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## The New Standard for Admissibility in European Community State AIDS Actions After COFAZ

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# The New Standard for Admissibility in European Community State AIDS Actions After COFAZ

Peter J. Allen

## **Abstract**

Part I of this Comment analyzes Community State aid policy and the standing issues facing individuals who seek judicial review of Community measures regarding State aids. Part II examines the rationale of the Court in rendering the COFAZ judgment. Part III explores the practical effect of COFAZ on individuals challenging State aids decisions and on Community State aids policy.

## COMMENT

### THE NEW STANDARD FOR ADMISSIBILITY IN EUROPEAN COMMUNITY STATE AIDS ACTIONS AFTER *COFAZ*

#### INTRODUCTION

In *Compagnie Française de l'Azote (COFAZ) S.A. v. Commission*,<sup>1</sup> the Court of Justice of the European Communities (Court) held for the first time that business enterprises in one Member State who are affected by State aid granted to competitors in another Member State have standing to seek judicial review of a Commission decision allowing the aid, even though the decision has been addressed to the competitor's national government. The Court thereby expanded the scope of admissibility<sup>2</sup> under Article 173(2) of the Treaty of Rome<sup>3</sup> (Treaty) to permit a private plaintiff cause of action to a new class of applicants. *COFAZ* indicates that the Court is willing to consider a broad range of factors when determining the admissibility of individual complaints concerning Community measures.<sup>4</sup>

This Comment argues that the Court has developed a new test to determine standing that is based on the applicants' conduct, the existence of procedural guarantees, and significant effect on economic interests. Part I analyzes Community State

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1. Case 169/84, 1986 E.C.R. — , Comm. Mkt. Rep. (CCH) ¶ 14,284.

2. The issue of admissibility determines whether the Court is competent to hear a case. Three factors comprise the determination: subject matter jurisdiction; applicant's *locus standi* (standing to sue); and timeliness of the proceedings. See T.C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 39 (1981). In *COFAZ* only the applicant's *locus standi* was at issue. See *id.* at — (para. 21 of the judgment), Comm. Mkt. Rep. (CCH) ¶ 14,284, at 16,762.

3. Treaty establishing the European Economic Community, Mar. 25, 1957, Gr. Brit. T.S. No. 1 (Cmd. 5179-II) 57 (official English transl.), 298 U.N.T.S. 11, 75-76 (1958) (unofficial English transl.), Comm. Mkt. Rep. (CCH) ¶ 4635 [hereinafter EEC Treaty]. Article 173(2) states that "[a]ny natural or legal person may . . . institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former." *Id.*, 298 U.N.T.S. at 75-76, Comm. Mkt. Rep. (CCH) ¶ 4635.

4. Community measures having legal effect may be in the form of regulations, directives, decisions, recommendations, and opinions. See 5 H. SMIT & P. HERZOG, *THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY* 5-572-73 (1986). For the purposes of this Comment, Community measures refer to regulations and decisions issued by the Commission and Council.

aid policy and the standing issues facing individuals who seek judicial review of Community measures regarding State aids. Part II examines the rationale of the Court in rendering the *COFAZ* judgment. Part III explores the practical effect of *COFAZ* on individuals challenging State aids decisions and on Community State aids policy. This Comment concludes that the more liberal approach to admissibility adopted by the Court in *COFAZ* is an appropriate step toward the acknowledgment of individual rights under the Treaty as well as a means of protecting individual interests and furthering the economic goals of the Community.

### I. STATE AIDS POLICY AND INDIVIDUAL ADMISSIBILITY

One of the main objectives of the European Community is economic integration by means of the development of a common market free of internal barriers to trade.<sup>5</sup> To this end, Article 92(1)<sup>6</sup> of the Treaty prohibits any State aid<sup>7</sup> that dis-

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5. See, e.g., Single European Act, E.C. Bull. No. 2 (Supp.), at 11 (1986). One of the goals of the Act, the purpose of which is to advance the Member States toward a European Union, is to establish by the end of 1992 an internal market completely free of barriers to the movement of goods, persons, services, and capital. See Glaesner, *The Single European Act: Attempt at an Appraisal*, 10 *FORDHAM INT'L L.J.* 446 (1987) (analysis of the provisions of the Single European Act). This goal may come into direct conflict with national economic policies pursued by Member States. See P. MATHIJSEN, *A GUIDE TO EUROPEAN COMMUNITY LAW 189-90* (4th ed. 1985). Since the outset of the European recession, triggered by the oil crisis of the 1970s, Member States have been under pressure to improve their economic performance by intervening in the operation of their economies. The States have increased assistance to industry for modernization of plant, rationalization of operations, and reduction of unemployment. See 3 H. SMIT & P. HERZOG, *supra* note 4, at 92.07; Comm'n, Eleventh Report on Competition Policy ¶ 175 (1981).

6. See EEC Treaty, *supra* note 3, art. 92(1), at 35, 298 U.N.T.S. at 51, Comm. Mkt. Rep. (CCH) ¶ 2921. Article 92(1) provides:

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

*Id.*, 298 U.N.T.S. at 51, Comm. Mkt. Rep. (CCH) ¶ 2921. This Comment discusses only the aid provisions of the Treaty of Rome. For a discussion of the European Coal and Steel Community rules, see Caspari, *State Aids in the EEC*, in 1983 *FORDHAM CORP. L. INST.* 1, 12-16 (B. Hawk ed. 1984).

7. State aid may be described as all government-sourced assistance to undertakings or activities that benefit their competitive position in one Member State vis-à-vis other undertakings or activities taking place in other Member States of the European Community. Aid may take any form and may benefit the undertakings in any man-

torts competition or affects trade between Member States.<sup>8</sup> Such State aids undermine the establishment of the internal market,<sup>9</sup> and are thus considered incompatible with the Common Market and subject to alteration or eradication.<sup>10</sup>

### A. *Community Policy*

While the Treaty subjects the grant of State aids to strict Community supervision,<sup>11</sup> not all State aids are precluded. Indeed, the Treaty provides for numerous exceptions to the general prohibition,<sup>12</sup> by virtue of which State aids may be author-

ner. Among the possibilities are financial contributions to capital equipment or interest costs, reductions or refunds for taxes or social security payments, reduced utility rates, supply of free land or buildings, free research or promotional assistance, and exemption from anti-pollution regulations. See 3 H. SMIT & P. HERZOG, *supra* note 4, at 92.03.

8. See EEC Treaty, *supra* note 3, art. 92(1), at 35, 298 U.N.T.S. at 51, Comm. Mkt. Rep. (CCH) ¶ 2921. The effects of State aids manifest themselves in various ways: the effects may be immediate, such as in the case of import restrictions; indirect, as in the grant of export incentives; or oblique, for example, where aid given to one industry in fact benefits another industry whose output is utilized by the first. See 3 H. SMIT & P. HERZOG, *supra* note 4, at 92.06; Comm'n, Fourth Report on Competition Policy ¶¶ 163-65 (1975).

