorre brand names and sources and a number of other local sources;

— the choice of purchaser, who must have sufficient financial resources and expertise in the field of branded beverage or food products, must be approved by the Commission;

— Nestlé is not to provide any data that is less than one year old on its sales volumes to any trade association or other entity which would provide that infor-

mation to other competitors, for as long as the present narrow oligopolistic market structure persists in the French bottled water market;

— Nestlé is to hold all assets and interests acquired from Perrier separate, until the sale of the abovementioned brand names and sources is completed;

— Nestlé may not make any structural changes in Perrier during the above period without prior approval by the Commission;

— Nestlé is not to transmit to any commercial entity within the Nestlé group any commercial or industrial information or property rights of a confidential or proprietary nature obtained from Perrier;

— Nestlé cannot sell Volvic to BSN until the sale of the abovementioned brand names and sources is completed;

— Nestlé cannot reacquire, directly or indirectly, the brand names or sources it is obliged to sell for a period of 10 years, and must inform the Commission of any acquisition by it, during a period of five years from the adoption of the decision, of any entity present in the French bottled water market with a market share exceeding 5%.

6 By application lodged at the Court Registry on 5 November 1992, Comité Central d'Entreprise de la Société Générale des Grandes Sources (central works council of Société Générale des Grandes Sources, hereinafter 'CCE Perrier'), Comité

d'Établissement de la Source Perrier (works council of Source Perrier, hereinafter 'CE Perrier'), CGT Perrier and Comité de Groupe Perrier (Perrier group works council, hereinafter 'CG Perrier') brought an action under Article 173 of the EC Treaty for the annulment of the Decision.

7 By separate document received at the Court Registry on 9 November 1992, the applicants also submitted an application under Articles 185 and 186 of the EC Treaty for suspension of the operation of the contested act.

8 That application for suspension was dismissed by order of the President of the Court of First Instance of 15 December 1992 (Case T-96/92 R *CCE Grandes Sources and Others* v *Commission* [1992] ECR II-2579). The costs were reserved.

9 In the action for annulment of the contested Decision, the written procedure was completed on 28 June 1993. Upon hearing the Report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure without any preparatory inquiry. The hearing took place on 5 October 1994.

Forms of order sought by the parties

10 The applicants claim that the Court should:

— declare the application for annulment admissible;

— annul the contested Decision and order the Commission to proceed under Article 8(4) of Regulation No 4064/89;

— order the Commission to pay the costs and, pursuant to Articles 87(3) and 91(b) of the Rules of Procedure of the Court of First Instance, to pay the sum of ECU 20 000.

11 The Commission contends that the Court should:

— dismiss the application;

— order the applicants jointly and severally to pay the costs.

Admissibility

Summary of the arguments of the parties

12 While putting forward argument on the substance, the Commission objects that the application is inadmissible. It argues, to begin with, that the admissibility of an application is subject not only to the two conditions set out in Article 173 of the EC Treaty, which requires that the contested act must be of direct and individual concern to the applicants, but also to proof of an interest in bringing proceedings (see the judgments of the Court of Justice in Case 88/76 *Exportation des Sucres* v *Commission* [1977] ECR 709 and Case 282/85 *DEFI* v *Commission* [1986] ECR 2469). In the present case, the Commission considers that the applicants have not shown such an interest from the point of view of the essential purpose of Regulation No 4064/89, which is to maintain and develop effective competition in the common market. It accepts that its assessment of the effect on competition of a concentration must remain within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty, including that of strengthening the Community's economic and social cohesion, referred to in Article 130a of the EC Treaty, as the thirteenth recital in the preamble to Regulation No 4064/89 notes. However, that recital does not require a detailed analysis of the

effect of a concentration on the employment situation in a specific undertaking, but the taking into account of its foreseeable effect on the employment situation in the Community as a whole or a part of the Community. In the Commission's opinion, the recognized representatives of employees do not therefore have an interest deserving of protection unless they are able to show, at least *prima facie*, that a concentration authorized by that institution is liable significantly to prejudice the social objectives referred to in Article 2 of the EC Treaty.

13 The Commission submits, moreover, that the applicants have no interest in bringing proceedings, in that they do not fulfil the two conditions of admissibility laid down in Article 173 of the Treaty. Firstly, it denies that the decision is of individual concern to the applicants. It notes in this respect that third parties fulfil that condition only if the decision in question 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 these factors distinguishes them individually just as in the case of the person addressed. It concludes therefrom that interested third parties who have not played a part in the administrative procedure are not entitled to bring proceedings against the decision adopted at the outcome of that procedure. It submits that in cases concerning competition as in cases on State aid, dumping and subsidies, the Court of Justice has acknowledged that third parties who have procedural guarantees are entitled to bring proceedings, precisely in order to enable the Court to review whether those procedural rights have been respected (see the judgments in Case 26/76 *Metro* v *Commission* [1977] ECR 1875, Case 191/82 *Fediol* v *Commission* [1983] ECR 2913, and Case 169/84 *Cofaz* v *Commission* [1986] ECR 391). To accept that an applicant who had not wished to exercise his procedural rights was entitled to bring proceedings would therefore amount to establishing an alternative procedure alongside that provided for by the Community legislation, in this case Article 18(4) of Regulation No 4064/89.

