

JUDGMENT OF THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)

10 May 2000 *

In Case T-46/97,

SIC — Sociedade Independente de Comunicação SA, established in Estrada da Outorela, Portugal, represented by C. Botelho Moniz and P. Moura Pinheiro, of the Lisbon Bar, with an address for service in Luxembourg at the Chambers of A. May, 31 Grand-Rue,

applicant,

v

Commission of the European Communities represented by G. Rozet, Legal Adviser, and A.M. Alves Vieira, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of the same service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: Portuguese.

supported by

RTP — Radiotevisão Portuguesa SA, established in Lisbon, Portugal, represented by M. Tinoco de Faria and I. Jalles, of the Lisbon Bar, with an address for service in Luxembourg at the Chambers of Beghin and Feider, 56 to 58 Rue Charles Martel,

by the

Portuguese Republic, represented by L. Fernandes, Director of the Legal Service of the Directorate-General for European Community Affairs, M.L. Duarte, Legal Adviser, and T. Ribeiro, Director of the Advisory and International Affairs Department of the Institute of Social Communication, acting as Agents, with an address for service in Luxembourg at the Portuguese Embassy, 33 Allée Scheffer,

and by the

United Kingdom of Great Britain and Northern Ireland, represented by R. Magrill, acting as Agent, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

interveners,

APPLICATION for the annulment of (i) the Commission's decision of 7 November 1996 concerning a proceeding under Article 93 of the EC Treaty (now Article 88 EC) on the financing of public television channels, notified to the applicant on 6 January 1997, and (ii) the decision allegedly contained in a letter from the Commission of 20 December 1996 concerning the complaint by the applicant against RTP — Radiotevisão Portuguesa SA,

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

composed of: B. Vesterdorf, President, V. Tiili, A. Potocki, A.W.H. Meij and M. Vilaras, Judges,

Registrar: G. Herzig, Administrator,

having regard to the written procedure and further to the hearing on 30 November 1999,

gives the following

Judgment

Facts

- 1 RTP — Radiotelevisão Portuguesa SA, which was formerly a public corporation, has since 1992, the date on which the Portuguese State audiovisual monopoly ended, been a limited liability company with public capital. RTP is the holder of the concession for the Portuguese public television service, and operates Channels 1 and 2 and the Portuguese-language channel RTP Internacional. Whilst private Portuguese television channels are financed exclusively by advertising revenues, RTP receives in addition to such revenues public financing granted annually in connection with its public service obligations, amounting from 1992 to 1995 to between 15% and 18% of its total annual resources.

- 2 SIC — Sociedade Independente de Comunicação SA is a commercial television company incorporated under Portuguese law, which has been running one of the main private television channels in Portugal since October 1992.

Complaints and administrative procedure before the Commission

- 3 On 30 July 1993, SIC referred a complaint to the Commission ('the first complaint') concerning the methods by which RTP's channels were financed and seeking a declaration, first, that a series of measures taken by the Portuguese Republic in favour of RTP was incompatible with the common market within the meaning of Article 92 of the EC Treaty (now, after amendment, Article 87 EC), and secondly, that there had been an infringement of Article 93(3) of the EC Treaty (now Article 88(3) EC) for failure to give prior notification of the measures complained of. In that first complaint, SIC estimated the amount of the grants made by the State to RTP in 1992 and 1993 by way of compensation for its public service obligations at PTE 6 200 million and PTE 7 100 million respectively. Apart from those grants, SIC complained of exemptions from registration fees enjoyed by RTP and the system of investment aid laid down in the terms of its concession. SIC therefore requested the Commission to initiate the formal procedure under Article 93(2) of the Treaty and order the Portuguese Republic to suspend payment of those unnotified aid measures pending the adoption of a final decision.
- 4 Following the lodging of the first complaint, a meeting took place on 3 November 1993 between Commission officials and representatives of SIC, at which SIC was asked to supply further information about the market concerned.
- 5 By letter of 12 February 1994, SIC supplied the information requested. It also supplemented the complaint, alerting the Commission to, first, the Portuguese

Government's authorisation for the rescheduling of a debt owed to the Segurança Social (the social security authority) estimated at PTE 2 billion together with exemption from interest on late payment, and, secondly, the purchase by the State at an inflated price of the television broadcasting network owned by RTP and the grant of payment facilities to the latter by the public body charged with managing that network. Taking the view that these measures constituted State aid incompatible with the common market, SIC requested that the procedure under Article 93(2) of the Treaty be initiated in respect of those measures, too.

- 6 Shortly beforehand, in December 1993, the Commission had instructed a firm of outside consultants to carry out a study of the funding of public television companies in the Community as a whole, and told the applicant that that study would be a decisive factor in investigating its complaint.

- 7 On 15 March 1994, the applicant provided the Commission with new information on the viewing figures for the various television channels in Portugal, and then informed it, on 14 April 1994, of a new compensatory payment by the Portuguese Government to RTP, for the year 1994, of PTE 7 145 million.

- 8 By letter of 4 August 1995 SIC formally called upon the Commission, pursuant to Article 175 of the EC Treaty (now Article 232 EC), to adopt a position on the complaint, and in particular on its request that the procedure under Article 93(2) of the Treaty be initiated.

- 9 On 16 October 1995, the Commission informed SIC that, having received the preliminary version of the study ordered in December 1993, it had asked the Portuguese authorities for further information to enable it to examine the case in the light of Article 92 of the Treaty.

- 10 On 1 November 1995, the Commission received the final version of the study in question and sent a copy to the Portuguese authorities for their observations.
- 11 By letter of 14 December 1995, the Portuguese authorities supplied the further information requested by the Commission concerning the aid measures referred to in the complaints.
- 12 By application lodged at the Registry of the Court of First Instance on 19 December 1995, SIC brought an action for failure to act under Article 175 of the EC Treaty, registered under case number T-231/95.
- 13 By letter of 31 January 1996, the Commission informed the Portuguese authorities that, in view of the replies given by them, 'certain points remain[ed] to be clarified'. It asked them, first, to supply it with accounting data on the grants paid in respect of RTP's public service obligations in 1992 and 1993 and in relation to the operating costs of RTP Internacional between 1992 and 1995. The Commission then pointed out that, 'after an initial examination, the tax exemptions and the delays permitted in relation to payments concerning the TDP network appear[ed] to constitute State aid within the scope of Article 92(1) of the Treaty'. It therefore requested the Portuguese authorities to indicate to it whether, in their opinion, that aid was based on one of the derogations referred to in Article 92 of the Treaty.
- 14 By letter of 20 March 1996, the Portuguese authorities replied to the Commission's request.

