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

In Case T-12/93,

Comité Central d'Entreprise de la Société Anonyme Vittel, an employees' representative institution governed by Book IV of the French Code du Travail (Labour Code), based in Vittel, France,

Comité d'Etablissement de Pierval, an employees' representative institution governed by the said code, based in Vittel,

and

Fédération Générale Agroalimentaire, a trade union organization, a member of Confédération Française Démocratique du Travail, based in Paris,

all represented by François Nativi, Hélène Rousseau and Françoise Bienayme-Galaz, of the Paris Bar, assisted by Aloyse May, of the Luxembourg Bar, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

applicants,

* Language of the case: French.

supported by

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 during the written procedure and by Alain Ottan during the oral procedure, both of the Montpellier Bar, with an address for service in Luxembourg at the Chambers of Guy Thomas, 77 Boulevard Grande-Duchesse Charlotte,

interveners,

Commission of the European Communities, represented by Francisco Enrique González Díaz, 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 7 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 On 22 July 1992 the Commission, in view of the commitments entered into by Nestlé, adopted Decision 92/553/EEC relating to a proceeding under Regulation No 4064/89 (Case No IV/M.190 — *Nestlé/Perrier*) (OJ 1992 L 536, 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 information 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%.

5 The Pierval source, which Nestlé is obliged to sell under the Decision, is operated by an establishment of Vittel SA (hereinafter 'Vittel'), the Pierval plant, where 119 employees are located. According to information provided by the applicants, Vittel became a subsidiary of the Nestlé group in 1992.

6 By application lodged with the Court Registry on 3 February 1993, Comité Central d'Entreprise de la Société Anonyme Vittel (central works council of Vittel SA, hereinafter 'CCE Vittel'), Comité d'Etablissement de Pierval (works council of the Pierval plant, hereinafter 'CE Pierval') and Fédération Générale Agroalimentaire-CFDT (hereinafter 'FGA-CFDT') brought an action under Article 173 of the EC Treaty for the annulment of the Decision 'in that it imposes on Nestlé conditions for accepting the Nestlé/Perrier concentration as compatible with the common market, although those conditions are unlawful and superfluous', in particular in so far as they include 'the sale by Vittel SA of an entire part of its business, consisting of the Pierval plant'.

7 By separate document received at the Court Registry on 2 March 1993, the applicants also brought an application under Articles 185 and 186 of the EC Treaty for adoption of interim measures, seeking primarily suspension of operation of the Decision and in the alternative suspension of the Decision in so far as it requires Pierval to be sold, until judgment is given in the main proceedings. By order of 2 April 1993 the President of the Court of First Instance ordered that the Commission should inform the Court, as soon as it was in possession of the relevant

information, that all the conditions relating to the transfer of assets provided for in the Decision had been met and in particular that any obstacles to the transfer of operating rights in the Vichy and Thonon sources had been removed. In the same order, he suspended the operation of the Decision, in so far as it required the Pierval plant to be transferred, until a ruling could be made on the applications for the adoption of interim measures in the light of the information to be communicated to the Court by the Commission (*CCE Vittel and CE Pierval* v *Commission* T-12/93 R [1993] ECR II-449). Following the communication of that information on 14 June 1993, the applications for interim measures were dismissed by order of the President of the Court of First Instance of 6 July 1993. The costs were reserved (T-12/93 R [1993] ECR II-785).

8 By application lodged at the Court Registry on 14 June 1993, 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'Etablissement de la Source Perrier, Vergèze (works council of Source Perrier, hereinafter 'CE Perrier'), Syndicat CGT de la Source Perrier (hereinafter 'CGT Perrier') and Comité de Groupe Perrier (Perrier group works council, hereinafter 'CG Perrier') sought leave to intervene in the case in support of the form of order sought by the applicants. The Court granted leave to intervene, by order of 16 December 1993.

9 The interveners submitted pleas and arguments in support of their claims on 14 March 1994. Since the applicants did not lodge observations on the statement in intervention within the prescribed period, the written procedure closed when the defendant's observations were lodged on 27 April 1994.