14 The Commission notes that in the present case CCE Perrier, CE Perrier and CG Perrier did not take part in the procedure. They therefore cannot be individually concerned by the contested Decision.

15 With respect to CGT Perrier, the Commission accepts that it took part, at its request, in the administrative procedure. However, it submits that in order to show that it is individually concerned, CGT Perrier must first show that under the applicable national law it is the representative of all the employees of Perrier, not just of its own members, as required by Article 18(4) of Regulation No 4064/89. On this point the Commission, in its rejoinder, takes note of the observations of the applicants, from which it is apparent that CGT Perrier corresponds to the definition of a recognized representative of the employees of an undertaking, within the meaning of Article 18 of Regulation No 4064/89.

16 In the second place, the Commission considers that in any event, even supposing that CGT Perrier is individually concerned by the Decision in that it submitted observations during the procedure, it, like the other applicants, cannot be directly concerned by the Decision. The Commission notes that, according to settled case-law, an individual is directly concerned by a Community act if the legal effects which he suffers flow directly from that act and from it alone. However, by virtue of the provisions of Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses, or parts of businesses (OJ 1977 L 61, p. 26, hereinafter 'Directive 77/187/EEC'), the Decision cannot be the actual immediate cause either of possible dismissals in the Perrier group which the Nestlé group might decide on or of a possible threat to the collective benefits enjoyed by Perrier employees.

17 The applicants for their part submit that the Commission's objection of inadmissibility is unfounded. To show that they have capacity to challenge the Decision, they rely on Article 18(4) of Regulation No 4064/89, which mentions the 'recognized representatives of [the] employees' of the undertakings concerned by the concentration in question among the natural or legal persons showing a 'sufficient interest' to enjoy the right to be heard, upon application, by the Commission, before the Commission adopts its decision on the concentration notified to it. They also rely on Article 15(1) of Commission Regulation (EEC) No 2367/90 of 25 July

1990 on the notifications, time-limits and hearings provided for in Regulation No 4064/89 (OJ 1990 L 219, p. 5, hereinafter 'Regulation No 2367/90'), confirming the provisions of Article 18(4) of Regulation No 4064/89.

18 In this respect the applicants state that CGT Perrier is a recognized representative of the employees of one of the undertakings concerned by the concentration in question, within the meaning of Article 18(4) of Regulation No 4064/89. They argue that under Article L.411-11 of the French Code du Travail that trade union is able to represent not only its own interests and those of its members but also the collective interests of the trade within the Perrier group.

19 The applicants submit that it follows from the abovementioned provisions of Article 18 of Regulation No 4064/89 and Article 15 of Regulation No 2367/90 that, although the Decision is addressed to the representatives of the Nestlé group, it is of direct and individual concern to them in their capacity as recognized representatives of the employees of the Perrier undertaking. There exists at the very least a very strong presumption in favour of the applicants being entitled to bring proceedings under Article 173 of the Treaty against the contested Decision. That view is confirmed by the circumstance that CGT Perrier was heard, on application by it, by the Commission as an interested third party. On this point, the applicants note that the Court of Justice has recognized that third party undertakings to which a regulation gives procedural guarantees during the administrative procedure are entitled to a remedy intended to protect their legitimate interests.

20 Moreover, the applicants rely on a number of decisions given by various French courts, in proceedings in which they had intervened to oppose the claims of the Nestlé companies 'whose plan to acquire the entire assets of Perrier included decisions liable seriously to prejudice the major interests which the applicants have a statutory duty to protect'. They cite *inter alia* the judgment of the Tribunal de Commerce (Commercial Court), Nîmes, of 6 March 1992 in proceedings between

Nestlé and Demilac, on the one hand, and Perrier, on the other, allowing the three abovementioned works councils and Syndicat CGT to intervene on the grounds that they had 'an actual interest ... in the proceedings in so far as they represented the employees of the Perrier company and group, who were concerned by the legal and economic organization of their undertaking'.

21 In the present case, the applicants submit to begin with that they have a special interest in the annulment of the contested Decision, in that the Decision infringes fundamental social rights, recognized both in French law and in the Community legal order, which the Commission is obliged to respect when reviewing concentrations under Regulation No 4064/89. They argue in particular that the right of workers to the preservation of jobs and the right of their representatives to be informed and consulted within undertakings have their legal basis in the European Social Charter signed in Turin on 18 October 1991, the additional Protocol signed in Strasbourg on 25 May 1988, the Community Charter of Fundamental Social Rights signed in Strasbourg on 9 December 1989, Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies (OJ 1975 L 48, p. 29), as amended by Council Directive 92/56/EEC of 24 June 1992 (OJ 1992 L 245, p. 3), Directive 77/187/EEC, Articles 117, 118, 118a and 118b of the EC Treaty, and the provisions of the European Convention on Human Rights guaranteeing in particular the right to a fair trial, respect for private and family life, and protection against inhuman and degrading treatment. The abovementioned employees' rights are also recognized at national level by the French Constitution.