9. See Caspari, *supra* note 6, at 3-4; see also Comm'n, Eleventh Report on Competition Policy ¶ 176 (1981).

10. See EEC Treaty, *supra* note 3, art. 93(2), at 36, 298 U.N.T.S. at 52, Comm. Mkt. Rep. (CCH) ¶ 2931. Article 93(2) provides: "[i]f . . . the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 92, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid. . . ." *Id.*, 298 U.N.T.S. at 52, Comm. Mkt. Rep. (CCH) ¶ 2931.

11. See EEC Treaty, *supra* note 3, art. 93(1), at 36, 298 U.N.T.S. at 52, Comm. Mkt. Rep. (CCH) ¶ 2931. Article 93(1) provides that "[t]he Commission shall, in cooperation with the Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market." *Id.*, 298 U.N.T.S. at 52, Comm. Mkt. Rep. (CCH) ¶ 2931. The Commission of the European Communities is the Community institution with primary responsibility for evaluating State aids and enforcing the Treaty provisions. See T.C. HARTLEY, *supra* note 2, at 8-11.

12. See EEC Treaty, *supra* note 3, art. 92(2), at 35, 298 U.N.T.S. at 51, Comm. Mkt. Rep. (CCH) ¶ 2921. Article 92(2) considers per se compatible certain aids which are justified on social or public welfare grounds, aids to rectify damage caused by natural disasters, and aid for economic compensation to certain sectors of the Federal Republic of Germany bordering on East Germany and Czechoslovakia. See *id.*, 298 U.N.T.S. at 51, Comm. Mkt. Rep. (CCH) ¶ 2921. Article 92(3) allows for derogation from Article 92(1) where, in the discretion of the Commission or Council, exceptions to the general rule are warranted. See *id.* at 36, 298 U.N.T.S. at 51, Comm. Mkt. Rep. (CCH) ¶ 2921. Aids which may be considered compatible with the

ized<sup>13</sup> by the Community and so enable the Member States to implement national industrial policy.<sup>14</sup>

Member States must notify the Commission of all new or altered aid schemes.<sup>15</sup> If in the Commission's judgment the proposed aid may be incompatible with the Common Market, the Commission will investigate the aid by using the procedure set forth in Article 93(2).<sup>16</sup> To evaluate the aid properly, the Commission is required<sup>17</sup> to allow all "parties concerned" to submit their observations on the proposed aid.<sup>18</sup> Once the Commission has heard from all such parties, it may render its final decision on the compatibility of the aid scheme.<sup>19</sup>

Common Market under Article 92(3) generally fall into three categories: sectoral aids, regional aids and general aids. See A. PARRY & J. DINNAGE, PARRY & HARDY: *EEC LAW 347-49* (2d ed. 1981); FitzGerald, *EEC Law Relating to State Aids: Articles 92 to 94 EEC Treaty*, in *DOING BUSINESS IN IRELAND* app. 2-2, at App. 2-2-6-13 (P. Ussher, B. O'Connor, C. McCarthy eds. 1987).

13. The Commission may use its discretionary power to allow certain aids in derogation from Article 92(1). It will do so with the proviso that there be some compensatory justification, taking the form of a contribution to the aims of the Common Market by the recipient of the aid, which would not otherwise be produced by the operation of normal market forces. See Comm'n, Tenth Report on Competition Policy ¶ 213 (1980).

14. To this end, Member States may design their aid schemes to fall within the derogations from Article 92(1) provided for in Article 92(2) & (3). See, e.g., Hogan, *Competition Law of EEC Origin*, in *DOING BUSINESS IN IRELAND* 15.03[7][b] (P. Ussher, B. O'Connor & C. McCarthy eds. 1987) (pointing to the possibility that certain of Ireland's state-sponsored aid and assistance programs may not qualify for any of the derogations from Article 92(1) and, therefore, may be considered incompatible).

15. See EEC Treaty, *supra* note 3, art. 93(3), at 36, 298 U.N.T.S. at 52, Comm. Mkt. Rep. (CCH) ¶ 2931. Article 93(3) provides that "[t]he Commission shall be informed . . . of any plans to grant or alter aid." *Id.*, 298 U.N.T.S. at 52, Comm. Mkt. Rep. (CCH) ¶ 2931.

16. See EEC Treaty, *supra* note 3, art. 93(2), at 36, 298 U.N.T.S. at 52, Comm. Mkt. Rep. (CCH) ¶ 2931. Article 93(2) provides, in pertinent part:

If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted . . . is not compatible with the common market having regard to Article 92, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

*Id.*, 298 U.N.T.S. at 52, Comm. Mkt. Rep. (CCH) ¶ 2931.

17. See *id.*, 298 U.N.T.S. at 52, Comm. Mkt. Rep. (CCH) ¶ 2931.

18. See *id.*, 298 U.N.T.S. at 52, Comm. Mkt. Rep. (CCH) ¶ 2931. Concerned parties include all States, individuals, and enterprises affected by the aid. See *Federal Republic of Germany v. Commission*, Case 84/82, 1984 E.C.R. 1451, Comm. Mkt. Rep. (CCH) ¶ 14,090 (Commission decision on the compatibility of a Belgian textile aid scheme struck down on the ground that complainant had not been afforded an opportunity to be heard during the Commission's investigation of the scheme).

19. The Commission is not required, however, to take a formal decision. See 3

The Commission may also investigate an unnotified State aid that comes to its attention.<sup>20</sup> In *COFAZ*, the complainants,<sup>21</sup> French manufacturers of nitrate fertilizers, claimed that a preferential tariff<sup>22</sup> for natural gas supplied to their Dutch competitors by the Dutch gas board (Gasunie) constituted an incompatible aid.<sup>23</sup> The Dutch government had not notified the Commission of the tariff. However, based on *COFAZ*'s complaint, the Commission opened an Article 93(2) procedure to evaluate the tariff's compatibility. During the course of the Article 93(2) investigation, Gasunie amended its tariff system<sup>24</sup> and so notified the Commission. In light of the new tariff sys-

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H. SMIT & P. HERZOG, *supra* note 4, at 93.07. In *COFAZ*, for example, the Commission found that the Netherlands government had failed to fulfill its obligation to notify under Article 93(3), but declined to rule at that time on the compatibility of the aid. See *Compagnie Française de l'Azote (COFAZ) S.A. v. Commission*, Case 169/84, 1986 E.C.R. — (para. 6 of the judgment), *Comm. Mkt. Rep. (CCH)* ¶ 14,284, at 16,760.

20. Additionally, the Commission may open Article 169 proceedings to enjoin payment of unnotified aid pursuant to the Member State's failure to notify. See *EEC Treaty, supra* note 3, art. 93(2), at 36, 298 U.N.T.S. at 52, *Comm. Mkt. Rep. (CCH)* ¶ 2931. See also Gilmour, *The Enforcement of Community Law by the Commission in the Context of State Aids: The Relationship between Articles 93 and 169 and the Choice of Remedies*, 18 *COMM. MKT. L. REV.* 63, 74 (1981).

