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

3 June 1999 *

In Case T-17/96,

Télévision Française 1 SA (TF1), a company incorporated under French law, established in Paris, represented by Georges Vandersanden, Jean-Paul Hordies and Agnès Maqua, of the Brussels Bar, with an address for service in Luxembourg at the offices of Fiduciaire Myson SARL, 30 Rue de Cessange,

applicant,

v

Commission of the European Communities, represented by Gérard Rozet, Legal Adviser, and Klaus Wiedner, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

supported by

French Republic, represented by Catherine de Salins, Head of Subdirectorate in the Legal Affairs Department of the Ministry of Foreign Affairs, Philippe

* Language of the case: French.

Martinet, Secretary for Foreign Affairs, and Frédérik Million, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

intervener,

APPLICATION under Article 175 of the EC Treaty (now Article 232 EC) for a declaration that the Commission failed to fulfil its obligations under the Treaty by not defining its position on the complaint submitted by the applicant against the French Republic concerning the compatibility of the methods of financing the public television broadcasting channels France 2 and France 3 (France-Télévision) with Article 85 (now Article 81 EC), Article 90(1) (now Article 86(1) EC) and Article 92 (now, after amendment, Article 87 EC) of the EC Treaty, and, in the alternative, an application under Article 173 of the EC Treaty (now, after amendment, Article 230 EC) for annulment of the purported decision rejecting the applicant's complaint, set out in a letter from the Commission of 11 December 1995,

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

composed of: M. Jaeger, President, K. Lenaerts, V. Tiili, J. Azizi and P. Mengozzi, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 24 November 1998,

gives the following

Judgment

Background

1 Until 1982 television broadcasting in France was controlled by State monopoly. Since that time it has been undergoing a gradual process of liberalisation and, at present, television broadcasting in France includes both the public sector, with the public broadcasting channels France 2 and France 3 (which together make up the France-Télévision group, herein referred to as 'France-Télévision') and a number of private television companies.

2 Whilst private sector television broadcasting is financed exclusively by advertising income (advertising in the strict sense of the term, programme sponsorship and teleshopping), the public broadcasting channels receive not only advertising income but also public funding in a variety of forms (a share of the income from licence fees, specific budgetary grants, subsidies, etc.).

3 On 10 March 1993 the applicant, Télévision Française 1 SA ('TF1'), submitted a complaint to the Commission concerning the methods used to finance and operate the France-Télévision channels. It is common ground that that complaint expressly referred to infringement of Article 85 (now Article 81 EC), Article 90(1) (now Article 86(1) EC) and Article 92 (now, after amendment, Article 87 EC) of the EC Treaty.

4 On 16 July 1993 the Commission sent the applicant a request for information, to which the applicant replied on 30 September 1993.

5 On 5 July 1995 Mr Van Miert, a Member of the Commission, informed the applicant that other similar complaints had been submitted to the Commission concerning other Member States, all raising the general question of the financing of public service television. Consequently, the Commission had ordered a study to be carried out covering the twelve Member States of the Union at the time. Because of methodological difficulties and the breadth of the enquiry, the study had still not been completed, although its first results were expected before summer 1995. However, it was impossible to specify exactly when the report would be implemented. Lastly, the Commission invited the applicant to send it any evidence that showed that the State aid received by France-Télévision was clearly disproportionate to its public service obligations.

6 By letter of 3 October 1995, the applicant put it to the Commission that, in France, State aid to the public channels was deliberately intended to distort competition between those channels and the private channels. The applicant stressed that it could not go on waiting for years and therefore formally requested the Commission and, in so far as was necessary, gave it formal notice to 'define its position and act upon the submissions set out in the complaint' of 10 March 1993.

7 On 11 December 1995 the defendant sent a letter to the applicant containing the statement: 'Following the results of the study into the financing of public television in the twelve States which were Members of the European Union before 1 January 1995, we sent a letter to the French authorities on 21 November 1995 asking a number of questions the answers to which will enable us to adopt a decision on the action to be taken with regard to your complaint. We will keep

you informed of the progress of the matter and may revert to you for further information, if necessary.'

Procedure

8 By application lodged at the Registry of the Court of First Instance on 2 February 1996, TF1 brought the present action.

9 By application lodged at the Registry of the Court of First Instance on 4 July 1996, the French Republic applied for leave to intervene in support of the form of order sought by the defendant. By order of the President of the Fifth Chamber, Extended Composition, of 17 September 1996, that application was granted.

10 By letter lodged at the Registry of the Court of First Instance on 2 June 1997, the Commission placed before the Court a copy of a letter dated 15 May 1997 sent to the applicant pursuant to Article 6 of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1963-1964, p. 47, hereinafter 'Regulation No 99/63'), in which it informed the applicant that, on the basis of the information in its possession, it was unable to uphold its complaint in so far as it alleged infringement of Articles 85 and 86 (now Article 82 EC) of the EC Treaty. The Commission invited the applicant to submit its comments within two months of 15 May 1997, adding that, having considered the allegation of infringement of Article 90 of the Treaty, it had been unable to establish that the matters complained of amounted to an infringement.

11 In view of the letter of 15 May 1997, the Registrar of the Court of First Instance invited the parties, by letter of 17 June 1997, to submit their observations on the remainder of the procedure and on the question whether it was still necessary for

the Court to give judgment. The defendant, the applicant and the intervener replied to that invitation on 2, 17 and 18 July 1998 respectively.

12 By decision of the Court of First Instance of 21 September 1998, the Judge-Rapporteur was appointed to the Third Chamber, Extended Composition, of the Court of First Instance, to which the case was therefore assigned.