10 Upon hearing the Report of the Judge-Rapporteur, the Court of First Instance (Second Chamber, extended composition) decided to open the oral procedure without any preparatory inquiry. The hearing took place on 7 October 1994.

Forms of order sought by the parties

11 The applicants claim that the Court should:

— order the Commission to produce all the documents on which the Decision was based;

— declare that the present application seeks annulment of the Decision in that it imposes on Nestlé conditions for declaring the Nestlé/Perrier concentration compatible with the common market, which conditions include the sale by Vittel of the Pierval plant, whereas the Commission should simply have taken a decision that the concentration was compatible with the common market, without imposing any conditions;

— consequently, annul the contested decision, with all ensuing legal consequences.

12 The Commission contends that the Court should:

— dismiss the application;

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

13 The interveners contend that the Court should:

— grant the form of order sought by the applicants for the annulment of the Decision;

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

Admissibility

Summary of the arguments of the parties

14 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.

15 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.

16 In the present case, the Commission does not accept the applicants' argument that they were informed belatedly of the transfer of the Pierval plant and were consequently unable to make use of their right to be heard under Article 18(4) of Regulation No 4064/89. The Commission argues that the lateness of the information cannot be imputed to it, in that Regulation No 4064/89 does not impose any such obligation on it. The lateness should be attributed either to negligence on the part of Nestlé managers or to the inadequacy of the French legislation. It therefore cannot justify holding the application admissible, in so far as the review by the Court would no longer relate to respect by the Commission of third parties' procedural rights guaranteed by Community legislation.

17 Furthermore, in its statement in defence, the Commission denies that FGA-CFDT is a recognized representative of the employees of Vittel, within the meaning of Article 18(4) of Regulation No 4064/89. It would be necessary in particular for national law to confer on employees' representatives wishing to avail themselves of the provisions of that article the task of representing the interests of all the employees of the undertaking, not merely those of their own members. In its rejoinder the Commission notes that the applicants have submitted, in the reply, that trade union

organizations have the task under French labour legislation of defending the collective interests of the trade. It says that, while it is for the Court to decide the question of the interpretation of the Community concept of 'recognized representatives of employees', the application of that concept requires an assessment in each Member State of the role given to trade unions by national law.

18 Secondly, the Commission denies that the contested act is of direct concern to the applicants. It submits that the first time the applicants refer to their own interests, which are said to be directly affected by the contested decision, is in the reply. That allegedly new plea should therefore be dismissed as inadmissible under Article 48(2) of the Rules of Procedure of the Court of First Instance. In any event, the Commission considers that the applicants cannot claim to have interests of their own — other than respect for the procedural guarantees laid down in Article 18(4) of Regulation No 4064/89 — distinct from the collective interests of the employees it is their task to represent.

19 The Commission submits further that possible dismissals in Vittel's central departments as a result of the sale of Pierval, alleged by the applicants, could not be the direct result of the decision. On this point, Article 4(1) 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') provides that the transfer of part of a business is not in itself to constitute grounds for dismissal by the transferor or the transferee.

20 As to the alleged calling into question of the benefits which Pierval employees enjoy under the works agreement in force within Vittel, the Commission points out that, by virtue of Article L.132-8 of the French Code du Travail, on the transfer of an undertaking any collective agreement in that undertaking continues to apply for

one year or until the entry into force of a substitute agreement. If no agreement is concluded during the year following the transfer, the employees keep the individual benefits acquired under the past agreement.

21 The applicants submit that the objection of inadmissibility raised by the Commission is unfounded. They deny that their application can be declared inadmissible on the ground that they have not shown an interest in bringing proceedings. They submit, firstly, that Article 173 of the Treaty does not make the admissibility of an application subject to the existence of an interest in bringing proceedings. Secondly, they observe that in any event their interest in bringing proceedings cannot be doubted. They assert in particular that in France works councils play an important part in safeguarding the industrial structure in the interests of the employees and for that purpose have genuine power to supervise and intervene in the undertaking's economic, financial and commercial activities. In those circumstances, it would be contrary both to the EC Treaty, whose Article 130a refers to the strenthening of economic and social cohesion within the Community, and to the principle of the proper administration of justice to 'discriminate' as regards access to the Community judicature between commercial companies, on the one hand, and legal persons responsible for protecting the interests of workers, on the other hand, whether these are trade unions or works councils.