21. The complainants joining *COFAZ* were *Société CdF Chimie Azote et Fertilisants S.A.* and *Société Chimique de la Grande Paroisse S.A.* The complaint was submitted on behalf of *COFAZ* et al. by the *Syndicat Professionnel de l'Industrie des Engrais Azotés* (Trade Association of Producers of Nitrate Fertilizers).

22. The tariff (tariff E) consisted of a two-tier structure that reduced the cost of natural gas used as a feed stock for the production of ammonia. *COFAZ*, 1986 E.C.R. at — (para. 4 of the judgment), *Comm. Mkt. Rep. (CCH)* ¶ 14,284, at 16,760.

23. *COFAZ* claimed that the annual savings transferred to the three Dutch producers of nitrate fertilizers by the tariff system amounted to approximately Hfl 165 million. In addition, *COFAZ* stated that natural gas represents approximately 80 percent of the ex-works cost of producing ammonia, the raw material from which nitrate fertilizers are manufactured. Finally, *COFAZ* submitted evidence that between 1978 and 1982 its Dutch competitors had tripled their volume of exports to France and had increased their share of the French market between 1980 and 1982 to 21.7 percent from 9 percent. *COFAZ*, 1986 E.C.R. at — (para. 27 of the judgment), *Comm. Mkt. Rep. (CCH)* ¶ 14,284, at 16,763.

24. The new tariff was intended to benefit major industrial users of natural gas without discrimination among industrial sectors. The tariff required that users accept the following terms: minimum annual consumption of 600 million cubic meters of gas; plant in operation at least 90 percent of the time; acceptance of total or partial interruptions of service; and supplies of gas having varying calorific values. *COFAZ*, 1986 E.C.R. at — (para. 10 of the judgment), *Comm. Mkt. Rep. (CCH)* ¶ 14,284, at 16,761.

tem, the Commission terminated its Article 93(2) procedure.<sup>25</sup> COFAZ subsequently lodged an application for annulment of the Commission decision, claiming that the Commission had committed errors in the assessment of material facts regarding the tariff system and that the new tariff was "merely an attempt to maintain in a different guise the previous tariff system."<sup>26</sup>

### B. Admissibility of Individuals' Complaints

The Treaty expressly grants Member States challenging Community measures access to the Court of Justice.<sup>27</sup> Consequently, national governments may bring actions against Commission decisions that either allow or deny the grant of aid.<sup>28</sup> Individuals, on the other hand, have far more tenuous rights to Community judicial review.

To challenge a Community measure, an individual must show that the measure is of "direct and individual concern" to him.<sup>29</sup> In *COFAZ*, the decision terminating the Article 93(2)

25. The Court's account of the Commission's conclusions regarding the compatibility of the new tariff read as follows:

The New tariff, tariff F, formed an integral part of the general tariff structure for users in the Netherlands and did not discriminate between sectors. The value of the rebate granted to the undertakings eligible for the new tariff (by comparison with Tariff E) was even lower than the total value of the savings made by Gasunie on account of the volume of consumption by those undertakings and the other aforementioned conditions of the new tariff system.

*Id.*, Comm. Mkt. Rep. (CCH) ¶ 14,284, at 16,761.

26. *Id.* at — (para. 12 of the judgment), Comm. Mkt. Rep. (CCH) ¶ 14,284, at 16,761.

27. See EEC Treaty, *supra* note 3, art. 173(1), at 57, 298 U.N.T.S. at 75, Comm. Mkt. Rep. (CCH) ¶ 4635. Article 173(1) provides:

The Court of Justice shall review the legality of acts of the Council and the Commission other than recommendations or opinions. It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty, or of any rule of law relating to its application, or misuse of powers.

*Id.*, 298 U.N.T.S. at 75, Comm. Mkt. Rep. (CCH) ¶ 4635. The Council, Commission, and Member States are so-called "privileged" applicants whose standing before the Court of Justice is never in question. See T.C. HARTLEY, *supra* note 2, at 351-52.

28. See, e.g., Federal Republic of Germany v. Commission, Case 84/82, 1984 E.C.R. 1451, Comm. Mkt. Rep. (CCH) ¶ 14,090 (action brought by Germany to annul a Commission decision authorizing Belgium to implement a plan to restructure its textile and clothing industry).

29. See EEC Treaty, *supra* note 3, art. 173(2), at 57, 298 U.N.T.S. at 75-76, Comm. Mkt. Rep. (CCH) ¶ 4635.



procedure was addressed not to COFAZ, but to the Dutch government. As a non-addressee of the decision, COFAZ sought annulment of the decision under Article 173(2) as a person directly and individually concerned.<sup>30</sup>

While the language of Article 173(2) does not admit of an exclusionary purpose toward individual applicants, from the beginning, the Court chose to take a narrow reading of the provision.<sup>31</sup> The Court established the definition of a person individually concerned in *Plaumann & Co. v. Commission*.<sup>32</sup> The Court found that for a decision to be contested, it must affect non-addressees "by reason of certain attributes which are peculiar to them"<sup>33</sup> or whose circumstances set them apart from the general public.<sup>34</sup> The individual must, by virtue of these attributes, be affected by the decision in a manner similar to that of the addressee.<sup>35</sup> The Court concluded that, to be individually concerned, the applicant must be affected by the decision in a manner different from that of the general class of individuals of which he is a member.<sup>36</sup>

The test for direct concern, developed in *Toepfer v. Commission*,<sup>37</sup> centers on whether the contested decision comes into

30. See *COFAZ*, 1986 E.C.R. at — (para. 1 of the judgment), Comm. Mkt. Rep. (CCH) ¶ 14,284, at 16,760. It has been established, however, that potential individual recipients of State aids have standing. See, e.g., *Philip Morris Holland BV v. Commission*, Case 730/79, 1980 E.C.R. 2671, Comm. Mkt. Rep. (CCH) ¶ 8695 (no challenge to the admissibility of an application by the complainant cigarette manufacturer who was the intended recipient of general investment aid from Dutch government).

31. See Dinnage, *Locus Standi and Article 173 EEC: The Effect of Metro SB Grossmärkte v. Commission*, 4 EUR. L. REV. 15, 18-30 (1979).

32. Case 25/62, 1963 E.C.R. 95, 1964 Comm. Mkt. L.R. 29. *Plaumann* concerned a suit brought by a German importer of fresh clementines who sought annulment of a Commission decision denying a request of the German government to reduce the customs duty applicable to his goods. In holding that the application was not admissible, the Court reasoned that the decision was not of individual concern to the applicants because they were simply members of a class of importers of clementines. *Id.* at 107, 1964 Comm. Mkt. L.R. at 47.

33. *Id.*, 1964 Comm. Mkt. L.R. at 47.

34. *Id.*, 1964 Comm. Mkt. L.R. at 47.

35. *Id.*, 1964 Comm. Mkt. L.R. at 47.

36. *Id.*, 1964 Comm. Mkt. L.R. at 47.