- 15 On 16 April 1996, the Commission sent a new request for information to those authorities, concerning the tax exemptions and payment facilities allowed to RTP, to which the authorities replied by letter of 21 June 1996.
- 16 On 22 October 1996, SIC lodged a fresh complaint ('the second complaint') seeking, first, a declaration that the grants by the Portuguese State to RTP for the period 1994 to 1996 were incompatible with the common market on the same grounds as those set out in the first complaint. In the second complaint, SIC also complained of the granting of new aid to RTP in 1994, not notified by the Portuguese State, resulting from an increase in capital and from the guarantee given by the State in connection with a bond issue by RTP. SIC therefore requested the Commission to initiate the formal procedure under Article 93(2), and to order the Portuguese Republic to desist from granting that aid pending the adoption of a final decision.
- 17 By letter of 20 December 1996, the Commission informed SIC that, following the second complaint against RTP, it had asked the Portuguese authorities for information concerning the increase in capital and the bond issue by RTP in 1994, and also concerning the establishment of a restructuring plan for the period 1996-2000 and the conclusion of an agreement with the Ministry of Culture to support cinematographic activity. In the second paragraph of its letter, the Commission added: 'As regards the financing in relation to the compensation received by... RTP during the period 1994-1996, we consider that this does not constitute State aid falling under Article 92(1) of the Treaty for the reasons set out in the decision [of 7 November 1996], of which we will send you a copy as soon as the Portuguese authorities have indicated to us which are the confidential aspects that may not be disclosed to third parties.'
- 18 On 6 January 1997, the applicant received a copy of the Commission's decision of 7 November 1996 addressed to the Portuguese Republic concerning the financing of public television channels ('the Decision').

The Decision

- 19 The Decision concerns six categories of measures taken by the Portuguese State in favour of RTP.
- 20 The first category of measures examined concerns the grants paid to RTP by way of compensation from 1992 to 1995. According to the Decision, the grants, of between PTE 6 200 million (approximately ECU 32.5 million) in 1992 and PTE 7 125 million (approximately ECU 36.2 million) in 1995, represent between 15% and 18% of RTP's annual receipts and are intended to finance the burden of public service obligations that private television channels do not undertake. The nature of those obligations and the amounts of compensation received by RTP, in millions of PTE, are as follows:

	1992	1993	1994	1995
1. Obligation to broadcast programmes covering the whole of the continental territory (private channels do not cover the whole of the territory (clause 4.2 of the concession terms)	406.7	1312	500	1032.81
2. Broadcasting of programmes in the Autonomous Regions (clause 4.3 of the concession terms)	3454	3486	1804	1992.166
3. Maintaining audiovisual archives (clause 7 of the concession terms)	509	241.5	517	283.66
4. Operation of RTP Internacional (clause 6 of the concession terms)	882.3	1517	2623	2729.116
5. Functioning of the structure linked to cooperation with Portuguese-speaking African countries (clause 8 of the concession terms)	186.9	128.3	172	195.273
6. Religious broadcasts (transfer of airtime rights) (clause 5.1 (f) of the concession terms)	482	350	579	327.9
7. Delegations and correspondents (clause 5.1 (n) of the concession terms)	797.8	658.6	800	504.27
8. São Carlos Foundation (public theatre) (clause 12.1.8 of the concession terms)	...	50	55	60

- 21 Concerning the year 1993, the Commission makes a comparative analysis of the figures supplied by the applicant and those supplied by RTP for assessing the cost of those operations. It states that 'the method of calculation used by the author of the complaint lacks precision [whereas] the analysis and the amounts [submitted] by the Portuguese authorities are much more reliable, especially where [the latter] are compared with the compensation received in 1994 and 1995, a period in which analytical accounting was obligatory'. In respect of the years 1994 and 1995, the Commission emphasises that application of those accounting rules to the calculation of the costs inherent in public service obligations and the supervision exercised by the Inspeção-Geral de Finanças (Inspectorate-General of Finances) ensure that no excess compensation was paid.
- 22 The Commission concludes that 'the financial advantage resulting [from those] transfers did not exceed what was strictly necessary in order to meet the public service obligations required by the terms of the concession'.
- 23 In relation to the year 1992, the Decision states that 'having regard to the amount of the financing in question..., which was far lower than in the two following years, and to its distribution, the possible existence of over-compensation may be excluded' even though RTP did not provide accounting data.
- 24 Concerning the compensation payments, the Commission concludes that it 'has no doubt as to the transparency of the system for financing expenses inherent in public service obligations, which correctly ensured in 1994 and 1995 the conformity of the public financing with the actual cost of the public service obligations, and as to the absence of aid elements in the measures in question', that conclusion being valid for the years 1992 and 1993 for the same reasons.
- 25 Concerning, secondly, the tax exemptions complained of, the Commission considers that RTP has in fact been exonerated only from the duties and expenses relating to the registration of the document creating the company in 1992,

amounting to about PTE 33 million. According to the Decision, that exemption does not constitute State aid because it is in conformity with the general scheme of the tax system, whereby registration of a document is not necessary where its authentication occurs by operation of law. At the time of the increase of capital in 1995, by contrast, RTP paid all the taxes and registration fees payable by private legal persons on such an occasion.

26 Thirdly, concerning RTP's debt to the Segurança Social, totalling PTE 2 189 million for the period 1983 to 1989, the Commission states that a settlement was initially reached between RTP and the Segurança Social on account of differences of interpretation as to the legality of the bases of assessment and in order to avoid legal proceedings, before, finally, a joint decree of the Ministry of Finance and the Ministry of Social Security of 3 May 1993 authorised rescheduling of the debt and the waiver of the corresponding fines and interest. The Commission concludes that the settlement, waiving interest for late payment assessed at PTE 1 206 million and accepting rescheduled payment of the debt of a far lower amount than the PTE 2 billion suggested by the applicant, reveals conduct on the part of the social security authority close to that of a private operator seeking to recover amounts due.