22 In that context the applicants argue that their interest in the annulment of the Decision follows firstly from the fact that once the concentration was authorized Nestlé, who by its takeover bid acquired virtually the entire share capital of Perrier, had been able to make changes in the management of the group and that the

new directors had decided to abolish a large number of jobs. On 23 March 1992, at an extraordinary meeting of CCE Perrier, the management had informed the employees' representatives that it intended in 1993 to abolish 740 jobs in the group, which employed a total of 5 400, because 'recent studies had confirmed the existence of over-manning in the mineral water companies in the group'. According to the applicants, Nestlé would not have taken such a decision if the concentration had not been authorized. Moreover, by requiring Nestlé to carry out further disposals of undertakings by transferring them outside the Perrier group, the Decision entailed the calling into question, with respect to the employees of those undertakings, of the collective works agreement of 14 March 1989 in force within Perrier.

23 In those circumstances, since a trade union is entitled to defend the collective interests of the trade, it cannot be disputed, according to the applicants, that CGT Perrier is entitled to seek the annulment of the Decision which will bring about job losses and prejudice the collective benefits of a large number of Perrier employees. As to the three applicant works councils, they have the same interest, firstly because a reduction in the payroll affects their funds, which are calculated with reference to the payroll, and secondly because 'losses of jobs ... require their consultative intervention at various levels and in good time, so that it can be considered whether ... the decisions taken should be withdrawn or at least amended in a manner favourable to the employees'.

24 The applicants dispute the view put forward by the Commission, namely that the infringement of fundamental rights which they claim to have suffered does not follow directly from the Decision. They state that the alleged job losses will follow automatically from the Decision and that by reason of the change of employer and the restructuring of the entire bottled water sector in France as a consequence of

the Decision, the collective benefits currently enjoyed within the Perrier group will be lost or at least threatened for a considerable number of employees.

Assessment of the Court

25 Under Article 173 of the Treaty, a natural or legal person can institute proceedings against a decision addressed to another person only if that decision is of direct and individual concern to him. Since the contested decision was addressed to Nestlé, it must be ascertained whether the applicants are directly and individually concerned by it.

26 In this respect, the mere fact that an act may have an effect on the legal position of the applicants does not suffice for it to be regarded as being of direct and individual concern to them. With respect, firstly, to the condition of admissibility relating to individual treatment of the applicants, it is also necessary, according to the settled case-law, for the contested decision to affect 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 which distinguish them individually just as in the case of the person addressed (see the judgments of the Court of Justice in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, at p. 107, and in Joined Cases 10 and 18/68 *Eridania* v *Commission* [1969] ECR 459, paragraph 7, and the judgment of this Court in Case T-83/92 *Zunis Holding and Others* v *Commission* [1993] ECR II-1169, paragraphs 34 and 36).

27 In the present case, it must therefore be ascertained whether the contested decision affects the applicants by virtue of attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and which thereby distinguish them individually just as in the case of the person addressed.

28 For that purpose it must be noted to begin with that in the scheme of Regulation No 4064/89, the primacy given to the establishment of a system of free competition may in certain cases be reconciled, in the context of the assessment of whether a concentration is compatible with the common market, with the taking into consideration of the social effects of that operation if they are liable to affect adversely the social objectives referred to in Article 2 of the Treaty. The Commission may therefore have to ascertain whether the concentration is liable to have consequences, even if only indirectly, for the position of the employees in the undertakings in question, such as to affect the level or conditions of employment in the Community or a substantial part of it.

29 Article 2(1)(b) of Regulation No 4064/89 requires the Commission to draw up an economic balance for the concentration in question, which may, in some circumstances, entail considerations of a social nature, as is confirmed by the thirteenth recital in the preamble to the regulation, which states that 'the Commission must place its appraisal within the general framework of the achievement of the fundamental objectives referred to in Article 2 of the Treaty, including that of strengthening the Community's economic and social cohesion, referred to in Article 130a'. In that legal context, the express provision in Article 18(4) of the regulation, giving specific expression to the principle stated in the nineteenth recital that the representatives of the employees of the undertakings concerned are entitled, upon application, to be heard, manifests an intention to ensure that the collective interests of those employees are taken into consideration in the administrative procedure.

30 In those circumstances, the Court considers that, in the scheme of Regulation No 4064/89, the position of the employees of the undertakings which are the subject of the concentration may in certain cases be taken into consideration by the Commission when adopting its decision. That is why the regulation makes individual mention of the recognized representatives of the employees of those undertakings, who constitute a closed category clearly defined at the time of adoption of the decision, by expressly and specifically giving them the right to submit their observations in the administrative procedure. Those organizations, who are responsible

for upholding the collective interests of the employees they represent, have a relevant interest with respect to the social considerations which may in appropriate cases be taken into account by the Commission in the context of its appraisal of whether the concentration is lawful from the point of view of Community law.

31 Consequently, in accordance with the scheme of Regulation No 4064/89, the express mention of the recognized representatives of the employees of the undertakings concerned by a concentration, among the third parties showing a sufficient interest to be heard by the Commission, suffices to differentiate them from all other persons, without it being necessary to establish, as the defendant institution argues, for the purpose of assessing the admissibility of the application, whether the concentration is at least *prima facie* liable to affect adversely the social objectives referred to in the Treaty. That latter question belongs in fact to the assessment of the substance.