37. *Toepfer & Getreide-Import Gesellschaft v. Commission*, Joined Cases 106 & 107/63, 1965 E.C.R. 405, 1966 Comm. Mkt. L.R. 111. *Toepfer* concerned applications by German importers of cereal grains for annulment of a Commission decision authorizing the German government's suspension of import licenses and maintenance of protective measures against the importation of maize. The decision was found to be of direct concern to the applicants because its effect was retroactive, and so immediately deprived them of an existing legal right to obtain import licenses. *Id.*

force immediately.<sup>38</sup> Under this test, if the addressee of the decision has any discretion in its implementation, the decision cannot be of direct concern to the non-addressee.<sup>39</sup> That is to say, if the addressee may choose the manner in which the decision is to be effectuated or, more importantly, whether or not it will be utilized, then the non-addressee's claim that the decision may deprive him of existing legal rights is tenuous.<sup>40</sup>

Under the restrictive interpretation of the standing provisions of Article 173(2) pronounced in *Plaumann* and *Toepfer*, the Court dismissed nearly every complaint brought by non-addressees of decisions.<sup>41</sup> The Court's jurisprudence in this area has undergone some change, however. Beginning with its *Metro I*<sup>42</sup> judgment and culminating with *COFAZ*, the Court has found admissible a handful of non-addressee applications.<sup>43</sup> These judgments suggest that the Court has developed standards and reasoning reflecting concerns different from those enunciated in *Plaumann* and *Toepfer*.

## II. THE COFAZ JUDGMENT

In finding that COFAZ was individually concerned, the Court found persuasive three factors: the applicant's role in the initiation of the procedure that culminated in the contested decision; the existence of a procedural guarantee that confers rights upon individuals; and the effect of the Commission de-

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at 411, 1966 Comm. Mkt. L.R. at 141; *see also* 5 H. SMIT & P. HERZOG, *supra* note 4, at 5-391-92.

38. *Toepfer*, 1965 E.C.R. at 411, 1966 Comm. Mkt. L.R. at 142.

39. *See* T.C. HARTLEY, *supra* note 2, at 373.

40. *See, e.g.*, Società "Eridania" Zuccherifici Nazionali v. Commission, Joined Cases 10 & 18/68, 1969 E.C.R. 459, Comm. Mkt. Rep. (CCH) ¶ 8099. Applicant sugar manufacturers sought annulment of Commission decisions authorizing the grant of aid from the European Agricultural Guidance and Guarantee Fund to certain sugar refineries in Italy. The decisions allowed the Italian government discretion in the grant of part of the aid, while the balance was distributed uniformly by the Fund to Italian sugar undertakings. Italy established certain criteria for the distribution of its portion of the aid which effectively excluded the applicants. The Court held that the Commission decisions had no influence on the discretionary grants and that the applicants therefore were not directly concerned by the decisions. *Id.* at 482, paras. 12-14, Comm. Mkt. Rep. (CCH) ¶ 8099, at 8426.

41. *See* 5 H. SMIT & P. HERZOG, *supra* note 4, at 173.18.

42. *Metro SB-Grossmärkte GmbH & Co K.G. v. Commission (Metro I)*, Case 26/76, 1977 E.C.R. 1875, Comm. Mkt. Rep. (CCH) ¶ 8435.

43. *See infra* notes 44-58 and accompanying text.

cision on the applicant's market position. These elements will be considered in turn.

### A. *Role Played by Applicant*

In assessing the role played by COFAZ in the Article 93(2) procedure examining the Dutch tariff system, the Court relied on its judgment in *Timex v. Council & Commission*.<sup>44</sup> *Timex* arose out of a complaint by the leading Community manufacturer of mechanical watches and watch movements against a Council regulation imposing an antidumping duty<sup>45</sup> on imports of mechanical wristwatches from the Soviet Union. In determining that *Timex's* application was admissible, the Court found dispositive the fact that *Timex*, by reason of its initial complaint, instigated the investigation procedure, that its views were heard during the procedure, and that "the conduct of the investigation procedure was largely determined by *Timex's* observations. . . ."<sup>46</sup>

By bringing the complaint that led to the initiation of the Article 93(2) procedure and by frequently submitting its observations and opinions to the Commission during the course of the examination of the tariff, COFAZ played a very similar role to that assumed by the complainant in *Timex*.<sup>47</sup> Citing as persuasive the findings in *Timex* concerning the applicant's involvement in the antidumping procedure, the Court held that "[t]he same conclusions [as in *Timex*] apply to undertakings which have played a comparable role in the procedure referred

44. *Timex Corp. v. Council & Commission*, Case 264/82, 1985 E.C.R. — , Comm. Mkt. Rep. (CCH) ¶ 14,143.

45. Antidumping duties are levied on imports to the Community which are determined to have been sold at an export price that is lower than the normal value of the same or similar products on their domestic or similar markets and which cause or threaten to cause injury to Community industry. See C. STANBROOK, *DUMPING* 14-15, 49-51 (1980).

46. *Timex*, 1985 E.C.R. at — (para. 15 of the judgment), Comm. Mkt. Rep. (CCH) ¶ 14,143, at 15,782.

47. In addition to its role of instigating the Commission decision by submitting the original complaint, COFAZ's actions included the following: on Jan. 6, 1984, COFAZ made further representations to the Commission as well as affirming its original complaint; on Mar. 28, 1984, COFAZ made further representations and raised objections to the amended tariff system; on May 22, 1984, COFAZ notified the Commission of its objections to the decision to terminate the Article 93(2) procedure. See *COFAZ*, 1986 E.C.R. at — (paras. 5, 7, 11 of the judgment), Comm. Mkt. Rep. (CCH) ¶ 14,284, at 16,760-61.

to in Article 93. . . ."<sup>48</sup>

### B. *Procedural Guarantees*

The Article 93(2) procedure for evaluation of the compatibility of State aids requires that the Commission notify all "parties concerned."<sup>49</sup> Notification ensures that those concerned by an aid have an opportunity to make their views known to the Commission.<sup>50</sup> An alleged violation by the Commission of such procedural rights of individuals is one of the means by which persons may bring actions for annulment of Commission decisions.<sup>51</sup>

In holding that COFAZ possessed procedural rights under Article 93(2) which were capable of protection, the Court relied primarily on its judgment in *Metro I*.<sup>52</sup> Metro lodged a complaint with the Commission pursuant to Regulation 17.<sup>53</sup> Article 3 of Regulation 17 entitles a person who claims a legitimate interest in the finding of an infringement of Article 85 or 86 to make an application to the Commission alleging such an infringement.<sup>54</sup> Basing its reasoning on this procedural right, the Court held that applicants whose requests have been dismissed by the Commission have a right to seek judicial review

48. See *id.* at — (para. 25 of the judgment), Comm. Mkt. Rep. (CCH) ¶ 14,284, at 16,763.

49. See *supra* note 16 and accompanying text.

50. See *supra* note 18 and accompanying text.

51. See *supra* note 27 and accompanying text.

52. *Metro SB-Grossmärkte GmbH & Co. K.G. v. Commission (Metro I)*, Case 26/76, 1977 E.C.R. 1875, Comm. Mkt. Rep. (CCH) ¶ 8435. The complainant in *Metro I* was a self-service wholesaler who wished to carry the products of SABA, a manufacturer of electronic audio equipment. To maintain certain conditions of sale of its products, SABA relied on a uniform distribution system for its Community distributors. SABA refused to grant Metro a distributorship because Metro did not fulfill the conditions in SABA's distribution agreement. Metro complained that the system of distribution agreements infringed Articles 85 and 86 of the EEC Treaty.