27 Fourthly, concerning the Portuguese State's acquisition in 1994 of the television broadcasting network owned by RTP for PTE 5 400 million, the Commission considers that that price, in so far as it was calculated on the basis of expert reports made by an independent private body amongst others, does not conceal any State aid. Moreover, the annual fee of PTE 2 000 million paid by RTP for the use of the network gave its present owner a very high return on the capital invested.

28 Fifthly, the Decision states that the delays in payment of that fee tolerated by Portugal Telecom, the new owner of the television broadcasting network, in relation to RTP only and not SIC, are not indicative of the existence of aid. Since

Portugal Telecom did not waive the interest due for late payment, assessed at approximately PTE 398 million in March 1996, RTP was not exonerated from the financial consequences of its conduct.

- 29 Sixthly, concerning the investment aid referred to in Article 14 of the terms of RTP's concession, whereby the State may participate in the investments made by RTP, the Commission finds that, according to the information supplied by the Portuguese authorities, no payment has hitherto been made in that respect.

Events subsequent to the Decision

- 30 Following the adoption of the Decision, the applicant abandoned the action for failure to act which it had brought in Case T-231/95, which was therefore removed from the register by order of the Court of First Instance of 4 July 1997.
- 31 By letter of 21 April 1997, the Commission informed the applicant that, having taken cognisance of the information supplied by the Portuguese authorities, it considered that the measures complained of in the second complaint concerning the increase in RTP's capital and the bond issue of 1994, as well as the agreement to support cinematographic activity and the 1996 to 2000 restructuring plan, did not represent State aid. The Commission stated that in the absence of any new information, therefore, it did not intend to pursue its investigation of that complaint.

Procedure

- 32 This action was lodged at the Registry of the Court of First Instance on 3 March 1997.
- 33 By applications lodged at the Registry of the Court of First Instance on 28 July, 5 August and 18 August 1997 respectively, RTP, the Portuguese Republic and the United Kingdom applied for leave to intervene in support of the Commission, which was granted by orders of the President of the Second Chamber, Extended Composition, of 13 November 1997. Only the United Kingdom did not lodge a statement in intervention and was not represented at the hearing.
- 34 By decision of the Court of First Instance of 21 September 1998, the Judge-Rapporteur was assigned to the First Chamber, Extended Composition, of the Court of First Instance, and the case was therefore assigned to that Chamber.
- 35 On hearing the report of the Judge-Rapporteur, the Court of First Instance (First Chamber, Extended Composition) decided to open the oral procedure. By way of measures of organisation of procedure, the main parties and the interveners were asked to reply to questions at the hearing. The Commission and the applicant were also asked to produce certain documents before 13 November 1999 and did so. However, on 29 November 1999, the applicant also lodged at the Registry of the Court of First Instance a copy of a judgment of the Supremo Tribunal Administrativo (Supreme Administrative Court) delivered on 16 June 1999. Since that document was produced out of time, it will not be taken into account for the purposes of the present judgment, in accordance with the observations of the Commission and RTP.

Forms of order sought

36 The applicant claims that the Court should:

- annul the Decision;

- annul the decision contained in the Commission's letter of 20 December 1996;

- order the Commission to place the administrative documents constituting the basis of the contested decisions on the Court file;

- order the Commission to pay the costs.

37 In its observations on the statements in intervention, the applicant further claims that the Court should:

- dismiss the interveners' pleas based on Article 90(2) of the Treaty (now Article 86(2) EC) as inadmissible;

— order the interveners to pay the costs arising from the interventions.

38 The Commission contends that the Court should:

— dismiss the action as unfounded;

— order the applicant to pay the costs.

39 RTP contends that the Court should:

— dismiss the action as unfounded;

— order the applicant to pay the costs.

40 The Portuguese Republic contends that the Court should:

— dismiss the action as unfounded;

— order the applicant to pay the costs.

The claim for annulment of the letter of 20 December 1996

Admissibility

Arguments of the parties

- 41 The Commission, supported by the Portuguese Republic and RTP, considers that only the Decision constitutes a challengeable measure. The letter of 20 December 1996, by contrast, was merely a note for information not capable of forming the subject-matter of an action.
- 42 In its reply, the applicant acknowledges that the first paragraph of the letter of 20 December 1996, concerning *inter alia* the increase in capital and RTP's bond issue, does not state the definitive position of the Commission, which was notified to it in the Commission's letter of 21 April 1997, after this action was brought.
- 43 On the other hand, SIC maintains that the second paragraph of the letter does contain a measure capable of forming the subject-matter of an action, since it expresses a definitive position of the Commission as regards the legal classification of the compensatory payments made between 1994 and 1996. It was in effect a decision rejecting SIC's second complaint, with reasoning in the form of a simple reference to the grounds stated in the Decision.

Findings of the Court

- 44 It is settled case-law that only a measure which produces binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action for annulment under Article 173 of the Treaty (now, after amendment, Article 230 EC) (order in Case T-182/98 *UPS Europe v Commission* [1999] ECR II-2857, paragraph 39, and the case-law cited therein).
- 45 It should also be remembered that decisions adopted by the Commission in the area of State aid are always addressed to the Member States. That is also the case where such decisions concern State measures to which objection is taken in complaints on the ground that they constitute State aid contrary to the Treaty and the Commission refuses to initiate the procedure under Article 93(2) because it considers either that the measures complained of do not constitute State aid within the meaning of Article 92 of the Treaty or that they are compatible with the common market. Where the Commission adopts such a decision and proceeds, in accordance with its duty of sound administration, to inform the complainants of its decision, it is the decision addressed to the Member State which must form the subject-matter of any action for annulment which the complainant may bring, and not the letter to the complainant (Case C-367/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719, paragraph 45; *UPS Europe*, cited above, paragraph 37).
- 46 In this case, as the applicant acknowledges, the first paragraph of the letter of 20 December 1996, concerning certain measures complained of in the second complaint (see paragraph 17 above), does not contain any statement by the Commission of its position. It merely informs SIC that requests for information

were sent to the Portuguese authorities. Moreover, it was not until its letter of 21 April 1997 that the Commission notified SIC of its decision to discontinue examination of those measures. Therefore, the letter of 20 December 1996 is, from that point of view, devoid of legal effect.