32 It follows that the recognized representatives of the employees of the undertakings concerned by a concentration must in principle be regarded as individually concerned by the Commission's decision on the compatibility of that concentration with the common market.

33 In the present case, the status of recognized representative of the employees of the undertakings concerned, within the meaning of Article 18(4) of Regulation No 4064/89, is not challenged by the Commission with respect to three of the applicants, namely CCE Perrier, CE Perrier and CG Perrier. As regards CGT Perrier, the defendant institution considers that it is for that trade union to establish that its capacity of representative of the employees of the undertakings concerned by the concentration in question is recognized in French law.

34 In this respect, the Court notes that it is for the Member States to define which organizations are competent to represent the collective interests of employees and to determine their rights and prerogatives, subject to the adoption of harmonization measures (see, for example, Council Directive 94/45/EC of 22 September 1994

on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, OJ 1994 L 254, p. 64). In the present case, moreover, in the light of the detailed information provided by the applicants in the reply, the Commission does not dispute that the representative capacity of the CGT Perrier trade union within the Perrier undertaking is recognized in French law, in so far as that trade union is affiliated to the CGT representative federation. That circumstance is enough for CGT Perrier to be regarded as constituting a recognized representative of the employees of the undertakings concerned by the concentration in question, within the meaning of Article 18(4) of Regulation No 4064/89.

35 Moreover, the Commission's argument that because three of the four applicants, namely CCE Perrier, CE Perrier and CG Perrier, did not seek to be heard during the administrative procedure, pursuant to Article 18(4) of Regulation No 4064/89, they are not individually concerned by the Decision is completely unfounded. By making the capacity to bring proceedings of specified third parties who enjoy procedural rights in the administrative procedure subject as a general rule to their actually taking part in that procedure, the Commission's view introduces an additional condition of admissibility, in the form of a compulsory prelitigation procedure, which is not provided for in Article 173 of the Treaty. As the applicants observe, that restrictive interpretation contradicts the abovementioned provisions of the Treaty under which any person has capacity to attack a decision which is of direct and individual concern to him.

36 An analysis of the case-law of the Court of Justice confirms that the standing to bring proceedings of third parties who show a sufficient interest to be heard during the administrative procedure is not necessarily subject to their taking part in that procedure. Other specific circumstances may in certain cases be such as to distinguish those third persons individually in the same way as the person to whom the contested decision is addressed. Contrary to the assertions of the defendant institution, the Court of Justice, in matters of competition and state aid as in matters of dumping and subsidies, has taken the participation of specified third parties in the

administrative procedure into consideration solely to hold that under certain particular conditions it raises a presumption that their application is admissible, so that the Community judicature can review not only whether their procedural rights have been respected but also whether the decision adopted following that procedure is vitiated by a manifest error of assessment or a misuse of powers. The Court has never held their participation in the procedure to be a necessary condition for acknowledging that the Commission's decision is of individual concern to those third persons (see *inter alia* the judgments of the Court of Justice in Case 28/76 *Metro* v *Commission*, cited above, paragraph 13; *Fediol* v *Commission*, cited above, paragraphs 28 to 31; Case 210/81 *Demo-Studio Schmidt* v *Commission* [1983] ECR 3045, paragraphs 14 and 15; Case 264/82 *Timex* v *Council and Commission* [1985] ECR 849, paragraphs 11 to 17; *Cofaz* v *Commission*, cited above, paragraph 25; and Case 75/84 *Metro* v *Commission* [1986] ECR 3021, paragraphs 18 to 23).

37 In those circumstances, in a case more specifically concerning the recognized representatives of the employees of the undertakings concerned, the number and identity of which are likely to be known when the decision is adopted, the mere fact that Regulation No 4064/89 mentions them expressly and specifically among the third persons showing a 'sufficient interest' to submit their observations to the Commission is enough to differentiate them from all other persons and enough for it to be considered that the decision adopted under that regulation is of individual concern to them, whether or not they have made use of their rights during the administrative procedure. It follows that in the present case that condition of admissibility, laid down in Article 173 of the Treaty, must for all the reasons stated above be regarded as fulfilled with respect to the four applicants, whether or not they have taken part in the procedure.

38 With respect, in the second place, to the question whether the contested Decision is of direct concern to the applicants, it must be stated to begin with that the concentration in question cannot prejudice the own rights of the representatives of the employees of the undertakings concerned. Contrary to the applicants' assertions, even supposing that the concentration brings about a reduction in the resources of the various applicant councils following job losses as alleged, that circumstance

cannot in any event be regarded as adversely affecting those councils' own rights. They have no interest in the maintenance of the undertakings' workforce specifically in order to guard against any reduction in their funds, the level of which is based on the level of the payroll. The employees' representative organizations can assert rights of their own only in relation to the functions and privileges given to them, under the applicable legislation, in an undertaking with a particular structure. In that respect, moreover, it follows essentially from Article 5 of Directive 77/187/EEC that, in the event of a transfer of an undertaking, the safeguarding of the own rights of the employees' representative organizations and the protective measures enjoyed by the employees' representatives are to be ensured in accordance with the laws, regulations and administrative provisions of the Member States. It follows from the above considerations that only a decision which may have an effect on the status of the employees' representative organizations or on the exercise of the prerogatives and duties given them by the legislation in force can affect such organizations' own interests. That cannot be the case with a decision authorizing a concentration.