53. Council Regulation No. 17, J.O. 13/204 (1962), O.J. 1959-62 (English Special Ed.) p. 87, Comm. Mkt. Rep. (CCH) ¶ 2401.

54. Article 3 of Regulation No. 17 reads, in pertinent part:

(1) Where the Commission, upon application or upon its own initiative, finds that there is infringement of Article 85 or 86 of the Treaty, it may by decision require the undertakings concerned or associations of undertakings concerned to bring such infringement to an end.

(2) Those entitled to make application are:

...

(b) natural or legal persons who claim a legitimate interest.

*Id.* at 205, O.J. 1959-62 at 88, Comm. Mkt. Rep. (CCH) ¶ 2401, at 1731.

in order to protect their interests.<sup>55</sup> *Metro I* was the first case to hold that admissibility may be predicated, in part, on a Community regulation that provides a procedural right to claim infringement of the Treaty.

The *COFAZ* Court also cited *FEDIOL v. Commission*<sup>56</sup> and *Demo-Studio Schmidt v. Commission*,<sup>57</sup> which followed *Metro I* by holding that secondary legislation<sup>58</sup> may afford individuals a basis for judicial review. In *Metro I*, *FEDIOL*, and *Schmidt*, applications for annulment were held admissible based on the existence of regulations granting procedural rights. However, because the Council has not yet promulgated any regulations under Article 94,<sup>59</sup> in *COFAZ* the Court looked to the right of

55. The Court stated:

It is in the interests of a satisfactory administration of justice and of the proper application of Articles 85 and 86 that natural or legal persons who are entitled, pursuant to Article 3(2)(b) of Regulation No. 17, to request the Commission to find an infringement of Articles 85 and 86 should be able, if their request is dismissed either wholly or in part, to institute proceedings in order to protect their legitimate interests.

*Metro I*, 1977 E.C.R. at 1901, para. 13, Comm. Mkt. Rep. (CCH) ¶ 8435, at 7848.

56. EEC Seed Crushers' & Oil Processors' Federation (*FEDIOL*) v. Commission, Case 191/82, 1983 E.C.R. 2913, Comm. Mkt. Rep. (CCH) ¶ 14,013. *FEDIOL* involved an application by a Community trade association for the annulment of the Commission's refusal to initiate an anti-subsidy proceeding in respect of imports of soya bean oil cake from Brazil. The Court relied on provisions of the antidumping regulation (at that time, Council Regulation No. 3017, O.J. L 339/1 (1979)) which allow any person acting on behalf of a Community industry that considers itself injured or threatened by injury by subsidized imports to lodge a complaint with the Commission. The Court held that because "the regulation acknowledges that undertakings . . . injured by subsidization practices . . . have a legitimate interest in the initiation of protective action by the Community . . . it must therefore be acknowledged that they have a right of action within the framework of the legal status which the regulation confers on them." *FEDIOL*, 1983 E.C.R. at 2936, para. 31, Comm. Mkt. Rep. (CCH) ¶ 14,013, at 14,173.

57. Case 210/81, 1983 E.C.R. 3045, Comm. Mkt. Rep. (CCH) ¶ 14,009. *Schmidt* follows very closely both the facts and holding of *Metro I* (1977 E.C.R. 1875, Comm. Mkt. Rep. (CCH) ¶ 8435). The *Schmidt* judgment reinforces the right of persons accorded procedural guarantees to seek review of decisions affecting their legitimate interests. *Schmidt*, 1983 E.C.R. at 3063, para. 14, Comm. Mkt. Rep. ¶ 14,009, at 14,118-19.

58. Primary legislation consists of the European Community Treaties and Annexes thereto; secondary legislation, for the purposes of Article 173, consists of regulations, directives, and decisions. See 5 H. SMIT & P. HERZOG, *supra* note 4, at 173.05.

59. See EEC Treaty, *supra* note 3, art. 94, at 36, 298 U.N.T.S. at 52, Comm. Mkt. Rep. (CCH) ¶ 2961. Article 94 provides that the Council may "make any appropriate regulations for the application of Articles 92 and 93 . . ." *Id.*, 298 U.N.T.S. at 52, Comm. Mkt. Rep. (CCH) ¶ 2961. For a discussion of the factors to be considered

“parties concerned” to submit their comments during an Article 93(2) procedure. The Court noted that “Article 93(2) recognizes in general terms that the undertakings concerned are entitled to submit their comments to the Commission but does not provide any further details.”<sup>60</sup> The Court reasoned that the provisions of Article 93(2) were sufficiently analogous to the regulations in *Metro I* and *FEDIOL* to conclude that they produce procedural rights within the meaning of Article 173(1).<sup>61</sup>

### C. Effect on Market Position

The COFAZ Court expanded the criteria for proof of individual concern with its requirement that the applicants' market position be significantly affected by the aid complained of.<sup>62</sup> In *Timex*, the Court noted that the complainant was the largest Community manufacturer of mechanical watches and that the antidumping duty complained of was fixed by taking account of the extent of injury caused to Timex by the dumped imports.<sup>63</sup> In comparison, in COFAZ there is no indication that the Commission, in its evaluation of the tariff, took account of COFAZ's specific situation. Nonetheless, the Court relied substantially on evidence supplied by COFAZ indicating that the preferential tariff had significant economic effects, including a tripling of the volume of imports to France by the Dutch manufacturers, whose market share increased sharply during the period preceding the filing of COFAZ's complaint.<sup>64</sup> This evi-

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where an individual challenges a regulation, rather than a decision (as in COFAZ) see Greaves, *Locus Standi under Article 173 EEC when Seeking Annulment of a Regulation*, 11 EUR. L. REV. 119 (1986).

60. COFAZ, 1986 E.C.R. at — (para. 25 of the judgment), Comm. Mkt. Rep. (CCH) ¶ 14,284, at 16,763.

61. See *supra* note 27 and accompanying text. The second paragraph of Article 173 provides that natural or legal persons may challenge Community acts on the same grounds as may privileged applicants under the first paragraph. See EEC Treaty, *supra* note 3, art. 173(2), at 57, 298 U.N.T.S. at 75-76, Comm. Mkt. Rep. (CCH) ¶ 4635.

62. The Court held that COFAZ could prove its complaint admissible if COFAZ could show, *inter alia*, that its “position on the market is significantly affected by the aid which is the subject of the contested decision.” COFAZ, 1986 E.C.R. at — (para. 25 of the judgment), Comm. Mkt. Rep. (CCH) ¶ 14,284, at 16,763.