22 As regards the conditions of admissibility set out in Article 173 of the Treaty, the applicants consider that in the present case there is 'a presumption of admissibility on the basis of the legislation and the case-law of the Court of Justice'. In the first place, they submit that the decision adopted within the framework of Regulation No 4064/89 is of individual concern to them, in so far as that regulation protects the collective rights of the workers in the undertakings in question. Firstly, Article 18(4) of that regulation enshrines the right of the recognized representatives of those employees to be heard, upon application, in the administrative procedure. It is settled case-law that where a regulation gives procedural rights to third parties during the administrative procedure, those third parties have a right to bring proceedings in order to protect their legitimate interests (judgments in *Metro* v *Commission*, *Fediol* v *Commission* and *Cofaz* v *Commission*, cited above).

23 In this respect the applicants state that the Community concept of the recognized representatives of the employees of an undertaking refers not only to the representatives chosen by those employees, but also, as the Commission has acknowledged, any organization whose statutory task is to represent the interests of all the employees of the undertaking, not merely those of its own members. That is the position with FGA-CFDT, whose representative character is recognized at national level. That trade union federation thus has the task of representing all employees in the agri-foodstuffs sector, to which Vittel belongs. Under Article L.411-11 of the French Code du Travail, FGA-CFDT, like any trade union, can exercise before all courts all the rights of a civil party in relation to acts causing direct or indirect damage to the collective interest of the trade it represents.

24 Moreover, the applicants do not accept that if the recognized representatives of the employees do not ask to be heard by the Commission during the administrative procedure, they cannot be regarded as being individually concerned by the final decision. Access to the Community judicature cannot be conditional on making use of the opportunity to be heard under Regulation No 4064/89, without depriving persons who are directly and individually concerned by a decision but have not made use of that opportunity of their right to bring proceedings, which would be contrary to Article 173 of the Treaty. The Commission's view would amount in practice to obliging all persons who might possibly be concerned by a decision to apply to submit their observations during the administrative procedure for the sole purpose of reserving the right to bring, if appropriate, an action for annulment.

25 In any event, in the present case, the applicants were not in a position to make use of their procedural rights under Article 18(4) of Regulation No 4064/89. They were not informed by their employer of the transfer of a number of sources, including Pierval, until after the Decision had been adopted, as the order of 2 April 1993 of the President of the Court of First Instance, cited above, states in paragraph 24.

26 Secondly, the applicants point out that the obligation to take the employees' rights into consideration in the context of Regulation No 4064/89 is confirmed by the thirty-first recital in the preamble to that regulation, which states that it 'in no way detracts from the collective rights of employees as recognized in the undertakings concerned'. In the present case, the institutions representing the Vittel employees are all the more concerned individually because one of the conditions which the Decision imposes in order to find the concentration in question compatible with the common market is the sale of an entire part of Vittel's business, namely the Pierval plant. That sale imposes an artificial separation on a former community of employees and affects the rights acquired by that community. The Decision thus affects the recognized representatives of Vittel's employees by reason of attributes which are peculiar to them and by reason of circumstances which distinguish them individually just as in the case of the Vittel undertaking, which is one of the undertakings concerned by the Decision on the same basis as its addressee, Nestlé.

27 In second place, the applicants submit that the Decision is of direct concern to them. They argue that the sale of part of Vittel, required by the Decision, affects both their own rights, conferred on them as recognized representatives of the employees, and the rights of the employees.