- 47 As for the second paragraph of the letter of 20 December 1996, concerning grants paid to RTP by way of compensation during the period 1994 to 1996, that merely informs the applicant of the position adopted by the Commission, in the Decision, as regards the classification of such measures with regard to Article 92 of the Treaty.
- 48 It is true that, in the Decision, the Commission adopted a position only in relation to the grants paid to RTP from 1992 to 1995, without any examination of the grant for 1996. In this case, however, that fact cannot justify interpreting the letter of 20 December 1996 as containing a decision concerning that grant. When asked about that point at the hearing, the Commission stated that it had not examined the grant received by RTP in 1996, and that that aspect of the second complaint had yet to be dealt with by the Commission's staff.
- 49 Since, therefore, the letter of 20 December 1996 was purely by way of information, it does not have the characteristics of a measure producing binding legal effects in relation to the applicant. Accordingly, the action must be dismissed as inadmissible in so far as it is directed against the letter of 20 December 1996.

The claim for annulment of the Decision

The subject-matter of the pleas

- 50 It should be noted as a preliminary observation, that, in reply to a question of the Court at the hearing, the applicant stated that the action does not seek the annulment of the Decision in so far as it concerns either the purchase price paid by the Portuguese State for the television broadcasting network owned by RTP or the system of investment aid referred to in Article 14 of the terms of RTP's concession. The Registrar took formal note of that statement by the applicant.
- 51 The pleas relating to the claim for annulment of the Decision must therefore be understood as seeking only the partial annulment of the Decision, in so far as it concerns the measures taken in favour of RTP consisting in the payment of grants by way of compensation from 1992 to 1995, tax exemptions, facilities for payment of the fee for use of the television broadcasting network and rescheduling of the debt due to the Segurança Social, together with the waiver of interest for late payment.

Substance

- 52 In support of its claim for annulment, the applicant relies on three pleas: infringement of procedural rules, breach of the duty to state reasons and infringement of Article 92 of the Treaty.

The first plea: infringement of procedural rules

- 53 In the applicant's pleadings, this plea was initially expressed in two parts, the first referring to infringement of the principle that complainants should first be given a hearing in the preliminary examination phase and the second to infringement of Article 93(2) of the Treaty. However, at the hearing, in reply to a question from the Court concerning the relevance of the first part of the plea after the judgment in *Sytraval and Brink's France* (cited above), the applicant withdrew that plea, and the Registrar has taken formal note of that withdrawal. This plea must therefore be understood as being based on infringement of Article 93(2) of the Treaty.

— Arguments of the parties

- 54 The applicant maintains that the Commission was required to initiate the formal procedure under Article 93(2) of the Treaty in view of the doubts which existed, or which the Commission should have had, concerning the nature of the measures complained of in the light of Article 92(1) of the Treaty.
- 55 First, SIC maintains, it has been shown that the Commission had serious doubts concerning the tax exemptions and the payment facilities granted to RTP, since, after two and a half years of investigation and having obtained replies from the Portuguese authorities, the Commission still considered, in a letter of 31 January 1996 addressed to those authorities, that those measures 'appear[ed] to constitute State aid' and therefore asked the authorities to demonstrate their compatibility with the common market under Article 92(3) of the Treaty.
- 56 Secondly, concerning the compensation payments complained of, the Commission should have had all the more doubt as to their classification with regard to Article 92(1) of the Treaty because, in a decision of 1994, the Commission itself

took the view that similar compensation granted by the Portuguese Government to the national airline constituted State aid (Commission Decision 94/666/EC of 6 July 1994 concerning compensation in respect of the deficit incurred by TAP on the routes to the Autonomous Regions of the Azores and Madeira (OJ 1994 L 260, p. 27)). Moreover, the effect of the judgment in Case T-106/95 *FFSA and Others v Commission* [1997] ECR II-229 is that even where an advantage is granted in order to set off burdens arising from tasks undertaken in the public interest, that does not affect the classification of the measure in question as State aid, without prejudice to Article 90(2) of the Treaty, application of which the Commission did not, however, envisage in its Decision.

57 Thirdly, concerning the rescheduling of RTP's debt to the Segurança Social and the waiver of accrued interest for late payment, the applicant argues that if the Commission had given it an opportunity to comment on the explanations provided by the Portuguese Government, the Commission would have been able to establish that this was in reality an exceptional postponement of debt, granted by decree, from which only RTP benefited. The argument that the debt postponement arose from the relations between two undertakings is, the applicant maintains, incorrect, since the problem underlying the dispute concerned the interpretation of Portuguese legislation on the basis of assessment to tax, and affected all taxpayers.

58 Finally, the fact that more than three years elapsed before the Commission was able to form a first opinion demonstrates in any event the need to initiate the procedure provided for in Article 93(2) of the Treaty. The inability of the Commission to form a view on the basis of a simple preliminary examination should have led it to initiate a full investigation, as required by the case-law (see, in particular, Case 84/82 *Germany v Commission* [1984] ECR 1451, paragraph 13). Whilst it may be acknowledged that the two-month period required by the case-law for the preliminary examination of duly notified aid (see, in particular, Case 120/73 *Lorenz v Germany* [1973] ECR 1471) is not necessarily applicable to unnotified measures that are already being applied, the fact remains that in the latter case the Commission is still required to initiate the procedure 'without

unjustified delay' (Opinion of Advocate General Sir Gordon Slynn in Case 223/85 *RSV v Commission* [1987] ECR 4617, at p. 4646). The absence of notification of such measures also implies, in the applicant's submission, that the Commission should act rapidly so as not to favour defaulting States.