63. See *Timex Corp. v. Council & Commission*, Case 264/82, 1985 E.C.R. — (para. 15 of the judgment), Comm. Mkt. Rep. (CCH) ¶ 14,143, at 15,782.

64. See COFAZ, 1986 E.C.R. at — (para. 27 of the judgment), Comm. Mkt. Rep. (CCH) ¶ 14,284, at 16,763; see also *supra* note 22.

dence proved sufficient for the Court to question whether, as *COFAZ* claimed, the Commission had committed errors in its assessment of the Dutch tariff system.<sup>65</sup>

### III. *THE EFFECTS OF COFAZ ON COMMUNITY LAW AND POLICY*

By expanding the scope of Article 173(2) standing to include State aids complainants, the Court has recognized that individuals should be able to protect their interests under Community law. The Court has done so, moreover, in a manner that does not threaten to undermine the functioning of the State aids provisions as set out in the Treaty. Finally, the *COFAZ* judgment represents an example of the Community's commitment to fair competition and the establishment of the Common Market.

#### *A. Judicial Review for Protection of Rights and Economic Interests*

The Court's decision in *COFAZ* recognizes the effects on individuals of Community acts concerning State aids and of individuals' stakes in the outcome of such acts. The three factors<sup>66</sup> determined to resolve the standing issue in *COFAZ* serve as guideposts to the policies the Court wishes to further with regard to individual citizens of the Community.

The first factor stated in *COFAZ* is the existence of the procedural framework of Article 93(2) granting individuals the right to be heard by Community institutions. By interpreting the procedural guarantee<sup>67</sup> afforded by Community legislation as satisfying the admissibility requirements of Article 173, the Court reinforced the ability of individuals to obtain judicial review. After *COFAZ*, persons seeking to protect their legitimate interests from incompatible State aids can rely on such legislation rather than on interpretations of the meaning of direct and individual concern such as those established in *Plaumann*

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65. See *COFAZ*, 1986 E.C.R. at — (para. 12 of the judgment), Comm. Mkt. Rep. (CCH) ¶ 14,284, at 16,761.

66. See *supra* notes 44-65 and accompanying text.

67. See Slynn, *EEC Competition Law from the Perspective of the Court of Justice*, in 1985 *FORDHAM CORP. L. INST.* 383, 386 (B. Hawk ed. 1986) (the Court is responsible for ensuring that the Commission fulfills its obligations both under Community legislation and with regard to procedural guarantees granted to individuals).

and *Toepfer*.<sup>68</sup> The Court in *COFAZ* acknowledged the economic concerns of individuals and the need for them to "institute proceedings in order to protect their legitimate interests."<sup>69</sup>

In *COFAZ*, the complainants had an express guarantee to be heard by the Commission under Article 93(2).<sup>70</sup> However, *COFAZ* did not claim that its procedural rights had been infringed. Rather, it appealed from the Court's discretionary judgment in finding the tariff compatible.<sup>71</sup> While it recognized that the existence of procedural rights could provide access to judicial review to *COFAZ*, the Court questioned not the Commission's adherence to the procedural guidelines, but its evaluation of the tariff.<sup>72</sup> Thus, *COFAZ* allowed individuals the right to judicial review of Community acts of discretion concerning State aids. The Court's apparent interest in the economic well-being of a Community industry<sup>73</sup> demonstrates its

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68. See *supra* notes 32-40 and accompanying text.

69. *COFAZ*, 1986 E.C.R. at — (para. 23 of the judgment), Comm. Mkt. Rep. (CCH) ¶ 14,284, at 16,763 (quoting *Metro SB-Grossmärkte GmbH & Co. K.G. v. Commission (Metro I)*, Case 26/76, 1977 E.C.R. 1875, at 1888, para. 13, Comm. Mkt. Rep. (CCH) ¶ 8435, at 1901). The Court further held that "[i]t is sufficient to note that the applicants have adduced pertinent reasons to show that the Commission's decision may adversely affect their legitimate interests by seriously jeopardizing their position on the market in question." *COFAZ*, 1986 E.C.R. at — (para. 28 of the judgment), Comm. Mkt. Rep. (CCH) ¶ 14,284, at 16,763. *But cf.* *Lord Bethell v. Commission*, 1982 E.C.R. 2277, Comm. Mkt. Rep. (CCH) ¶ 8858 (applicant, a user of airlines and a leading member of an organization of users of air passenger services, found not to have a direct interest in an investigation by the Commission of alleged price fixing of air fares among Community air carriers, and so not in the necessary legal position to bring an action for annulment of a Commission communication declining to open such an investigation).

70. *COFAZ* was, in fact, involved at every stage of the procedure and concurrently made its views known. See *supra* note 16 and accompanying text.

71. See *COFAZ*, 1986 E.C.R. at — (para. 12 of the judgment), Comm. Mkt. Rep. (CCH) ¶ 14,284, at 16,761.

72. See *id.* at — (paras. 24-29 of the judgment), Comm. Mkt. Rep. (CCH) ¶ 14,284, at 16,763. See also *EEC Seed Crushers' & Oil Processors' Federation (FEDIOL) v. Commission*, Case 191/82, 1983 E.C.R. 2913, Comm. Mkt. Rep. (CCH) ¶ 14,013. The Court enumerated the theories under which a complainant could seek annulment of an antidumping decision. The Court held that complainants had a right to judicial review of "whether the Commission has observed the procedural guarantees granted . . . whether or not it has committed manifest errors in its assessment of the facts, has omitted to take into consideration any essential matters . . . or has based the reasons for its decision on considerations amounting to a misuse of powers." *Id.* at 2935, para. 30, Comm. Mkt. Rep. (CCH) ¶ 14,013, at 14,173.

73. *But cf.* *Slynn*, *supra* note 67, at 393-94 (suggesting that, in the context of



commitment to upholding Community competition policy,<sup>74</sup> in which State aids play an important role.

The second factor determinative of standing—that the applicants be at the origin of the Commission's investigation of the aid, which culminates in the contested decision—has a two-fold effect. First, it prevents intervenors from gaining standing merely by joining an ongoing investigation procedure once they receive notice from the Commission that the procedure is in progress. Additionally, this test ensures that only worthy applications come before the Court. The merit of the complaint determines whether the Commission will open an Article 93(2) procedure.<sup>75</sup> Therefore, if the Commission deems the complaint to be groundless there will be no decision from which the applicant may appeal.

The other, and perhaps unintended, effect of the participation requirement is to encourage business enterprises to play a more activist role in protecting their competitive positions and economic stakes. This could result in increased vigilance as to the grant of unnotified or improperly modified aids and to an increased number of complaints filed by individuals. Such supplementary policing of State aids would assist the Commission, which is already overburdened in its enforcement effort.<sup>76</sup>

The final factor is the requirement that the aid which is the subject of the contested decision significantly affect the market position of the applicant.<sup>77</sup> This test serves as a safeguard against frivolous actions by requiring a showing of a substan-

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Articles 85 and 86, the Court is concerned primarily with Community aims rather than the protection of enterprises or consumers).