39 Moreover, with respect to the prejudice allegedly caused by the Decision to the consultative functions of the applicant councils within their undertakings, with reference for example to decisions relating to the concentration itself, the restructuring or alleged job losses, it must be noted that Regulation No 4064/89 lays down rules for the review of concentrations from the point of view of Community competition law without prejudice to the exercise by the representatives of the employees of the undertakings concerned of all the rights they have under the applicable national law. Regulation No 4064/89 expressly confirms, moreover, in the thirty-first recital that it 'in no way detracts from the collective rights of employees as recognized in the undertakings concerned'.

40 It must be stated further that the argument that the contested Decision directly prejudices the interests of the Perrier employees, in so far as it entails, according to

the applicants, the abolition of jobs and the loss of collective benefits, does not withstand examination either. It must be stated in this respect that the legislation intended to safeguard the rights of the employees, in particular in the event of a concentration, prevents the realization of a concentration in itself entailing the alleged consequences for the level and conditions of employment in the undertakings in question, as will be shown in the following paragraphs. Such effects are thus produced only if measures which are independent of the concentration itself are first adopted, by the undertakings in question acting alone or by the social partners, as the case may be, in conditions strictly defined by the applicable rules. Bearing in mind in particular the bargaining power of the various social partners, the possibility of such measures being adopted is not entirely theoretical, which means that the employees' representatives cannot be regarded as directly concerned by the decision authorizing the concentration (see the judgments of the Court of Justice in Case 11/82 *Piraiki Patraiki* v *Commission* [1985] ECR 207 and in *Cofaz* v *Commission*, cited above).

41 On this point, it follows clearly from the applicable legislation that job losses and changes in the social benefits given to the Perrier group employees either by their individual contracts or, within the group of undertakings which are signatories thereto, by the collective agreement of 14 March 1989 to which the applicants refer, are not inevitable following a concentration. Article 3 of Directive 77/187/EEC provides for the transfer to the transferee of the transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of the transfer of the undertaking. Moreover, the first subparagraph of Article 4(1) of that directive provides that 'the transfer of an undertaking ... shall not in itself constitute grounds for dismissal by the transferor or the transferee'.

42 In this respect it must also be noted that the annulment of the Commission's Decision, in so far as that Decision authorizes the concentration in question by making its declaration of compatibility subject *inter alia* to the requirement for

Nestlé to sell certain undertakings belonging to the Perrier group, would not constitute a safeguard against all measures involving job losses adopted in accordance with the law. In that connection, the fact that Article 4 of Directive 77/187/EEC goes on to state that it 'shall not stand in the way of dismissals that may take place for economic, technical or organizational reasons entailing changes in the workforce' confirms that such dismissals can in no case follow directly from a concentration, but require the adoption of independent measures subject to identical rules to those which apply where there is no concentration.

43 Similarly, with respect more particularly to the assertions as to the loss of the social benefits enjoyed by the Pierval employees, it must be stated that Directive 77/187/EEC provides, in the first subparagraph of Article 3(2), that 'following the transfer ... the transferee shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the transferor under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement'. In that respect Article L.132-8 of the French Code du Travail provides, as is common ground between the parties, that any collective agreement — intended to deal with all the conditions of employment, in accordance with the definition in Article L.132-1 of the Code — or any collective work agreement — which, according to that definition, deals only with some of those conditions — of indefinite duration may be terminated by the signatories under the conditions provided for in the agreement. If the agreement is terminated *inter alia* because of a merger, transfer or demerger, the same provision provides that the agreement shall continue to apply *in toto* until the entry into force of a new agreement, or in default thereof for a minimum of one year from the notice of termination, the employees in question keeping the individual benefits they have acquired if the terminated agreement has not been replaced by the end of that period. Moreover, the safeguards relating to the preservation of social benefits are further strengthened by Article 4(2) of Directive 77/187/EEC, under which, if the contract of employment is terminated because the transfer of the undertaking involves a substantial change in working conditions to the detriment of the employee, the employer is to be regarded as having been responsible for the termination.

44 It follows from all the above points that current individual contracts are all transferred to the new company. As to the collective agreement in force in the Perrier group, that will continue to apply under the conditions defined in Article L.132-8 of the Code du Travail, cited above. It should be noted that, according to the applicable legislation, the transfer of an undertaking, such as in the present case, does not in itself entail the termination of, or any change whatever in, the collective agreements in force. If that transfer were nevertheless to be followed by a threat to the collective agreement, the seventh paragraph of Article L.132-8 of the French Code du Travail provides for the same rules to apply as apply to any notice of termination by one or more of the signatories where there is no transfer of an undertaking, in accordance with the provisions of Directive 77/187/EEC (see, in particular, the judgment of the Court of Justice in Case C-209/91 *Watson Rask and Christensen* [1992] ECR I-5755, paragraph 26 et seq.).