- 59 The applicant emphasises that initiation of the procedure would have had important consequences in this case. First, it would have enabled the Commission to use all the necessary means of inquiry in order to reach a decision in full knowledge of the facts. Secondly, SIC, as complainant, would have been given the possibility of submitting its observations in order to guarantee that its interests would be taken into account. Finally, in so far as the Commission has sole power to determine whether aid is compatible with the common market, it was under an obligation to take a position on all the matters contained in the complaint.
- 60 In reply to the Commission's argument that the applicant could refer the matter to the national courts, the applicant argues that the initiation of any such proceedings is unrelated to the requirement that the Commission comply with the procedural rules laid down by Article 93 of the Treaty. It points out, however, that it referred the matter to the Supremo Tribunal Administrativo several times. Although, initially, that court annulled the ministerial decision fixing the amount of compensation allocated to RTP in 1993 for lack of reasoning in relation to the factors taken into account by the State in calculating it (judgment of 13 February 1996), the full court of the Supremo Tribunal Administrativo subsequently took the view, in a judgment of 23 June 1998, that such a measure was not capable of being challenged in a legal action. The court could not therefore have ruled on the legal classification of the measures complained of in relation to Articles 92 and 93 of the Treaty. The applicant states that other cases, concerning subsequent compensation payments and waivers of debt by the Seguranga Social, are also pending before the Portuguese courts.
- 61 The Commission contends that it is not required to initiate the procedure under Article 93(2) of the Treaty where it encounters difficulties in defining the legal

nature of the measures in question. Under Article 93(3) of the Treaty the initiation of the procedure obliges the Member State to suspend the grant of the aid, that obligation having direct effect, moreover, for both notified and unnotified aid (*Lorenz*). The suspension of the alleged aid measures could have serious economic consequences if the measures were subsequently found to be compatible with the common market, or even not to constitute State aid at all.

- 62 If the applicant wished the Portuguese authorities to abandon the aid complained of, its proper course was to refer the matter to the Portuguese courts while waiting for the Commission to complete the investigation procedures. Even where the matter is being dealt with in parallel by the Commission, the national courts have jurisdiction to examine the validity of measures taken by the Member States involving the implementation of aid the legality of which is challenged, in order to safeguard the rights of individuals (Case C-354/90 *FNCE v France* [1991] ECR I-5505; Case C-39/94 *SFEI and Others* [1996] ECR I-3547). In this case, moreover, the applicant mentioned in its complaint that it had brought proceedings before the national courts to challenge the alleged aid to RTP and that it had referred the matter to the public authorities and to the competition council.
- 63 In any event, the Commission considers that it was not necessary to initiate the procedure in this case.
- 64 Concerning, first, the letter addressed to the Portuguese authorities on 31 January 1996, the Commission maintains that this shows that there was no doubt as to whether the tax exemptions and the periods allowed for payment of the fee linked to the use of the TDP network were in the nature of aid provided by the State. Further clarification was sought solely in order to enable the Commission to form an opinion as to whether there was in fact State aid. The Commission considers that in the absence of all the factors necessary for a proper assessment of the situation in order to reach a decision, it could not initiate the procedure without due consideration.

- 65 Concerning the classification of the debt rescheduling allowed by the Seguranga Social, the Commission emphasises that a settlement subsequently confirmed by decree had been concluded with RTP in order to avoid legal proceedings on the interpretation of the national rules on the taxation of certain salary additions, the constitutionality of which was debatable.
- 66 The Commission goes on to maintain that SIC's argument to the effect that initiating the procedure would have enabled the Commission to define its position without undue haste and the better to have taken the complainant's interests into account is incorrect. The Commission does not have sole power to determine whether there is aid, so that the applicant was not deprived of legal protection by the mere fact that the procedure was not initiated, having the possibility of referring the matter to the national courts. The Decision was, moreover, capable of forming the subject-matter of an action.
- 67 Finally, the Commission submits that the fact that the preliminary analysis takes a long time does not in itself imply that the procedure under Article 93(2) of the Treaty should be initiated. In this case, the Commission did not remain inactive, and it would have been premature to initiate the procedure without having at its disposal all the information concerning the general problems of the audiovisual sector in Europe and the clarifications provided by the national authorities.
- 68 The Portuguese Republic considers that the Commission is required to open the procedure under Article 93(2) of the Treaty only where it has doubts as to the compatibility of an aid measure, and not where all that is at issue is the classification of measures under Article 92 of the Treaty. The fact that classification might, as in this case, require a long, complex and continuous assessment of the facts by the Commission does not signify that that operation will necessarily lead to the conclusion that there is State aid. The proper course is for the Commission to decide whether it has sufficient information to refuse to classify a measure as State aid and, for that purpose, to use the time and the means that it considers necessary.

- 69 RTP supports the argument of the Commission, and maintains in particular that the television industry is excluded from the scope of the competition rules, so that the disputed compensation payments are not subject to either the provisions of Article 92 of the Treaty or the control of the Commission.

— Findings of the Court

- 70 In the context of Article 93 of the Treaty, a distinction must be drawn between, on the one hand, the preliminary stage of the procedure for reviewing aid under Article 93(3), which is intended merely to allow the Commission to form a *prima facie* opinion on the character of the measure in question as State aid and the partial or complete conformity of the aid in question with the common market, and, on the other hand, the formal stage of the examination under Article 93(2). It is only in connection with the latter examination, which is designed to enable the Commission to be fully informed of all the facts of the case, that the Treaty imposes an obligation on the Commission to give the parties concerned notice to submit their comments (see, *inter alia*, Case C-198/91 *Cook v Commission* [1993] ECR I-2487, paragraph 22; Case C-225/91 *Matra v Commission* [1993] ECR I-3203, paragraph 16).
- 71 It is settled case-law that the procedure under Article 93(2) is essential whenever the Commission has serious difficulty in determining whether aid is compatible with the common market. It follows that when the Commission gives a favourable decision on aid it may restrict itself to the preliminary examination under Article 93(3) only if it is able to satisfy itself after an initial examination that the aid is compatible with the common market. If, on the other hand, the initial examination leads the Commission to the opposite conclusion or if it does not enable it to resolve all the difficulties involved in determining whether the aid is compatible with the common market, it is under a duty to carry out all the requisite consultations and for that purpose to initiate the procedure under Article 93(2) (*Sytraval and Brink's France*, paragraph 39, and the case-law cited therein).