74. For a discussion of the EEC rules of competition applicable to Member States, see Pescatore, *Public and Private Aspects of Community Competition Law*, 10 *FORDHAM INT'L L.J.* 373, 375-80 (1987) (arguing that the competition rules applicable to public operators are based on the same principles as those applicable to private undertakings, and so there exists a system of Community competition regulation common to both).

75. See *supra* notes 16-19 and accompanying text.

76. The Commission has admitted the difficulty of policing State aids because of both the number and complexity of aids granted. See Comm'n, *Eleventh Report on Competition Policy* ¶ 176 (1981).

77. This express recognition of the potential for injury to the applicant is in contrast to the *Plaumann* judgment, where injury was not a consideration. See *supra* notes 32-36 and accompanying text.

tial economic stake.<sup>78</sup> It may also function as a means for the Court to evaluate independently the economic criteria the Commission has refuted. The attention paid by the Court to COFAZ's evidence of economic injury demonstrates a willingness to second-guess the Commission's exercise of discretion.<sup>79</sup> This occurs despite the Court's disclaimers to the contrary.<sup>80</sup>

### B. Expansion of the "Direct and Individual Concern" Test

The Court has shown itself willing to construe liberally the tests for direct and individual concern articulated in the *Toepfer* and *Plaumann* judgments.<sup>81</sup> A review of recent cases in which the Court granted standing reveals that it does not always distinguish between direct and individual concern elements, but simply considers the facts in the aggregate to meet the requirements for admissibility.<sup>82</sup> In *COFAZ*, the Court did not mention the *Toepfer* direct concern requirement that the decision

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78. The Court makes plain in both *COFAZ* and *Timex* that the complainants have adduced substantial evidence of adverse economic effects caused by implementation of the contested measures. See *supra* notes 62-65 and accompanying text.

79. The criteria established in *FEDIOL*, see *supra* note 72, appear to allow a broad base from which complainants might attack a Commission decision. See Temple Lang, *Judicial Review of Trade Safeguard Measures in the European Community*, in 1985 FORDHAM CORP. L. INST. 641, 670 (B. Hawk ed. 1986).

80. While the Court in *COFAZ* states that "[i]t is not for the Court of Justice, at this stage of the procedure, when it is considering whether the application is admissible, to make a definitive finding on the competitive relationship between the applicants and the Netherlands undertakings," the Court's decision to find the complaint admissible relies substantially on just such an evaluation of the economic criteria. *COFAZ*, 1986 E.C.R. at — (para. 28 of the judgment), Comm. Mkt. Rep. (CCH) ¶ 14,284, at 16,763. See also *FEDIOL v. Commission*, Case 191/82, 1983 E.C.R. 2913, Comm. Mkt. Rep. (CCH) ¶ 14,013. Regarding its decision to allow admissibility to challenge a Commission decision refusing to initiate an anti-subsidy procedure, the Court stated that it "is required to exercise its normal powers of review over a discretion granted to a public authority, even though it has no jurisdiction to intervene in the exercise of the discretion reserved to the Community authorities by the aforementioned regulation." *Id.* at 2935-36, para. 30, Comm. Mkt. Rep. (CCH) ¶ 14,013, at 14,173.

81. See *supra* notes 32-40 and accompanying text.

82. See, e.g., *Timex Corp. v. Council & Commission*, Case 264/82, 1985 E.C.R. —, Comm. Mkt. Rep. (CCH) ¶ 14,143; *Demo-Studio Schmidt v. Commission*, Case 210/81, 1983 E.C.R. 3045, Comm. Mkt. Rep. (CCH) ¶ 14,009. In *FEDIOL*, the Court does not in fact mention the tests, rather it invokes the "spirit of the principles which lie behind Articles 164 and 173" to find complainants deserving of judicial review. *FEDIOL*, 1983 E.C.R. at 2935, para. 29, Comm. Mkt. Rep. (CCH) ¶ 14,013, at 14,173.

come into effect immediately to deny the applicant an existing legal right.<sup>83</sup> Rather, the Court concluded that it was enough that there existed a connection between the subject matter of the contested decision and the complaint at the origin of that decision.<sup>84</sup>

In the *Plaumann* judgment, the complainant importers were denied admissibility because they were merely members of a class of importers of particular merchandise. In *COFAZ*, there was no attempt by the complainants to distinguish themselves from other Community producers of nitrate fertilizers.<sup>85</sup> Nor is there any indication that the Court considered whether the complainants suffered individuated harm or if it examined only general conditions in the French market.<sup>86</sup> Hence, the Court's assessment of standards of admissibility shows a marked liberalization since the *Plaumann* judgment.

The Court has also accorded greater significance to the activism displayed by individuals in attempting to protect their rights under Community law. The *Plaumann* test acknowledged that persons may be individually concerned where the contested decision affects them by reason of their attributes.<sup>87</sup> In *Metro I*, the Court noted that the applicant's complaint led to the adoption of the decision being challenged under Article 173(2).<sup>88</sup> The *Timex* judgment stressed that the applicant's

83. See *supra* notes 37-38 and accompanying text.

84. The Court stated "it is sufficient to observe that the decision has left intact all the effects of the tariff system set up, whilst the procedure sought by the applicants would lead to the adoption of a decision to abolish or amend that system." *COFAZ*, 1986 E.C.R. at — (para. 30 of the judgment), Comm. Mkt. Rep. (CCH) ¶ 14,284, at 16,764. See also *Metro SB-Grossmärkte GmbH & Co. K.G. v. Commission (Metro II)*, Case 75/84, 1986 E.C.R. —, Comm. Mkt. Rep. (CCH) ¶ 14,326, where the Court similarly found admissible a complaint that directly addressed the subject matter of a contested decision and where the decision maintained a distribution system, the specific features of which were criticized by complainant during an administrative procedure under Regulation 17. *Id.* at —, Comm. Mkt. Rep. (CCH) ¶ 14,326, at 17,033.

85. See *COFAZ*, 1986 E.C.R. at — (paras. 17-18 of the judgment), Comm. Mkt. Rep. (CCH) ¶ 14,284, at 16,762. Cf. *Società "Eridania" Zuccherifici Nazionali v. Commission*, 1969 E.C.R. 459, Comm. Mkt. Rep. (CCH) ¶ 8099 (stating that the mere fact that a Community measure may influence the competitive relationships existing on the market in question cannot suffice to allow any enterprise thereby affected to be regarded as directly and individually concerned).