28 In their reply, the applicants argue primarily that the Decision affects their own rights directly and inevitably. Firstly, the Decision 'attacks the economic, industrial, technical and financial structure of the undertaking by the obligation imposed on Vittel to transfer the Pierval plant, irrespective of the consequences for the working community and the rights of the employees'. Secondly, it involves 'a distortion of the structure of the applicant employees' representative bodies, by reason of the disappearance from within Vittel of the Pierval works council and the consequential absence from the central works council of the representatives from the Pierval plant, with a change in the legal character of the central works council to a works council'. The Decision thus affects the rights given to a central works council by

French law. As to FGA-CFDT, the trade union representing a clear majority of Vittel's employees, the decision is of direct concern to it in its representative function within Vittel, in that the sale of the Pierval plant will, under Article L.122-2 of the French Code du Travail, entail the transfer of the employees at that plant.

29 In addition, the applicants submit that the Decision directly affects the rights of the employees of Vittel and Pierval, who suffer the legal consequences of the sale of the part of the business imposed by the Decision. The Pierval plant represents a substantial part of Vittel's assets and 'the legitimate counterpart of the guarantee of employment'. The Decision proposes, however, to approve the transferee on the sole basis of criteria relating to the development of competition. Furthermore, the employees will suffer job losses as a result of dismissals following the concentration. Moreover, Pierval employees are directly affected by the loss of the collective benefits agreed to within Vittel. As regards evidence of such direct harmful effects, the applicants refer expressly to their application for interim measures and to the documents produced at the hearing in the interim measures procedure.

30 The applicants consider that it follows from all the above considerations that in their capacity as recognized representatives of the employees they are entitled to bring proceedings before the Court in order to ensure protection of the collective rights of workers guaranteed by Regulation No 4064/89. The applicants say that, although in French law employees' representatives can bring judicial proceedings if a transfer of an undertaking is irregular, that does not mean that they are entitled to challenge before the national courts the implementation of a decision by the Commission, the lawfulness of which can be reviewed only by the Community judicature.

31 The interveners support all the arguments for admissibility put forward by the applicants. They note that Article 173 of the Treaty gives a remedy against a decision by an institution to any person to whom that decision is of direct and individual concern. In the context of Regulation No 4064/89, the express mention

of certain 'privileged' persons among third parties showing a sufficient interest establishes a real presumption of admissibility for applications brought by those third parties against the decision. The fact that Regulation No 4064/89 does not provide for any complaint procedure, and the fact that the third parties referred to above have not taken part in the procedure before the Commission, are of no relevance in this respect. The interveners assert that in the decisions relied on by the Commission the Court of Justice regarded the demonstration of a sufficient interest and actual participation in the administrative procedure as alternative, not cumulative, conditions of admissibility.

32 On this point the interveners note that although 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) gives certain persons the right to be heard on application, paragraph 3 of that article allows the Commission in any event to take the initiative of obtaining the views of any third party. In the present case, the Commission did not consider it necessary to hear the recognized representatives of the employees.

33 With reference more specifically to the direct effect of the decision on the legal position of the applicants, the interveners observe that the applicants rightly claim to have suffered 'composite damage', by reason both of their own status as legal persons and of their statutory task of upholding the collective rights of the employees. They assert in this respect that a decision which affects the level or conditions of employment necessarily affects the employees' recognized representatives' own rights, and vice versa. Reliance by the applicants, in the reply, on such rights of their own cannot therefore constitute a new plea.

34 On the substance, the interveners argue that the applicants are directly affected by the Decision in so far as it requires the Pierval plant to be sold, which would have

an effect on the level and conditions of employment of the Pierval employees and on the own rights of the recognized representatives of the employees of the undertakings in question. Those representatives should have been informed of the operation 'in good time', in accordance with the national legislation and Directive 77/187/EEC. The Commission did not, however, ensure that that information was provided and deliberately omitted to seek information on the labour situation from the recognized representatives of the employees of the undertaking in question, thereby failing to comply with the provisions of the Treaty (Articles 2, 117, 118, 118a and 118b), the Community Charter of 9 December 1989, the European Social Charter of 18 October 1961 and Directive 77/187/EEC. Moreover, the applicants were financially affected by the consequences of the sale of Pierval for their operational budget and the company budget. Finally, the employees' representation on the Vittel central works council is reduced as a result of the sale.