45 It follows that in the present case the acquisition of Perrier by Nestlé, accompanied by the sale by Nestlé of some of the Perrier group's brand names and sources to a third party, does not in itself entail any direct consequences for the rights which the Perrier employees derive from their contracts or employment relationship. In the absence of any direct causal link between the alleged attack on those rights and the Commission's decision making authorization of the concentration subject *inter alia* to the transfer of certain brand names and sources, the persons concerned must have an appropriate legal remedy available for the defence of their legitimate interests not at the stage of the review of the lawfulness of the said decision, but at the stage of the measures which are the immediate origin of the adverse effects thus alleged, and which may be adopted by the undertakings or in certain cases by the social partners concerned without any intervention by the Commission. It is at the stage of the adoption of such measures, review of which is within the jurisdiction of the national courts, that the safeguards intervene which are given to employees by the provisions of national law and of Community law such as, in particular, Directive 77/187/EEC (see also the proposal for a Council directive on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, submitted by the Commission on 8 September 1994 with a view to recasting that directive, OJ 1994 C 274, p. 10) and Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the

Member States relating to collective redundancies (OJ 1975 L 48, p. 29), as amended by Council Directive 92/56/EEC of 24 June 1992 (OJ 1992 L 245, p. 3).

46 For all the above reasons, the applicants cannot be regarded as directly concerned by the contested decision, without prejudice to the guarantee of the procedural rights given them by Regulation No 4064/89 in the administrative procedure. It must be noted that as a general rule where a regulation gives procedural rights to third persons, they must have a remedy available for the protection of their legitimate interests, in accordance with settled case-law (see *inter alia* the judgment in Case 28/76 *Metro* v *Commission*, cited above, paragraph 13). On this point, it must be stated in particular that the right of specified third persons to be properly heard, on application by them, during the administrative procedure can in principle be given effect to by the Community judicature only at the stage of review of the lawfulness of the Commission's final decision. It follows that, although in the present case the considerations set out above make it apparent that in substance the final decision is not of direct concern to the applicants, they must nevertheless be recognized as being entitled to bring proceedings against that decision for the specific purpose of examining whether the procedural guarantees which they were entitled to assert, during the administrative procedure, under Article 18 of Regulation No 4064/89 have been infringed, as they allege. Only if the Court were to find a clear breach of those guarantees, such as to prejudice the applicants' right to make an effective statement of their position, if they have applied to do so, during the administrative procedure, would the Court have to annul the decision on the ground of breach of essential procedural requirements. In the absence of such a substantial breach of their procedural rights, the mere fact that the applicants claim, before the Community judicature, that those rights have been infringed during the administrative procedure cannot make the application admissible in so far as it is based on pleas alleging breach of substantive rules of law, given that, as the Court has already established above, the applicants' legal position is not directly affected by the wording of the Decision. Only if the latter condition was fulfilled would the applicants be entitled, under Article 173 of the Treaty, to ask the Court to examine the statement of reasons in, and the substantive lawfulness of, the Decision.

47 The present application must therefore be declared inadmissible only to the extent that its purpose is not to ensure protection of the procedural guarantees which the applicants have during the administrative procedure. It must be examined whether, as the applicants argue, the Decision fails to respect their procedural rights.

The plea alleging failure to observe the applicants' procedural rights

Summary of the arguments of the parties

48 The applicants submit that the Commission failed to inform them in writing of the nature and subject-matter of the procedure, before the hearing, in order to allow them to state their point of view. The Commission thereby infringed the provisions of Articles 11, 12 and 15 of Regulation No 2367/90. On this point, CGT Perrier disputes that the information provided by the specialist press was such as to mitigate the Commission's failure with respect to the provision of that information, which is expressly provided for by the Community legislation.

49 The applicants further submit that in so far as CGT Perrier had applied to be heard by the Commission, as a third party showing the 'sufficient interest' it not only had to be given a hearing, which was done on 2 July 1992, but also had to have access to the file, which it moreover impliedly requested in its aforementioned letter of 19 June 1992. The applicants rely on Article 18(3) of Regulation No 4064/89, which states that 'access to the file shall be open at least to the parties directly involved, subject to the legitimate interest of undertakings in the protection of their business secrets'.

50 Finally, the applicants submit that the Commission failed to advise CGT Perrier, having regard to its lack of experience in the field of proceedings under Regulation

No 4064/89, of the urgent need to submit written observations before the date of the hearing, fixed for 2 July 1992. It follows from the tenth and eleventh recitals in the preamble to Regulation No 2367/90 that the hearing is in principle intended only to supplement the written observations previously made. Moreover, the Commission did not inform CGT Perrier that it could be assisted *inter alia* by a lawyer at the hearing, pursuant to Article 14(3) of Regulation No 2367/90.

51 In those circumstances the applicants consider that the actual conditions under which the recognized representatives of the workers were heard did not enable the Commission to take their observations into account, as required by the abovementioned provisions. Such a situation is equivalent to not receiving a hearing and, since the hearing is obligatory, that entails the nullity of the contested act on the ground of breach of essential procedural requirements, in accordance with the settled case-law of the Court of Justice.

52 The applicants argue that CGT Perrier cannot be held liable for the haste with which it was invited to the hearing on 2 July 1992, without first receiving information and consequently without having an opportunity of preparing for the meeting with the administration. On the contrary, such haste, attributable to the administration, constitutes a clear breach of the rights of the defence.