13 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber, Extended Composition) decided to initiate the oral procedure without any preparatory measures of inquiry.

14 The parties presented oral argument and gave their replies to the questions asked by the Court at the hearing on 24 November 1998.

Forms of order sought by the parties

15 The applicant claims that the Court should:

— declare that the Commission, by not defining its position within two months of the applicant's letter of formal notice of 3 October 1995, failed to act;

— call upon the Commission to act by adopting a decision on the complaint;

— in the alternative, annul the position defined by the Commission on 11 December 1995;

— order the Commission to pay all the costs.

16 The defendant contends that the Court should:

— declare the action for failure to act inadmissible, or, in the alternative, unfounded;

— declare the claim for annulment, made in the alternative, inadmissible;

— order the applicant to pay the costs.

17 The French Republic, as intervener, supports the form of order sought by the Commission.

The action for failure to act

Admissibility

Admissibility of the action in so far as it concerns the Commission's failure to act in pursuance of Articles 92 and 93 of the EC Treaty

— Defendant's pleas in law and arguments

18 First, the Commission maintains that the action, in so far as it is claimed therein that it failed to fulfil its alleged obligation to initiate the procedure provided for in

Article 93(2) of the EC Treaty (now Article 88(2) EC), is inadmissible because the applicant does not have *locus standi*. It argues that the decision which it is called on to adopt after examining the compatibility with the common market of a measure reported as constituting State aid will, if it is established that the measure in question is in fact State aid within the meaning of Articles 92 and 93 of the EC Treaty, be addressed to the French Republic. The applicant cannot be the addressee of such a decision and does not, therefore, have capacity to bring an action for a declaration that the Commission failed, as alleged, to adopt a measure, of which it would not be the addressee.

19 The Commission states that the procedural rules which apply in the context of Articles 85 and 86 of the Treaty cannot be likened to those applicable to Articles 92 and 93 of the Treaty, because the competition rules which focus on the conduct of undertakings necessarily confer a decisive role upon complainants whereas, in the field of State aid, the main party with which the Commission must deal is the Member State whose conduct has been called into question.

20 Nevertheless, the Commission recognises the fact that the Treaty provides for a role for third parties who have an interest in the dialogue between the Commission and the Member State concerned. Thus it points out that if, after its preliminary examination, it has not been able to eliminate all doubt as to the aid's compatibility with the common market, it is required to initiate the procedure laid down in Article 93(2) of the Treaty. As part of that procedure, it must give notice to the parties concerned to submit their observations, but 'the sole aim of [that] communication is to obtain from persons concerned all information required for the guidance of the Commission with regard to its future action' (Case 70/72 *Commission* v *Germany* [1973] ECR 813, paragraph 19).

21 The Commission argues that a complainant has no special status in the context of the procedure provided for in Article 93(2) of the Treaty and that it is inconceivable for a decision to be addressed directly to such a party (the judgments of the Court of Justice in Case C-313/90 *CIRFS and Others* v

Commission [1993] ECR I-1125, paragraph 28, and Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 10; the Opinion of Advocate General Tesauro in Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, I-2502, I-2510).

22 Secondly, the Commission states that the third paragraph of Article 175 of the Treaty (now the third paragraph of Article 232 EC) cannot be interpreted so broadly as to confer on interested third parties a right of action. It takes the view that the significant difference in drafting between the fourth paragraph of Article 173 of the EC Treaty (now, after amendment, Article 230 EC) and the third paragraph of Article 175 of the Treaty must be regarded as evidence that the right of action under Article 175 of the Treaty is more limited than that under Article 173. Basing its argument on the judgment of the Court of Justice in Case 246/81 *Lord Bethell* v *Commission* [1982] ECR 2277, at paragraph 16, and on the order of the Court of First Instance in Case T-3/90 *Prodifarma* v *Commission* [1991] ECR II-1, at paragraph 35, the Commission maintains that only the potential addressee of a measure is entitled to bring an action under Article 175 of the Treaty.

23 The Commission also draws a distinction between the present case and the matter which led to the judgment in Case C-107/91 *ENU* v *Commission* [1993] ECR I-599 (paragraphs 15 to 17), in which the Court of Justice declared admissible an action for failure to act brought by an undertaking which relied on the fact that it was directly and individually concerned by the act requested, even though it was not officially its addressee. The Commission argues that ENU's position is special within the general structure of the Euratom Treaty and differs from that of the applicant in the present case in that ENU was the real addressee of the decision sought and because that decision was capable of producing legal effects with regard to ENU, whereas the decision requested by TF1 is a decision addressed to France with no direct effect upon the applicant.

24 The Commission is careful to point out that a declaration that the present action for failure to act is inadmissible would in no way imply a lacuna in the system for the protection of the legitimate interests of third parties, given that the national courts and the Commission have complementary roles to play. When faced with

an infringement by the national authorities of the last sentence of Article 93(3) of the Treaty, the national courts are required to take all necessary steps to ensure that the interests of any third parties concerned are protected.

25 The French Republic adds that the case-law on complaints under Articles 85 and 86 of the Treaty is irrelevant because, in competition matters, Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87) and Regulation No 99/63 accorded complainants a special status, whereas there are, as yet, no procedural rules relating to Articles 92 and 93 of the Treaty and there is no provision which requires the Commission to inform a complainant, where it would be appropriate to do so, that it does not intend to uphold its complaint. In addition, the intervener draws attention to the fact that the Commission is not the only body which has jurisdiction to ensure compliance with Article 93(3) of the Treaty, as the national courts must declare invalid any aid measure which is not notified, and must follow up any such declaration by ordering, where appropriate, the return of funds, even where a complaint is pending before the Commission (Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Others* [1991] ECR I-5505). The fact that an action for failure to act concerning a refusal to initiate the procedure under Article 93(2) of the Treaty or concerning the rejection of a complaint is inadmissible does not therefore deprive the applicant of its right to an effective legal remedy.