Assessment of the Court

35 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.

36 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).

37 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.

38 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.

39 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 appli-

cation, to be heard, manifests an intention to ensure that the collective interests of those employees are taken into consideration in the administrative procedure.

40 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.

41 In those circumstances the applicants rightly submit that, in 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.

42 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.

43 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 two of the applicants, namely CCE Vittel and CE Pierval.

44 In those circumstances, as there is only one application involved, there is no need to examine the standing to bring proceedings of the third applicant, FGA-CFDT. As the Court of Justice held in Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraph 31, if at least one of the applicants fulfils the conditions laid down in Article 173 of the Treaty, that is enough for the application to be admissible.

45 In any event, 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 supplied by the applicant in the reply, the Commission does not dispute that the representative character of FGA-CFDT in the agri-foodstuffs sector, and consequently in undertakings in that sector, such as Vittel (where it is the majority trade union), is recognized in French law, in so far as that trade union federation is affiliated to the CFDT representative federation. That circumstance is enough for FGA-CFDT 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.

46 Moreover, the Commission's argument that because the applicants 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.

47 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).

48 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 the applicants must, for all the reasons stated above, be regarded as fulfilling that condition of admissibility laid down in Article 173 of the Treaty, independently of whether or not they have taken part in the administrative procedure.

49 Secondly, with respect to the question whether the contested decision is of direct concern to the applicants, the Court considers, to begin with, that the applicants' argument in the reply, namely that the contested decision affects their own rights, does not constitute a new plea in law. That argument is based on the consequences for the applicants' own rights of the alleged effects of the sale of the Pierval plant on the structure of Vittel and the level of employment in that company. It is therefore connected with the plea based on the adverse effect that sale would have on the collective rights of the employees of the undertakings concerned, which was relied upon in the application. The Commission's objection of inadmissibility must therefore be rejected.

50 On the substance, it must be stated 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, the fact that the sale of the Pierval plant, required by the decision authorizing the concentration, entails *inter alia* the disappearance from within Vittel of the Pierval works council, and consequently the end of the central works council, does not adversely affect the latter's own rights. The central works council has not demonstrated an interest in the preservation of its functions where by reason of a change in the structure of the undertaking concerned the conditions under which the applicable national law provides for it to be set up are no longer met. Similarly, FGA-CFDT has no interest of its own in the maintenance of the Pierval plant within Vittel, on the grounds that the sale of a substantial part of that company would entail structural and financial consequences for that trade union, as the interveners argue. The employees' representative organizations can assert rights of their own only in relation to the functions

and prerogatives given to them, under the applicable legislation, in an undertaking with a particular structure. They cannot claim that the structure of the undertaking should last indefinitely. In that respect, moreover, it follows essentially from Article 5 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) 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 all those 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.

51 Moreover, the applicants' alternative argument, namely that the contested decision directly prejudices the interests of the employees they represent, in so far as it requires the Pierval plant to be sold, which would entail the loss of a substantial part of Vittel's assets and the loss of collective benefits and the loss of jobs, does not withstand examination either. In this respect it should be noted to begin with that, in the words of the thirty-first recital in the preamble to Regulation No 4064/89, that regulation 'in no way detracts from the collective rights of employees as recognized in the undertakings concerned'.

52 With respect in particular to the dismantling of Vittel's assets alleged by the applicants, the Court considers that a decision which requires part of the assets of the undertaking concerned to be sold cannot be regarded as directly affecting the interests of the employees of that undertaking on the ground that the undertaking's assets represent a guarantee of the continued employment of the workers, who are among the undertaking's first-ranking creditors, as the applicants state. Even if it is conceded that a significant financial, property or industrial decision taken by an undertaking may in certain cases have an effect on the position of the employees —