- 72 It also follows from that case-law that the Commission is required to initiate the procedure provided for in Article 93(2) of the Treaty if an initial examination does not enable it to resolve all the difficulties raised by the question whether a State measure submitted to it for review constitutes aid for the purposes of Article 92(1) of the Treaty, unless, in the course of that initial examination, the Commission is able to satisfy itself that the measure at issue is in any event compatible with the common market, even if it is aid (Case T-11/95 *BP Chemicals v Commission* [1998] ECR II-3235, paragraph 166).
- 73 In this case, it is undisputed that the Commission adopted the Decision without initiating the procedure laid down by Article 93(2) of the Treaty and took the view that the six categories of measure submitted for its assessment did not constitute aid within the meaning of Article 92(1) of the Treaty. It should also be noted that the Commission did not consider whether those measures, if they were to be classified as aid, would be compatible with the common market either under Article 92(2) or (3) of the Treaty, or under Article 90(2) of the Treaty.
- 74 It is therefore necessary to see whether, in so far as they concern the four categories of measure concerned in this action, the assessments on which the Commission relied in order to adopt a decision favourable to those measures at the conclusion of the preliminary examination stage were sufficiently complex to justify initiating the procedure under Article 93(2) of the Treaty.
- 75 As regards, first, the grants paid by the Portuguese State to RTP by way of compensation, the Commission found in the Decision that they did not constitute aid within the meaning of Article 92(1) of the Treaty because they were intended to offset the actual cost of meeting the public service obligations assumed by RTP. It should be remembered in particular that, with regard to the compensation paid from 1993 to 1995, the Commission took the view that 'the financial advantage resulting [from those] transfers did not exceed what was strictly necessary in

order to meet the public service obligations required by the terms of the concession' (see paragraph 22 above). In respect of 1992, the Commission also relied on the absence of 'over-compensation', such absence being deduced from the small amount of the compensation paid to RTP that year, in concluding that the compensation did not constitute aid (see paragraph 23 above).

- 76 Article 92(1) of the Treaty provides that '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.'
- 77 The Court has consistently held that the aim of that provision is to prevent trade between Member States being affected by advantages granted by public authorities which, in various forms, distort or threaten to distort competition by favouring certain undertakings or certain products (Case C-387/92 *Banco Exterior de España v Ayuntamiento de Valencia* [1994] ECR I-877, paragraph 12, and *SFEI and Others*, paragraph 58).
- 78 In order to determine whether a State measure constitutes aid, therefore, it is necessary to establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions (*SFEI and Others*, paragraph 60; Case C-342/96 *Spain v Commission* [1999] ECR I-2459, paragraph 41; Case C-256/97 *DM Transport* [1999] ECR I-3913, paragraph 22).
- 79 In this case, as the Commission itself stated in the Decision, the grants paid each year to RTP by way of compensation have the result of giving that undertaking a 'financial advantage'.

- 80 The Decision also indicates that the grants paid to RTP between 1992 and 1995 represented between 15% and 18% of its annual resources (see paragraph 20 above), while at the same time RTP also enjoyed advertising revenue like other television channels with which it is in direct competition in the advertising market.
- 81 Therefore, in so far as the Commission found in the Decision that RTP enjoyed a 'financial advantage' as a result of the grants in question, which appear to be capable of distorting existing competition with other television operators, the validity of its assessment that those measures did not constitute State aid was, at the least, capable of raising serious difficulties.
- 82 The fact that, according to the Decision, the grants were merely intended to offset the additional cost of the public service tasks assumed by RTP cannot prevent them from being classified as aid within the meaning of Article 92 of the Treaty.
- 83 Article 92(1) of the Treaty does not distinguish between measures of State intervention by reference to their causes or aims but defines them in relation to their effects (Case C-56/93 *Belgium v Commission* [1996] ECR I-723, paragraph 79; Case C-241/94 *France v Commission* [1996] ECR I-4551, paragraph 20). It follows that the concept of aid is an objective one, the test being whether a State measure confers an advantage on one or more particular undertakings (Case T-67/94 *Ladbroke Racing v Commission* [1998] ECR II-1, paragraph 52).
- 84 As the case-law shows, the fact that a financial advantage is granted to an undertaking by the public authorities in order to offset the cost of public service obligations which that undertaking is claimed to have assumed has no bearing on the classification of that measure as aid within the meaning of Article 92(1) of the Treaty, although that aspect may be taken into account when considering whether

the aid in question is compatible with the common market under Article 90(2) of the Treaty (*FFSA and Others*, paragraphs 178 and 199, confirmed by the order in Case C-174/97 P *FFSA and Others v Commission* [1998] ECR I-1303, paragraph 33). It should be noted that, in this case, unlike the *FFSA* case, the Commission did not apply the derogation allowed for by Article 90(2) of the Treaty in its Decision, nor, *a fortiori*, did it apply the specific conditions laid down by that provision, which, moreover, it does not claim to have done.

85 It follows that the assessment on which the Commission relied in concluding that the grants to RTP by way of compensation did not constitute aid presented serious difficulties which, to the extent that the compatibility of those grants with the common market was not established, required the initiation of the procedure under Article 93(2) of the Treaty.

86 Concerning, secondly, the tax exemptions and payment facilities granted to RTP, the Commission held in the Decision that those two categories of measure did not constitute aid within the meaning of Article 92(1) of the Treaty either (see paragraphs 25 and 28 above).

87 That is despite the fact that the Commission informed the Portuguese authorities by letter of 31 January 1996 that 'after an initial examination, [those measures] appear[ed] to constitute State aid within the scope of Article 92(1) of the Treaty' and therefore asked them whether they considered them to be compatible with the common market (see paragraph 13 above).

88 It is therefore necessary to consider whether, as the applicant argues, the assessments thus made by the Commission of the measures in question and the information requested from the Portuguese public authorities during the preliminary examination stage indicate the existence of serious difficulties necessitating initiation of the procedure under Article 93(2) of the Treaty.