— Findings of the Court

26 Under the third paragraph of Article 175 of the Treaty any natural or legal person may complain to the Community Judicature that an institution of the Community has failed to address to that person any act other than a recommendation or an opinion.

27 The case-law shows that Articles 173 and 175 of the Treaty merely prescribe one and the same method of recourse and that the third paragraph of Article 175

must be interpreted as entitling individuals to bring an action for failure to act not only against an institution which has failed to adopt an act which otherwise would be addressed to them, but also against an institution which they claim has failed to adopt a measure which would have concerned them directly and individually (Case C-68/95 *T. Port* [1996] ECR I-6065, paragraph 59).

28 It follows that the Commission is wrong to take the view that the claim for a declaration of failure to act, in so far as it is directed against failure on the part of the Commission to act pursuant to Articles 92 and 93 of the Treaty, is inadmissible for the sole reason that the applicant is not the potential addressee of any of the three decisions that the Commission might adopt with regard, in this case, to the French Republic, at the end of the preliminary examination phase referred to in Article 93(3) of the Treaty, whether that decision is a declaration that the measures complained of do not constitute aid within the meaning of Article 92(1) of the Treaty, or a declaration that the measures, whilst constituting aid within the meaning of Article 92(1) of the Treaty, are compatible with the common market by virtue of Article 92(2) or 92(3) of the Treaty, or, in the event that the Commission takes the opposite view or is unable to surmount all the difficulties raised by the assessment of the measures in question, a decision to initiate the procedure under Article 93(2) of the Treaty.

29 It is therefore appropriate to consider whether the applicant is directly and individually concerned by the measures in question.

30 It is clear from the judgment of the Court of First Instance in Case T-435/93 *ASPEC and Others* v *Commission* [1995] ECR II-1281, at paragraph 60, that an undertaking must be considered to be directly concerned by a decision of the Commission relating to State aid where there is no doubt about the intention of the national authorities to go ahead with their aid proposal. In the present case, it is established that the French authorities in question have already made the

various financial grants at issue and continue to do so. That being the case, the applicant must be held to be directly concerned.

31 Next, according to settled case-law, where, without initiating the procedure under Article 93(2) of the Treaty, the Commission finds, on the basis of Article 93(3), that a measure does not constitute aid or that a measure, whilst constituting aid, is compatible with the common market, the persons intended to benefit from the procedural guarantees provided by Article 93(2) may secure compliance therewith only if they are able to challenge that decision by the Commission before the Court (see, latterly, Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraphs 40 and 47, and Case T-188/95 *Waterleiding Maatschappij* v *Commission* [1998] ECR II-3713, paragraph 53). The parties concerned, within the meaning of Article 93(2) of the Treaty, who are to be regarded as being individually concerned, are those persons, undertakings or associations whose interests might be affected by the grant of the aid, in particular competing undertakings (*Commission* v *Sytraval and Brink's France*, cited above, paragraph 41). In the present case, it is beyond doubt that the applicant is a concerned party within the meaning of Article 93(2) of the Treaty as a result of being the operator of one of the private television channels competing with the public television channels which benefit from the contested financial grants, and the author of the complaint which led to the Commission's preliminary examination of those grants.

32 Lastly, it should be observed that the decision to initiate the procedure under Article 93(2) of the Treaty is the necessary preliminary to the conduct of a procedure at the end of which the Commission must adopt a final decision which will be of individual concern to the applicant, such as a declaration that the measures complained of, the classification of which as aid had previously caused serious difficulties, are compatible with the common market.

33 The applicant must, therefore, be considered to be directly and individually concerned by decisions which the Commission might adopt after initiating the

procedure for carrying out a preliminary examination of the grants made by the French authorities to the public television companies.

34 Furthermore, by its letter of 3 October 1995, the applicant validly gave the Commission formal notice, within the meaning of Article 175 of the Treaty, to act pursuant to Articles 92 and 93 of the Treaty.

35 Finally, it should be borne in mind that the fact that remedies may exist at national level, enabling the applicant to oppose the allocation of the contested grants to the public channels, can have no bearing on the admissibility of the present claim for a declaration of failure to act (see, to that effect, Case T-398/94 *Kahn Scheepvaart* v *Commission* [1996] ECR II-477, paragraph 50).

36 It follows that the action for failure to act, in so far as it is directed against the Commission's failure to act pursuant to Articles 92 and 93 of the Treaty, is admissible.

Admissibility of the action in so far as it concerns the Commission's failure to act in pursuance of Articles 85 and 86 of the Treaty

— Arguments of the parties

37 The Commission points out that, in accordance with Article 175 of the Treaty, an action for failure to act is admissible only if the institution concerned has first been called upon to act. The letter of 3 October 1995, which mentions the complaint concerning the financing of public television and the grant of State aid

to support it, cannot be regarded as a call upon the Commission, within the meaning of Article 175 of the Treaty, to act in pursuance of Articles 85 and 86 of the Treaty. The Commission maintains that that interpretation is confirmed by the Commission's holding reply, the drafting of which shows that it had understood the letter of 3 October 1995 to refer exclusively to the State aid reported in the complaint of 10 March 1993.