which has not been established in the present case with respect to the sale by the Nestlé group of the Pierval plant — that effect can in any event only be of an indirect nature. That analysis is confirmed by the case-law of the Court of Justice, which has dismissed as inadmissible an application to intervene brought by a trade union in the context of judicial proceedings relating to the payment of compensation to undertakings, which, if successful, could have had a favourable impact on the economic well-being of the undertakings in question and consequently on the number of persons they employed, on the ground that the trade union had only an indirect and remote interest in the payment of such compensation (Order in Joined Cases 197 to 200, 243, 245 and 247/80 *Ludwigshafener Walzmühle Erling* v *EEC* [1981] ECR 1041, paragraphs 8 and 9). Furthermore, with respect more particularly to the damage which the applicants consider would result from the sale of the Pierval plant at an allegedly derisory price, it must be noted that, as the President of this Court said in his order of 6 July 1993 in Case T-12/93 R *CCE Vittel and CE Pierval* v *Commission*, cited above, paragraph 26, the price at which that plant is sold, even supposing that it can be described as derisory, follows not from the Commission's decision but from the negotiations carried on between Nestlé and Castel on the sale of all the assets Nestlé undertook to sell.

53 As to the alleged effects on the level and conditions of employment in the undertakings concerned, it must be stated that the legislation intended to guarantee employees' rights, in particular in the event of a concentration, prevents the realization of a concentration in itself bringing about such effects, 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).

54 On this point, it follows clearly from the applicable legislation that job losses and changes in the social benefits given to the Pierval employees either by the collective agreement in force within Vittel or by their individual contracts 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, that directive also states in the first subparagraph of Article 4(1) that the 'transfer of an undertaking ... shall not in itself constitute grounds for dismissal by the transferor or the transferee'.

55 It should also be noted in this connection that the annulment of the Decision, in so far as the Decision requires the Pierval plant to be sold, 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.

56 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.

57 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 Vittel, 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 that article, 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.).

58 It follows that in the present case the transfer of the Pierval plant does not in itself entail any direct consequences for the rights which the employees derive from their contract 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 the Pierval plant, 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).

59 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, with respect more particularly to actions brought by natural or legal persons, 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 is alleged by the parties granted leave to intervene in support of the applicants. 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 the applicants' procedural rights, the mere fact that the applicants or the parties granted leave to intervene in support of 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.

60 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. The Court must ascertain whether, as the interveners argue, the Decision fails to observe those guarantees.

The plea alleging failure to observe the applicants' procedural rights

61 The interveners submit that during the administrative procedure the Commission failed to respect the rights of the recognized representatives of the employees of the undertakings concerned by the concentration in question, in so far as it did not inform them in time of that concentration.

62 That argument cannot be upheld. Regulation No 4064/89 does no more than lay down, in Article 18(4), the right of those representatives to submit observations, on application by them, to the Commission. It does not impose on the Commission any obligation to provide the representatives of the employees of the undertakings in question with information on the existence of a concentration proposal notified to it, as in the present case, by an undertaking acquiring control over another undertaking. It should be noted here that in the event of the transfer of an undertaking, business or part of a business, the transferor and the transferee are obliged under Article 6 of the abovementioned Directive 77/187/EEC to give information to the representatives of the employees, the transferor in particular being required to inform the representatives of his employees, in good time before the transfer is carried out, of the reasons for the transfer, its legal, economic and social implications for the employees, and the measures envisaged in relation to the employees.

63 It follows that even if the recognized representatives of the employees of the undertakings concerned by the concentration in question were not informed in good time, that omission cannot be laid at the Commission's door. It is for the competent national authorities and the national courts to ensure that undertakings comply with their obligation to inform the employees' representative organizations. In the present case, the defendant institution cannot therefore be charged with having infringed the applicants' procedural rights.

64 In those circumstances, the Decision cannot be vitiated by the alleged delay in informing the applicants. The present application must therefore be dismissed as unfounded, in so far as its purpose is to review whether the applicants' procedural rights were respected.

Costs

65 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.

66 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;

3. Orders the interveners to bear their own costs.

Vesterdorf Barrington Saggio

Kirschner Kalogeropoulos

Delivered in open court in Luxembourg on 27 April 1995.

H. Jung
Registrar

B. Vesterdorf
President