89 The case-law shows that the mere fact that discussions took place between the Commission and the Member State concerned during the preliminary examination stage, and that, in that context, the Commission asked for additional information about the measures submitted for its review, cannot in itself be regarded as evidence that the Commission was confronted with serious difficulties of assessment (*Matra*, paragraph 38). That does not, however, exclude the possibility that the content of the discussions between the Commission and the Member State concerned during that stage of the procedure may, in certain circumstances, be capable of revealing the existence of such difficulties (*Germany v Commission*, paragraph 14).

90 In this case, it should be noted first that the Commission's letter of 31 January 1996 had already been preceded by an initial request for information concerning the measures in question, to which the Portuguese authorities had replied by letter of 14 December 1995. It is also undisputed that that fresh request for information took place more than 30 months after the applicant complained of tax exemptions in favour of RTP in the complaint lodged on 30 July 1993, and nearly 24 months after the Commission was informed of payment facilities allowed to RTP by the public body entrusted with the management of the television broadcasting network. Moreover, as the Commission stated in its letter of 31 December 1996, that new request for information took place 'after an initial examination' of those measures. In the light of those factors it is clear that when the letter referred to above was sent to the Portuguese authorities the Commission had already carried out an 'initial examination' of the measures complained of within the meaning of the case-law.

91 It should be remembered in that respect that the Commission cannot limit itself to the preliminary phase under Article 93(3) of the Treaty and take a favourable decision on a State measure which has not been notified unless it is in a position to reach the firm view, following an initial investigation, that the State measure in question cannot be classified as aid within the meaning of Article 92(1) of the Treaty or that the measure, whilst constituting aid, is compatible with the common market (Case T-95/96 *Gestevisión Telecinco v Commission* [1998] ECR II-3407, paragraph 52, and the case-law cited therein).

- 92 In this case, the Commission's letter to the Portuguese authorities of 31 January 1996 shows that, at the conclusion of its initial examination, the Commission considered that the tax exemptions and payment facilities granted to RTP constituted aid within the meaning of Article 92(1) of the Treaty, and that, far from being in a position to close the proceedings with a decision favourable to those measures, it harboured serious doubts as to their compatibility with the common market.
- 93 That finding is confirmed, moreover, by a subsequent letter of 16 April 1996, produced by the Commission following a written question of the Court of First Instance, which it had sent to the Portuguese authorities after receiving the reply to its request.
- 94 Concerning, first, the tax exemptions, the Commission once again stated: '[This measure] constituted State aid within the meaning of Article 92(1) of the Treaty and... the Portuguese authorities should therefore indicate whether they consider that the aid may be justified on the basis of the derogations provided for in Article 92.'
- 95 Secondly, concerning the payment facilities allowed to RTP for the use of the television broadcasting network, the Commission asked to be informed of the reasons why the tariffs applied to RTP were different from those imposed on SIC, and of the amount of interest for late payment owed by RTP, stating that 'the TDP network is public property, and any favourable treatment it grants which would not be granted by a private undertaking following market rules may constitute State aid.' In that respect, it should be noted that, under the case-law, any interest or penalties for late payment which an undertaking might have to pay to a public body in return for generous payment facilities cannot wholly undo the advantage gained by that undertaking. Such payment facilities, granted to the undertaking in a discretionary manner, constitute State aid if, having regard to the size of the economic advantage so conferred, the undertaking would manifestly

have been unable to obtain comparable facilities from a private creditor in the same situation as the public creditor in question (*DM Transport*, paragraphs 21 and 30).

- 96 In those circumstances, it must be held that when it concluded the initial examination the Commission was in fact confronted with serious difficulties of assessment not only in classifying the measures in question in relation to the concept of aid, but also in establishing their compatibility with the common market, with the result that it was required to initiate the procedure provided for in Article 93(2) of the Treaty.
- 97 Thirdly, the Decision shows that in 1993 RTP enjoyed both the rescheduling of a debt to the Seguranga Social, arising from failure to pay contributions due on salary increments for the period 1983 to 1989, amounting to PTE 2 189 million, and exoneration from the corresponding interest and penalties for late payment. The Commission concluded that this was not aid because the measure complained of resulted from a settlement between RTP and the Seguranga Social intended to avoid legal proceedings concerning the legality of the contributions in question. According to the Commission, the Seguranga Social's conduct was close to that of a private operator confronted with similar circumstances.
- 98 The Court of Justice has held that where a public body with responsibility for collecting social security contributions tolerates late payment of such contributions, its conduct gives the recipient undertaking a significant commercial advantage by mitigating, for that undertaking, the burden associated with normal application of the social security system (*DM Transport*, paragraph 19). The interest normally applicable to that type of debt is intended to make good the loss suffered by the creditor because of the debtor's delay in performing its obligation to pay off its debt, namely default interest (*Spain v Commission*, paragraph 48).

- 99 It is true that, under the same case-law, where arrangements including the grant of facilities for payment are made between an undertaking and a public body with responsibility for collecting social security contributions the conduct of that body, which is presumed to have acted as a public creditor, must be compared with that of a hypothetical private creditor in the same position *vis-à-vis* its debtor and seeking to recover the sums owed to it (*DM Transport*, paragraph 25; *Spain v Commission*, paragraph 46). Therefore, the possibility cannot be excluded that a transaction concluded between a social security organisation and its debtor in order to avoid the uncertainty of litigation amounts to conduct which would be normal for a private creditor seeking to recover sums due to him.
- 100 In this case, however, the Decision itself shows that, as the applicant argued in its complaint without being challenged by the Commission, it was 'a joint decree of the Ministry of Finance and the Ministry of Social Security [which] established the rescheduling of the debt and the waiver of the corresponding fines and interest payments', and not a settlement between the *Segurança Social* and RTP. Nor has it been denied, as the applicant also emphasised in its complaint, that the regulation complained of, made in derogation from social security legislation, has not been extended to the other companies concerned.
- 101 It follows that, in circumstances such as these, where the Commission sought to rely exclusively on the conduct of the Portuguese social security body in order to authorise the advantages granted to RTP, it should have had more information on the true nature of the measure complained of in order to deal with the objections raised by the applicant in its complaint. It was its duty in those circumstances to initiate the procedure under Article 93(2) of the Treaty so that, having obtained all the necessary views, it could check the validity of its assessment, which, in the absence of additional clarification, was likely to raise serious difficulties.