38 The Commission also points out that the letter of 3 October 1995 does not specify precisely which act or decision it is accused of having failed to adopt. It is settled case-law that, where the Commission does not have exclusive jurisdiction, it is not required to investigate or, *a fortiori*, to give notice of objections in order to identify possible infringements of Articles 85 and 86 of the Treaty (Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223). Thus the letter of 3 October 1995, which does not request the adoption of a decision rejecting a complaint — the only decision to which the applicant is entitled — cannot be regarded as fulfilling the conditions laid down by Article 175 of the Treaty.

39 The Commission concludes that the letter of 3 October 1995 does not satisfy the requirements of clarity and precision which case-law imposes for the admissibility of an action for failure to act (Joined Cases 81/85 and 119/85 *Usinor* v *Commission* [1986] ECR 1777 and Case C-180/88 *Wirtschaftsvereinigung Eisen- und Stahlindustrie* v *Commission* [1990] ECR I-4413).

40 The applicant disputes the view that the letter of 3 October 1995 cannot be regarded as a letter of formal notice in relation not only to the system of aid but also in relation to infringement of Article 85 of the Treaty. In this connection, it points out that, in the letter, it asked the Commission to make its attitude known and to act on the submissions set out in its complaint. The applicant points to the heading given to the complaint of 10 March 1993 which expressly refers to Article 85 of the Treaty and alluded to infringement of that article. Moreover, the applicant maintains that a complainant is entitled not only to bring an action for

annulment of a decision rejecting a complaint, but also to give the Commission formal notice to act and, where appropriate, to bring an action against it for failure to act, on the basis of Article 175 of the Treaty.

— Findings of the Court

41 Under the second paragraph of Article 175 of the Treaty, an action for failure to act is admissible only if the institution concerned has first been called upon to act. Giving the institution formal notice is an essential procedural requirement the effects of which are, first, to cause the two-month period within which the institution is required to define its position to begin to run and, secondly, to delimit any action that might be brought should the institution fail to define its position. Whilst there is no particular requirement as to form, the notice must be sufficiently clear and precise to enable the Commission to ascertain in specific terms the content of the decision which it is being asked to adopt and must make clear that its purpose is to compel the Commission to state its position (see, to that effect, *Usinor* v *Commission*, cited at paragraph 39 above, paragraph 15).

42 In the present case, the applicant's letter of 3 October 1995 refers in three places solely to the issue of the financing of public television in France and the aid granted to support it, and not to the question of infringement of Articles 85 and 86 of the Treaty. Nevertheless, it is abundantly clear that the applicant closed its letter of 3 October 1995 with a formal and explicit request to the Commission to act on the submissions set out in its complaint of 10 March 1993. It is common ground that that complaint referred not only to infringement of Article 92 of the Treaty (part 2, chapter 1), but also to infringement of Article 90 of the Treaty (part 2, chapter 2) and infringement of Article 85 of the Treaty (part 2, chapter 3). It follows that the letter of 3 October 1995, whilst emphasising very heavily the issue of State aid, must be taken to constitute a letter of formal notice within the meaning of the second paragraph of Article 175 of the Treaty with regard to

all the submissions exhaustively set out in the complaint, including, therefore, those alleging infringement of Article 85 of the Treaty.

43 It follows that the action, in so far as it is directed against the Commission's failure to act pursuant to Article 85 of the Treaty, is admissible.

44 On the other hand, in so far as the action is directed against the Commission's failure to act pursuant to Article 86 of the Treaty, it is quite clear that the applicant's only plea on this point is contained in its reply. There is no reference to Article 86 either in the complaint of 10 March 1993 or in the letter of formal notice of 3 October 1995, which merely calls upon the Commission to 'make its attitude known and act on the submissions made in the complaint', or in the originating application in the present action. Thus it cannot be said that the letter of 3 October 1995 calls upon the Commission, within the meaning of the second paragraph of Article 175, to act pursuant to Article 86 of the Treaty. That aspect of the action must therefore be dismissed as inadmissible.

Admissibility of the action in so far as it is directed against the Commission's failure to act in pursuance of Article 90 of the Treaty

— Pleas in law and arguments of the parties

45 The Commission maintains, first, that this part of the action is inadmissible because the letter of 3 October 1995 cannot be regarded as calling on it, within

the meaning of Article 175 of the Treaty, to act with regard to the part of the complaint of 10 March 1993 which relates to Article 90 of the Treaty.

46 Next, the Commission argues that this part of the action is inadmissible in any event because the wide discretion it enjoys in implementing Article 90 of the Treaty excludes any obligation on its part to take action. It follows that legal or natural persons who request it to act under Article 90(3) of the Treaty do not have the right to bring an action against a decision of the Commission refusing to use its powers or against its failure to use its powers (judgment in Case T-32/93 *Ladbroke Racing* v *Commission* [1994] ECR II-1015; order in Case T-84/94 *Bilanzbuchhalter* v *Commission* [1995] ECR II-101).

47 The applicant accepts that the Commission has a wide discretion in implementing Article 90 of the Treaty, but points out that Article 90(3) of the Treaty requires it to ensure the application of the provisions of that article and, where necessary, to address appropriate directives or decisions to Member States. Those provisions imply that the Commission should act within a reasonable period, failing which an action for failure to act may be brought against it.

— Findings of the Court

48 First of all, contrary to the Commission's view, the letter of 3 October 1995, in so far as the applicant formally requests the Commission to act 'on the submissions set out in the complaint' of 10 March 1993, must be held to be a proper call upon

the Commission, within the meaning of the second paragraph of Article 175 of the Treaty, to act pursuant to Article 90 of the Treaty.