53 The Commission for its part submits that the hearing of CGT Perrier took place in proper conditions. As regard the applicants' alleged right to be informed in writing of the nature and subject-matter of the procedure before making their views known, it submits in the defence that in the letter of 19 June 1992 CGT Perrier did not apply to be heard as a recognized representative of the Perrier employees in accordance with Article 18(4) of Regulation No 4064/89, but merely asked to be informed of the state of the procedure. For that reason the Commission was not obliged to inform it in advance of the nature and subject-matter of the procedure. The Commission considers that even if it is accepted that that trade union was a recognized representative of the employees of Perrier, the nature of its request,

which was moreover submitted at a very late stage of the procedure, justified the arrangement of a meeting at short notice without prior information being given. Such a solution was all the more legitimate in that the trade union was thought to be well aware of the nature and subject-matter of the case, in view of the frequent references made by the applicants to the specialist press, in the context of the present proceedings.

54 As to the right of access to the file, laid down in Article 18(3) of Regulation No 4064/89, its purpose is to allow interested parties to make known their views on the complaints brought against them by the Commission. Since the contested Decision does not uphold any complaint against the recognized representatives of the employees of the undertakings concerned by the concentration in question, and does not reject any request made by them under Regulation No 4064/89, they cannot have access to the file. Moreover, in any event, the applicants never sought to make use of their right of access to the file.

Assessment of the Court

55 It should be stated to begin with that under Article 18(4) of Regulation No 4064/89, the Commission is only obliged to hear the recognized representatives of the employees of the undertakings concerned by the concentration in question, in their capacity as third parties showing a sufficient interest, in so far as they actually apply to be heard. Moreover, it follows from the tenth recital in the preamble to Regulation No 2367/90 that such an application is in principle to be made in writing.

56 Protection of the legitimate interests of specified third parties does not require that they should enjoy identical guarantees during the administrative procedure to those given to the persons interested by the concentration in question in order to ensure

that their rights of the defence are respected during the procedure before the Commission. Since the interests of the latter are in principle directly affected by the decision, they must have access to the file and be put in a position to make known their views on the objections against them, as provided for in Article 18(1) and (3) of Regulation No 4064/89. Third parties, by contrast, are merely liable in certain cases to suffer the incidental effects of the decision on their legal sphere. That is why Article 18(4) of Regulation No 4064/89 only gives them the right to be heard by the Commission if they so request and have shown, as a general rule, that they have a sufficient interest for that purpose, it being understood that it suffices in that respect for the representatives of the employees of the undertakings concerned to show that their representative status in the undertaking is recognized under the applicable national law. That interpretation is confirmed by the judgment of the Court of Justice in Case 43/85 *Ancides* v *Commission* [1987] ECR 3131, paragraph 8, in which it was held that the procedural position of specified third parties cannot be equated to that of persons involved, in the context of Council Regulation No 17, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87), Article 19(2) of which expressly provides, in terms identical in this respect to those of Article 18(4) of Regulation No 4064/89, that third parties showing a sufficient interest need be heard only upon application by them.

57 The system for protecting the respective rights of the persons involved and third parties which has just been described is the background to Article 15 of Regulation No 2367/90, paragraph 1 of which states that if third parties showing a sufficient interest, such as the recognized representatives of the workers of the undertakings concerned, apply to be heard pursuant to Article 18(4) of Regulation No 4064/89, 'the Commission shall inform them in writing of the nature and subject-matter of the procedure and shall fix a time-limit within which they may make known their views'. Article 15(2) states that 'the third parties referred to in paragraph 1 above shall make known their views in writing or orally within the time-limit fixed. They may confirm their oral statements in writing.' Conversely, if third parties showing a sufficient interest do not apply to be heard, the Commission may 'afford [them] the opportunity of expressing their views', pursuant to Article 15(3), which thus imposes no obligation to provide information.

58 In the present case, an examination of the documents in the file makes it clearly apparent that CGT Perrier did not apply to the Commission to be heard, within the meaning of Article 18(4) of Regulation No 4064/89, but made a mere request for information, worded as follows in its letter of 19 June 1992: 'Can you indicate the sources of information which will allow us to obtain very detailed information on the investigation being carried on by the Commission of the European Communities into the takeover of Source Perrier by Nestlé/Demilac?' In those circumstances, the mere fact that CGT Perrier in the same letter gives as the reasons for its request for information the fact that it is a representative trade union within the Perrier group and that it has *inter alia* brought an action before the national courts concerning various financial operations relating to Nestlé's takeover bid for Perrier is not enough for that letter to be interpreted as an application, even implicit, to be heard pursuant to Article 18(4) of Regulation No 4064/89 as a recognized representative of Perrier employees. The fax sent to CGT Perrier by the Commission on 29 June 1992, to confirm the holding of an 'information meeting' on 2 July, also shows that the letter was not interpreted by the Commission as a request to be heard. Furthermore, no such request was otherwise made by the trade union in question. It does not claim to have made such a request in writing subsequent to its letter of 19 June 1992, referred to above, nor even at the meeting on 2 July 1992. Moreover, CGT Perrier's letter to the Commission of 3 July 1992 expressly confirms that that meeting did indeed in the opinion of the trade union have the character of a mere information meeting.