- 102 Finally, it should be noted that, according to the case-law, the fact that the time spent on an initial examination under Article 93(3) of the Treaty considerably exceeds the time usually taken may, with other factors, justify the conclusion that the Commission encountered serious difficulties of assessment necessitating initiation of the procedure under Article 93(2) of the Treaty (*Germany v Commission*, paragraphs 15 and 17).
- 103 It is true that in a case where, as here, the disputed State measures were not notified by the Member State concerned, the Commission is not required to carry out an initial examination of those measures within the two-month period envisaged by the judgment in *Lorenz (Gestevisión Telecinco)*, paragraph 79).
- 104 That approach is based on the need to take account of the legitimate interest of the Member State concerned in being rapidly informed of the legality of the measures which have been notified to the Commission. That element is missing where the Member State has implemented measures without first notifying them to the Commission. If the State had doubts as to whether the aid planned was State aid, it would be at liberty to safeguard its interests by notifying the Commission of the measures planned, which would place the Commission under an obligation to define its position within two months (*SFEI and Others*, paragraph 48; *Gestevisión Telecinco*, paragraph 78).
- 105 However, where interested third parties submit complaints to the Commission relating to State measures which have not been notified under Article 93(3) the Commission is bound, in the context of the preliminary stage referred to in that provision, to conduct a diligent and impartial examination of the complaints in the interests of sound administration of the fundamental rules of the Treaty relating to State aid (*Gestevisión Telecinco*, paragraph 53; *Sytraval and Brink's*

France, paragraph 62). It follows, in particular, that where the Commission has initiated a preliminary investigation into State measures in relation to which there has been a complaint under Article 92(1) of the Treaty, it cannot prolong that investigation indefinitely (*Gestevisión Telecinco*, paragraph 74).

106 In this case, it should be noted that the Decision, dated 7 November 1996, was adopted at the conclusion of a preliminary examination stage that had been initiated on 30 July 1993, the date on which the applicant's first complaint was lodged, that is to say more than 39 months earlier and, in any event, nearly 33 months after the applicant finalised its complaint on 12 February 1994.

107 In the light of the case-law such periods far exceed the period normally required for a preliminary examination (*Germany v Commission*, paragraph 15; *Gestevisión Telecinco*, paragraphs 80 and 81; Opinion of Advocate General Lenz in *Sytraval and Brink's France*, paragraph 92), the purpose of which is simply to allow the Commission to form an initial opinion on the classification of the measures submitted for its assessment and their compatibility with the common market.

108 Having regard to all those considerations, it must therefore be held that the Commission was not in a position, at the conclusion of an initial examination, to resolve all the difficulties raised by the question whether the disputed measures submitted for its assessment constituted State aid within the meaning of Article 92(1) of the Treaty. Since the compatibility of those measures with the common market was not established in the Decision, the Commission was under a duty to initiate the procedure under Article 93(2) of the Treaty so that, having obtained all the necessary views, it could check the validity of its assessment.

- 109 Since that procedure did not take place before the Decision was adopted, and without there being any need to rule on the applicant's other pleas and claims, the Decision must be annulled in so far as it relates to the measures by the Portuguese State in favour of RTP consisting in grants by way of compensation, tax exemptions, payment facilities for use of the television broadcasting network and the rescheduling of a debt arising from failure to pay social security contributions, together with the waiver of interest for late payment.

Costs

- 110 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. According to Article 87(3) of the Rules of Procedure, the Court of First Instance may order that the costs be shared where each party succeeds on some and fails on other heads.
- 111 In this case, the Commission has failed in its claim that the action for annulment of the Decision should be dismissed, whilst the applicant has failed in its claim for the annulment of the decision allegedly contained in the letter of 20 December 1996. Since, however, the essence of the parties' arguments concerned the legality of the Decision, it is fair in the circumstances of the case to rule that the Commission must, in addition to its own costs, bear two thirds of the applicant's costs, excluding those incurred by the latter as a result of the intervention of the Portuguese Republic and RTP.
- 112 Under the first subparagraph of Article 87(4) of the Rules of Procedure of the Court of First Instance, Member States and institutions which intervene in the proceedings are to bear their own costs. Under the third subparagraph of the same paragraph, the Court may order interveners other than Member States,

States which are parties to the European Economic Area Agreement, the institutions and the EFTA Surveillance Authority to bear their own costs.

- 113 The Portuguese Republic and RTP, which have intervened in support of the Commission, are ordered to bear their own costs and, jointly and severally, to pay two thirds of the costs incurred by the applicant as a result of their intervention.
- 114 The United Kingdom, which did not lodge a statement in intervention, must bear its own costs.

On those grounds,

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

hereby:

1. Dismisses the action as inadmissible in so far as it is directed against the Commission's letter of 20 December 1996;

2. Annuls the Decision in so far as it relates to the measures taken by the Portuguese State in favour of RTP — Radiotevisão Portuguesa SA consisting in grants by way of compensation, tax exemptions, payment facilities for use of the television broadcasting network and the rescheduling of a debt arising from failure to pay social security contributions, together with waiver of interest for late payment;
3. Orders the Commission to bear its own costs and to pay two thirds of the costs incurred by the applicant, excluding those incurred as a result of the interventions of RTP — Radiotevisão Portuguesa SA and the Portuguese Republic;
4. Orders the Portuguese Republic and RTP — Radiotevisão Portuguesa SA — to bear their own costs and, jointly and severally, to pay two thirds of the costs incurred by the applicant as a result of their intervention;
5. Orders the United Kingdom to bear its own costs.

Vesterdorf

Tiili

Potocki

Meij

Vilaras

Delivered in open court in Luxembourg on 10 May 2000.

H. Jung

Registrar

B. Vesterdorf

President