49 Secondly, it is appropriate to consider to what extent an action for failure to act may be directed against a failure on the part of the Commission to act pursuant to Article 90 of the Treaty. It should be observed that Article 90(3) of the Treaty requires the Commission to ensure that Member States comply with their obligations as regards the undertakings referred to in Article 90(1) and expressly empowers it to take action for that purpose by way of directives and decisions. The Commission is empowered, *inter alia*, to determine, by means of a decision taken on the basis of Article 90(3) of the Treaty, that a given State measure is incompatible with the rules of the Treaty, including those in Articles 85 to 94 (now Article 89 EC) of the Treaty, and to indicate what measures the State to which a decision is addressed must adopt in order to comply with its obligations under Community law (Joined Cases C-48/90 and C-66/90 *Netherlands and Others* v *Commission* [1992] ECR I-565, paragraphs 22 to 30).

50 Next, it should be observed that, owing to its position in the general structure of the Treaty and its purpose, Article 90(3) of the Treaty figures among the rules whose object is to ensure freedom to compete, and is therefore intended to protect economic operators against measures whereby a Member State might frustrate the fundamental economic freedoms enshrined in the Treaty. Thus it is to be inferred, as much from the position of those provisions in the Treaty as from their purpose, that, where, with regard to public undertakings or undertakings which benefit from special or exclusive rights, a Member State enacts or keeps in force measures which have an anti-competitive effect equivalent to that produced by anti-competitive conduct on the part of any other undertaking, an individual may not be deprived of the protection of his legitimate interests. In this connection it is appropriate also to observe that, by virtue of case-law, one of the general principles of Community law is that any person must be able to obtain effective

judicial review of decisions which may infringe a right conferred by the Treaties (see, in particular, Case 222/84 *Johnston* v *Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paragraph 18, Case C-249/88 *Commission* v *Belgium* [1991] ECR I-1275, paragraph 25, and Case T-186/94 *Guérin Automobiles* v *Commission* [1995] ECR II-1753, paragraph 23).

51 The wide discretion which the Commission enjoys in implementing Article 90 of the Treaty cannot undo that protection. Indeed, in its judgment in Case C-107/95 P *Bundesverband der Bilanzbuchhalter* v *Commission* [1997] ECR I-947, at paragraph 25, the Court of Justice held that the possibility cannot be ruled out that exceptional situations might exist where an individual had standing to bring proceedings against a refusal by the Commission to adopt a decision pursuant to its supervisory functions under Article 90(1) and (3) of the Treaty.

52 It is therefore appropriate to consider whether, in the present case, the applicant is in such an exceptional situation that it has standing to bring an action against the Commission for its failure to adopt a decision pursuant to Article 90 of the Treaty.

53 It is common ground that the applicant is the largest private television channel in France, enjoying a 42% share of the viewing audience in 1992 and a 55% share of the advertising market. Furthermore, because of its generalist programming (news, sport, feature films, drama, general entertainment, magazine programmes, documentaries), it competes directly with the France-Télévision channels for the same viewing audience. Similarly, it is established that TF1 and the two France-

Télévision channels compete directly, as regards both the acquisition of rights to show cinematographic and audiovisual works and to broadcast sporting events and the sale of their advertising space to advertisers.

54 It is also appropriate to observe that, according to the applicant, the various subsidies, benefits, practices, agreements and regulations reported in the complaint are inter-connected and form a body of measures whose purpose or effect is to distort competition between the applicant and the two France-Télévision channels.

55 The applicant also asserted, without being contradicted by the defendant, that the various measures laid down by the French State in favour of France-Télévision were having an appreciable effect upon its financial situation.

56 Lastly, the Court notes that, unlike the complainant in the matter which led to the judgment in *Bundesverband der Bilanzbuchhalter* v *Commission*, cited in paragraph 51 above, which intended, by means of its action directed against the Commission's refusal to adopt a decision, pursuant to Article 90(1) and (3) of the Treaty, with regard to the Federal Republic of Germany, indirectly to force that Member State to adopt legislation having general application, the applicant in the present case seeks to have the Commission define its position, pursuant to Article 90 of the Treaty, on the various State measures complained of, which it alleges favour two particular economic operators who are clearly identified and with whom it is in direct competition.

57 It follows from the foregoing considerations that, in so far as it is directed against the Commission's failure to act pursuant to Article 90 of the Treaty, the application is admissible.

Substance

Alleged failure to act in pursuance of Articles 92 and 93 of the Treaty

— Pleas in law and arguments of the parties

58 The applicant maintains that, where the Commission is asked to assess the compatibility with the common market of aid, it is required to go beyond the preliminary phase mentioned in Article 93(3) of the Treaty and to initiate the procedure provided for in Article 93(2) (*Cook* v *Commission*, cited at paragraph 21 above, Case T-49/93 *SIDE* v *Commission* [1995] ECR II-2501, and Case T-95/94 *Sytraval and Brink's France* v *Commission* [1995] ECR II-2651). In the present case, the Commission has failed to fulfil that obligation.