59 It follows that in the absence of an application by CGT Perrier to be heard, the Commission was not obliged under Article 15 of Regulation No 2367/90 (see paragraph 57 above) to inform that trade union in writing, following its letter of 19 June 1992, of the nature and subject-matter of the procedure, before giving it an opportunity to make known its views.

60 In this case the Commission not only complied with CGT Perrier's request for information by arranging an information meeting on 2 July 1992; it also gave the representatives of that trade union an opportunity to submit observations, at that meeting, on the social consequences of the proposed concentration, as it was entitled to under Article 15(3) of Regulation No 2367/90, which provides that the

Commission may hear third parties generally in cases other than those where a person showing a sufficient interest has applied to be heard. Furthermore, it can be seen from the information supplied on this point by the Commission, which is not disputed, that after the meeting CGT Perrier, at the Commission's invitation, submitted supplementary written observations and provided it with additional information in reply to the questions it had asked at the meeting. Moreover, the Commission's observations, not disputed by the applicants, show that CGT Perrier did not raise any objection, even at the above meeting, with respect to the difficulties the applicants claim it encountered in presenting its views, by reason of the alleged lack of written information.

61 With respect to the complaint that the Commission failed to advise CGT Perrier to submit written observations before the date of the meeting fixed for 2 July 1992, it must be noted that in the circumstances of the case no provision imposed such an obligation. In particular, Article 15(3) of Regulation No 2367/90, which was the Commission's basis for hearing CGT Perrier, as is apparent from the considerations set out above, contains no indication as to the manner in which specified third parties who have not applied to be heard may nevertheless express their views at the Commission's initiative. Furthermore, in any event, even supposing that the applicants did ask to be heard under Article 18(4) of Regulation No 4064/89, it remains the case that Article 15(2) of Regulation No 2367/90 merely provides that third parties showing a sufficient interest who so apply may make their views known. That article gives no indication as to the written or oral form of their observations. It follows that the Commission was not obliged in the present case to invite the trade union in question to submit written observations before the meeting on 2 July 1992.

62 The eleventh recital in the preamble to Regulation No 2367/90, relied on by the applicants, confirms that interpretation of Article 15. After noting that 'the various persons entitled to submit comments should do so in writing, both in their own interest and in the interest of good administration, without prejudice to their right

to request an oral hearing where appropriate to supplement the written procedure', the recital qualifies that principle by specifying that 'in urgent cases, however, the Commission must be able to proceed immediately to oral hearings of the parties concerned or third parties', in which case 'the persons to be heard must have the right to confirm their oral statements in writing'. In the present case, having regard to the urgency with which the Commission had to arrange an information meeting with CGT Perrier, in response to its request of 19 June 1992, at what was already an advanced stage of the procedure which had been initiated on 25 March 1992, the parties concerned having been heard on 25 May 1992, the Commission was entitled to fix the date of that meeting for 2 July 1992, while reserving the possibility for the trade union to submit supplementary written observations following the meeting at which it put forward its arguments.

63 Moreover, while persons heard by the Commission, at their request or on the institution's initiative, may indeed be assisted *inter alia* by a lawyer pursuant to Article 14 of Regulation No 2367/90, no provision of that regulation obliges the Commission to inform those persons of that possibility. Even if the giving of such information might appear desirable, its omission cannot have the effect of vitiating the procedure.

64 Finally, with respect to the right of access to the file claimed by the applicants, it must be noted that under Article 18(3) of Regulation No 4064/89 'access to the file shall be open at least to the parties directly involved, subject to the legitimate interest of undertakings in the protection of their business secrets'. That provision cannot in any event be interpreted as requiring the Commission automatically to give access to the file to any third party heard, at his own request or on the initiative of the Commission, during the administrative procedure. It follows that in so far as the trade union in question was not one of the 'parties directly involved' by the concentration, within the meaning of the said Article 18(3), the Commission could not be required to offer it access to the file. In those circumstances, without it being necessary to rule in the present proceedings on whether and under what conditions third parties showing a sufficient interest to be heard may be given the right of

access to the file if they so request, it suffices to state that in any event, in the present case, the request for information by CGT Perrier to the Commission in its letter of 19 June 1992 did not contain, even implicitly, any request for access to the file. The Commission cannot therefore be criticized for the fact that CGT Perrier did not have access to the file.

65 For all the above reasons, the plea in law alleging breach of the applicants' procedural rights, in particular those of CGT Perrier, must be rejected as unfounded.

66 It follows that the present application must be rejected in its entirety.

Costs

67 Under Article 87(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. However, Article 87(3) provides that where the circumstances are exceptional the Court may order that each party bear its own costs.

68 As the present case is the first application brought by representatives of the employees of the undertakings concerned by a concentration against the Commission's decision authorizing that concentration under Regulation No 4064/89, the Commission should be ordered to bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)

hereby:

1. Dismisses the application;

2. Orders the parties to bear their own costs, including the costs relating to the proceedings for interim measures.

Vesterdorf Barrington Saggio

Kirschner Kalogeropoulos

Delivered in open court in Luxembourg on 27 April 1995.

H. Jung B. Vesterdorf

Registrar President