86. See *COFAZ*, 1986 E.C.R. at — (paras. 26-27 of the judgment), Comm. Mkt. Rep. (CCH) ¶ 14,284, at 16,763.

87. See *supra* notes 32-36 and accompanying text.

88. See *Metro SB-Grossmärkte GmbH & Co. K.G. v. Commission (Metro I)*, Case 26/76, 1977 E.C.R. 1875, para. 13, Comm. Mkt. Rep. (CCH) ¶ 8435, at 7848.

views were heard during the procedure and their observations largely determined the conduct of the investigation.<sup>89</sup> It is clear that the Court will consider new criteria<sup>90</sup> in its admissibility judgments,<sup>91</sup> criteria that reflect both respect for individuals' rights and Community policy toward enforcement of the State aid rules.

### C. Community Policy and the Effect of COFAZ

The Commission's stated policy of vigorous enforcement of the State aids provisions of the Treaty is of vital importance to the future of the Community.<sup>92</sup> Incompatible State aids distort competition, raise trade barriers, and produce unemployment and overcapacity in the industries of the Member States.<sup>93</sup> Individual competitors and citizens therefore have a substantial interest in protecting themselves from the adverse effects caused by such aid.<sup>94</sup> Recent procedural changes have shown that the Commission is eager to assist individuals affected by State aids and to encourage their intervention in Article 93(2) procedures.<sup>95</sup> COFAZ may well have been a benefi-

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89. See *supra* note 46 and accompanying text.

90. Although the Court is now willing to consider a broad range of admissibility criteria, it is also apparent that the *Toepfer* and *Plaumann* tests are still viable. See *Piraiki-Patraiki Cotton Indus. A.E. v. Commission*, Case 11/82, 1985 E.C.R. —, Comm. Mkt. Rep. (CCH) ¶ 14,159. The Court found admissible a complaint by Greek cotton exporters against French quotas on imports of cotton. The Court utilized the *Toepfer* test to find that any discretion on the part of the French government in implementing the quotas was illusory and so the quotas could be considered to come into effect immediately upon Community permission. *Id.* at — (paras. 8-10 of the judgment), Comm. Mkt. Rep. (CCH) ¶ 14,159, at 15,934-35. By using the *Plaumann* test the Court determined that the exporters with executory contracts with French customers were individually distinguished as a limited class of traders identifiable to the Commission. *Id.* at — (paras. 30-32 of the judgment), Comm. Mkt. Rep. (CCH) ¶ 14,159, at 15,937.

91. One commentator has suggested that the focus of the Court on the existence of procedural rights in cases such as *FEDIOL* may signal that those rulings were "based more on the legislation than on Article 173." See Temple Lang, *supra* note 79, at 663. This could mean that the liberalized standing test would not be applicable in cases not involving competition-related Treaty provisions. See *id.*

92. See *Brussels Rift over Enforcing Competition*, Financial Times, Oct. 7, 1986, at 1, col. 3; Comm'n, Eleventh Report on Competition Policy ¶ 177 (1981).

93. See 3 H. SMIT & P. HERZOG, *supra* note 4, at 92.05.-07.

94. Community competitors pay the price of State aids in the form of lost market share, unfair competition, and unemployment caused by distortions in intra-Community competition and internal barriers to trade; taxpayers are saddled with the burden of financing the aid. See Caspari, *supra* note 6, at 3.

95. The Commission has instituted a policy of sending copies of all final deci-

ciary of this more open climate. It would be unfortunate if the effect of the *COFAZ* judgment were to make the Commission wary of conferring with or acting on complaints by individuals out of fear their decisions will later be challenged before the Court. The Commission's resolve in enforcing the Treaty and limiting the use of State aids,<sup>96</sup> however, should prevail over any such concerns.

The *COFAZ* judgment could possibly have the effect of overwhelming the Commission with complaints and the Court with challenges to Commission decisions. However, in both *COFAZ* and *Timex*,<sup>97</sup> the Court required very significant evidence of the potential for economic injury resulting from implementation of the contested decisions. This test alone will discourage ill-founded complaints.

The procedural rules of Article 93 also guard against possible untoward effects stemming from *COFAZ*.<sup>98</sup> As noted above, applicants may not claim standing simply by intervening in an Article 93(2) procedure already in progress.<sup>99</sup> Additionally, frivolous complaints will be limited because only non-notified, and therefore illegal, aid systems are subject to review initiated by an applicant such as *COFAZ*. This is because any Article 93(2) procedure opened to evaluate a notified aid system will perforce be initiated by the Commission itself. This

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sions to all interested third parties who intervene in an Article 93(2) procedure. To encourage intervention, the Commission will now provide more information on such procedures and more detail where a State modifies its original aid proposal than it did previously. See Comm'n, Fifteenth Report on Competition Policy ¶ 171 (1985).

96. *See id.*

97. *See supra* notes 62-65 and accompanying text.

98. One such effect might be to undermine the security of recipients of State aids by subjecting the aid to subsequent challenge. This possibility would be minimized, however, by the *COFAZ* requirement that the applicant be at the origin of the Article 93(2) procedure. This means that only unnotified grants or alterations of State aids would be within the ambit of *COFAZ*, since notified aid will be subject to investigation procedures begun by the Commission itself. In these cases, the aid in question would be either illegal, because unnotified, or incompatible, because of changes in the aid or in the environment of the Community. In either instance, the aid in question would be liable to application of the Treaty provisions under Articles 92 and 93. If the aid is ultimately found compatible by the Commission, recipients are not harmed; if the aid is found incompatible, the *COFAZ* judgment will have assisted in enforcing the State aids rules. This situation emphasizes how important it is that potential recipients of grants enquire as to whether the issuing Member State has cleared the proposed aid scheme with the Community. *See FitzGerald, supra* note 12, app. 2-2, at App. 2-2-5-6.

99. *See supra* notes 15-20 and accompanying text.

result nullifies the possibility that the applicant is at the origin of the decision.

### CONCLUSION

The *COFAZ* decision is a positive step toward liberalizing the standard for admissibility,<sup>100</sup> and therefore expanding the potential for judicial review of Community acts that have a definite impact on the lives and livelihoods of individuals within the Common Market.<sup>101</sup> *COFAZ* is also laudable because of the harmful nature of subsidization in the environment of the European Community.<sup>102</sup> Vigilance by competitors and the possibility of sanctions may prove a strong deterrent to States considering the grant of incompatible or unnotified aids. Incompatible aid granted even for short periods can have serious effects on competitive relationships in inter-Community markets.<sup>103</sup> By recognizing and strengthening individual rights concerning State aids, the Court further binds together the interests of all the citizens of the European Community.

*Peter J. Allen\**

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100. It has been suggested that the liberalization of the standard for admissibility may be limited to competition-related causes of action (antitrust, antidumping, and State aids). See *Competition Cases before the EC Court of Justice: Panel Discussion*, in 1986 FORDHAM CORP. L. INST. ch. 20 (B. Hawk ed. 1987) (comments of Messrs. Eric Stein and Pierre Pescatore).

101. See Caspari, *supra* note 6, at 3-4.

102. See FitzGerald, *supra* note 12, app. 2-2, at App. 2-2-1.

103. See Flynn, *State Aid and Self-help*, 8 EUR. L. REV. 297, 299, 308 (1983).

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