59 The defendant puts forward three lines of argument to show that it is not guilty of a failure to act.

60 First, the Commission asserts that, whilst it clearly has not taken a decision on whether State aid has been granted or on the initiation of the procedure under Article 93(2) of the Treaty, it has nevertheless not been inactive. On the contrary, it has undertaken a series of actions intended to enable it to analyse, from every angle, a particularly complex problem that is common to all the Member States. In this connection, it points out that, as early as 12 August 1993, it invited the French authorities to submit their observations on the various objections raised by the applicant in its complaint. The French authorities replied on 9 December 1993. Similarly, it organised several meetings with the complainant. The Commission adds that, on account of the nature and complexity of the matter, in December 1993 it commissioned an in-depth study into the operation and

functioning of the public television broadcasting channels of the Community. As soon as the results of that study were received in October 1995, it reverted to the French authorities, asking them to provide supplemental information, which was sent to it on 16 February 1996. Furthermore, it exchanged numerous letters and, from March 1993 onwards, was in contact on many occasions with the complainant (notably at meetings in September and November 1994 and in January and October 1995). The Commission states that the applicant was aware of those various steps and of the fact that, in July 1995, it had not yet received the results of the study. It is therefore astonished that the applicant sent it a letter of formal notice on 3 October 1995.

61 The Commission refutes the applicant's assertions that it did no more than commission a study. It points out that it actively investigated the matter with the French authorities, as is evidenced by the numerous meetings it held with them, the exchange of correspondence and the increasingly specific questions it asked them, in particular, by letters of 4 and 18 October 1996.

62 Secondly, the Commission points to the complexity of the matter to explain its failure to define its position.

63 The Commission observes that there are no rules laying down the period within which it is required to respond to a complaint concerning the grant of State aid which has not been notified, and that such period should be determined in accordance with the principles of due care and attention and sound administration. Whether or not those principles have been observed must, it maintains, be assessed in the light of the legal and political complexity and sensitivity of the matter. The Commission takes the view that special care must be taken if the conduct of which the applicant complains is to be legally characterised as

constituting State aid, and that, before taking any such decision, the Commission must be in possession of all the legal and factual information it needs to gain an overall understanding of the problem.

64 The Commission emphasises that the opening up of television broadcasting to competition is relatively recent and has raised novel issues, particularly in connection with the co-existence of the public and private channels.

65 The Commission notes that television is an area in which public authorities may, in the context of their activities relating to television, pursue non-commercial aims and may impose upon broadcasters an obligation to provide a service to the whole of a national population. The Commission has no experience in dealing with State aid in this sector and should, therefore, establish special criteria and principles of methodology for that purpose. It would thus be appropriate to determine what risk there is of intra-Community trade being affected, given that the complaint made by the applicant, a private French undertaking, concerns the conduct of the French public authorities in relation to French broadcasting channels. Similarly, it would be appropriate to identify precisely what the public service obligations are and determine to what extent the grants and other benefits complained of by the applicant go beyond the offsetting of the costs of performing those obligations and thus constitute State aid, the compatibility of which would then have to be assessed. The Commission observes that in July 1995 it sent to the Member States a first draft of general guidelines in relation to the issue and hopes shortly to be in a position to release, in conjunction with the Member States, a general reference document to assist in the analysis of actual cases.

66 Thirdly, the Commission argues that it is not yet able to define its position and that the procedural requirements that must be satisfied before an action may be brought, as set out in the second paragraph of Article 175 of the Treaty, have not therefore been met.

67 The Commission maintains that it cannot be regarded as having failed to act within the meaning of Article 175 of the Treaty. When the letter of formal notice was sent, it was impossible for it to act as the applicant wished, in so far as it had not yet reached a decision on the classification as State aid of the grants of capital and other benefits made to France-Télévision, even though it had begun taking all the appropriate steps to enable it to reach such a conclusion.

68 Moreover, the Commission emphasises that, because of the serious repercussions that a decision to initiate the procedure provided for in Article 93(2) of the Treaty may have not only for France-Télévision but for most of the public television channels operating in the Community, in particular with regard to the obligation to suspend the grant of State aid (Case C-312/90 *Spain* v *Commission* [1992] ECR I-4117), the principles of sound administration and due care and attention require that it adopt a decision only after it has succeeded in forming a duly substantiated opinion.

69 In conclusion, the Commission takes the view that the applicant's request is not well founded in that, first, it has taken all the necessary steps which the complexity of the matter calls for, within a reasonable period of time, having regard to the difficulties of analysing the sector generally, the novelty of the subject-matter, the significance of the conclusions it might reach and the difficulties which are peculiar to France-Télévision's case, and, secondly, at the time when it was called upon to act, it was not in a position to act as the applicant wished.

70 Lastly, the Commission maintains that the press release of 2 October 1996 concerning the financing of public television in Portugal confirms that its attitude to the financing of public television channels is not at all dilatory and that it takes decisions as soon as it is in a position to do so.

71 The intervener wholly subscribes to the defendant's arguments and confirms that the Commission is continuing to look into the questions put to it and that that exercise is posing complex problems which justify the length of the investigation into the matter.

— Findings of the Court

72 In order to rule on the merits of the claim for a declaration of failure to act, it is necessary to ascertain whether, at the time when the Commission was called upon to act pursuant to Article 175 of the Treaty, it was under any obligation to act (orders of the Court of First Instance in Case T-126/95 *Dumez* v *Commission* [1995] ECR II-2863, paragraph 44, and in Case T-286/97 *Goldstein* v *Commission* [1998] ECR II-2629, paragraph 24).

73 In so far as the Commission has exclusive jurisdiction to assess the compatibility of a grant of State aid with the common market, it is required, in the interests of the sound administration of the fundamental rules of the Treaty relating to State aid, to conduct a diligent and impartial examination of complaints reporting the grant of aid which is incompatible with the common market (see, to that effect, *Commission* v *Sytraval and Brink's France*, cited above, paragraph 62).

74 It has been held that, just as the Commission cannot postpone indefinitely defining its position in relation to an application for clearance under Article 85(3) of the Treaty (Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 55), neither may it prolong indefinitely its preliminary investigation into State measures in relation to which there has been a complaint under Article 92(1) of the Treaty where it has, as in this case, agreed to initiate such an investigation (Case T-95/96 *Gestevisión Telecinco* v *Commission* [1998] ECR II-3407, paragraph 74). On the contrary, settled case-law shows that

the procedure under Article 93(2) is indispensable whenever the Commission has serious difficulties in determining whether a grant of State aid is compatible with the common market (see, in particular, *Commission* v *Sytraval and Brink's France*, paragraph 39).

75 Whether or not the duration of an administrative procedure of that kind is reasonable must be determined in relation to the particular circumstances of the case and, in particular, its context, the various procedural stages to be gone through by the Commission, the complexity of the case and its importance for the various parties involved (Case T-73/95 *Oliveira* v *Commission* [1997] ECR II-381, paragraph 45, and *SCK and FNK* v *Commission*, cited in the preceding paragraph, paragraph 57).

76 In the present case, the applicant's complaint was lodged on 10 March 1993. Thus, when, on 3 October 1995, the Commission was called upon to act, in accordance with Article 175 of the Treaty, 31 months had already been spent on the Commission's preliminary investigation. Furthermore, the parties are agreed that, since 2 March 1992, when a similar complaint concerning television broadcasting in Spain was lodged, the Commission had been examining generally the issue of the financing of public television.

77 So much time elapsed that the Commission ought to have been able to complete its preliminary examination of the measures at issue. The institution should therefore have adopted within that time a decision on those measures (see paragraph 28 of the present judgment), unless that delay can be justified by exceptional circumstances.

78 Clearly, none of the arguments advanced by the Commission justifies the length of time that elapsed. As the Court of First Instance held in *Gestevisión Telecinco* v *Commission*, cited at paragraph 74 above, at paragraphs 82 to 90, with regard to a complaint raising the same issue of the financing of public television, neither

the complexity of the case, nor the politically sensitive nature of the subject-matter, nor the various steps taken by the Commission, nor the circumstance that it was not yet in a position to classify the various grants given to France-Télévision as State aid can justify so lengthy a preliminary examination of the measures at issue. When it was called upon to act on 3 October 1995, the Commission ought to have been in a position to adopt a decision declaring that the various forms of finance and grants in question did not constitute State aid, or that they did constitute State aid but were compatible with the common market, or that serious difficulties obliged it to initiate the procedure under Article 93(2) of the Treaty, thus allowing all parties concerned, and in particular the complainant and the Member States, to submit their observations. Furthermore, it could also have adopted, in the time that elapsed, a hybrid decision combining, according to the circumstances, any of the three decisions just mentioned (see, to that effect, Case T-107/96 *Pantochim* v *Commission* [1998] ECR II-311, paragraph 51). Moreover, if a Member State is in doubt as to whether measures it proposes will be classified as State aid, it may protect its interests by notifying its proposal to the Commission, which is then obliged to adopt a position within two months, failing which the aid is to be regarded as existing aid subject to the review provided for in Article 93(1) and (2) of the Treaty, and the Member State in question may implement the proposal on giving the Commission advance notice (Case 120/73 *Lorenz* v *Germany* [1973] ECR 1471, paragraph 4). This case-law is based on the need to take account of the legitimate interest of the Member State in being rapidly informed of the legal position. That element is missing, however, where the Member State has implemented planned aid without having notified the Commission beforehand (Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraph 48). In such a case, as the Court of Justice has stated, the immediate applicability of the prohibition on implementation referred to in the last sentence of Article 93(3) of the Treaty extends to all aid which has been implemented without being notified (*SFEI and Others*, paragraph 39). Where, as in the present case, the Member State has failed to notify planned aid, it is faced with an absolute prohibition on implementing the proposed measures, the breach of which may be sanctioned by any national court. It follows that, in the present case, the Commission cannot, in any event, justify its failure to define its position by relying on the fact that initiating the procedure provided for in Article 93(2) of the Treaty would entail the suspension of the aid at issue.

79 Moreover, it is common ground that the Commission has still not adopted a decision.

80 It follows from the foregoing that the Commission had, by 3 December 1995, failed to act, this date being two months from 3 October 1995, the date on which it was called upon to act, since it had refrained from adopting a decision declaring that the State measures in question did not amount to aid within the meaning of Article 92(1) of the Treaty, or that those measures were to be classified as aid within the meaning of Article 92(1) but were compatible with the common market under Article 92(2) and (3) of the Treaty, or that the procedure under Article 93(2) of the Treaty had to be initiated, or from adopting a combination of those various possible decisions according to the circumstances.

81 The claim for a declaration of failure to act, in so far as a declaration that the Commission unlawfully failed to reach a decision pursuant to Articles 92 and 93 of the Treaty is sought, must be held to be well founded.

Alleged failure to act in pursuance of Article 85 of the Treaty

— Pleas and arguments of the parties

82 The applicant maintains that the Commission was under an obligation to send it the communication referred to in Article 6 of Regulation No 99/63 on completion of the preliminary investigation phase. Since the Commission did not fulfil that obligation, it was in a position of having failed to act.

83 In its observations, the applicant maintains that the letter of 15 May 1997 sent pursuant to Article 6 of Regulation No 99/63 cannot be regarded as defining a position and thereby putting an end to a failure to act. It argues that the statement of reasons given in the letter is quite insufficient and that the letter was also late, especially in view of the four years already spent on the investigation, and that,

ultimately, it is no more than an attempt on the part of the Commission wrongly to take advantage of the case-law of the Court of Justice according to which the definition of its position by the defendant institution terminates the failure to act. It emphasises that a letter from the Commission cannot be called a definition of a position in the sense of the judgment of the Court of Justice in Case 125/78 *GEMA* v *Commission* [1979] ECR 3173, unless it complies with the requirements set out in Article 6 of Regulation No 99/63 and, in particular, unless it sets out the reasons for which the position was adopted.

84 The applicant states that the reason given by the Commission for not applying Article 85 of the Treaty, namely the fact that France-Télévision forms a single business entity, is based on the answers provided by France 2 and France 3 on 10 November 1993 and TF1's letter of 30 April 1993. Neither the complexity of the file on the case nor the results of the study could therefore have had the least influence on the particularly terse content of the letter of 15 May 1997. The argument of the absence of Community interest put forward by the Commission also takes no account of the arguments and documents appearing in the supplement to the complaint lodged on 10 March 1997. The applicant therefore asks the Court of First Instance to call upon the Commission to send a properly reasoned reply that will enlighten the applicant and enable it to determine whether or not it is appropriate to request the Court to rule on the failure to act.

85 The defendant refers to the arguments it put forward in the context of the examination of the allegation of infringement of Article 92 of the Treaty.

86 The defendant further maintains that the letter it sent the applicant on 15 May 1997 constitutes the adoption of a position pursuant to Article 6 of Regulation No 99/63 and puts an end to the failure to act. There is therefore no need for the Court to rule on this part of the application.

87 The intervener endorses the defendant's arguments.

— Findings of the Court

88 Case-law shows that a letter addressed to a complainant which complies with the requirements of Article 6 of Regulation No 99/63 constitutes a definition of position within the meaning of the second paragraph of Article 175 of the Treaty (*GEMA* v *Commission*, paragraph 21). Such a definition of position terminates the Commission's failure to act and deprives the action brought for that purpose by the complainant of its subject-matter (Case C-282/95 P *Guérin Automobiles* v *Commission* [1997] ECR I-1503, paragraphs 30 and 31).

89 It is therefore appropriate to consider to what extent the letter addressed to the applicant by the Commission on 15 May 1997 may be regarded as a communication under Article 6 of Regulation No 99/63.

90 In this connection, the Court observes that the letter of 15 May 1997, which expressly refers to Article 6 of Regulation No 99/63, complies with all the formal requirements laid down in that article. After summarising the objections set out in the complaint, it informs the complainant of the reasons for which the complaint rejected and allows it a period of time — two months, in this case — in which to submit any further comments in writing.

91 Nevertheless, the applicant maintains that the letter of 15 May 1997 cannot be regarded as a definition of position capable of putting an end to the Commission's failure to act because the statement of reasons given therein is extremely inadequate and the letter was late.

92 That argument cannot be accepted. The Commission sets out in its letter of 15 May 1997 the two reasons which led it to the conclusion that it could not uphold the applicant's complaint alleging infringement of Article 85 of the Treaty, which is the only part of the action under consideration in this part of the

Court's assessment. First, the Commission indicates that, because the two undertakings, France 2 and France 3, belong to the same group and are controlled by the same chairman providing unity of management, they do not have real autonomy within the market but form a single economic unit such that their alleged collusion cannot, according to case-law (Case C-73/95 P *Viho* v *Commission* [1996] ECR I-5457) be regarded as contrary to Article 85 of the Treaty. Secondly, the Commission takes the view that the conditions for rejecting a complaint on the ground of lack of sufficient Community interest are, in the present case, satisfied given that 'the matter does not reveal any significant effect upon intra-Community trade'.

93 Even if it were the case, as the applicant alleges, that the statement of reasons contained in the letter of 15 May 1997 is terse and open to challenge, such a claim is irrelevant as regards the question whether the Commission has defined its position within the meaning of Article 175 of the Treaty.

94 The letter of 15 May 1997 must therefore be classified as a communication under Article 6 of Regulation No 99/63 that terminated any failure to act on the part of the Commission.

95 It follows that there is no need to rule on the claim for a declaration of failure to act in so far as a declaration is sought that the Commission unlawfully failed to act pursuant to Article 85 of the Treaty.

Alleged failure to act in pursuance of Article 90 of the Treaty

— Pleas and arguments of the parties

96 The applicant argues that the Commission's letter of 15 May 1997 informing the applicant of its intention not to initiate the procedure under Article 90 of the

Treaty is terse to the point of being non-existent and quite insufficient to enable the complainant to make any useful comment. The applicant concludes that the letter of 15 May 1997 did not put an end to the Commission's failure to act, since it cannot be viewed as the valid definition of a position.

97 The Commission argues that the letter of 15 May 1997 goes so far as to include an analysis of the facts in relation to Article 90 of the Treaty, even though that provision confers no rights on the plaintiff in that regard.

98 The intervener maintains that, in any event, the Commission's definition of position, contained in the letter of 15 May 1997, on the applicability of Article 90 of the Treaty renders the action for failure to act devoid of purpose.

— Findings of the Court

99 It is appropriate to consider to what extent the Commission's letter of 15 May 1997 constitutes the definition of a position, within the meaning of the second paragraph of Article 175 of the Treaty, putting an end to the Commission's inaction and rendering the action for failure to act devoid of purpose in so far as it concerns the Commission's alleged failure to act pursuant to Article 90 of the Treaty.

100 The Court observes that, in its letter of 15 May 1997, the Commission both informed the applicant that, having considered the merits of its allegations based on Article 90 of the Treaty, it was unable to find that the facts complained of

amounted to an infringement, and set out the reasons why it did not intend to initiate the procedure under Article 90 of the Treaty.

101 Thus it is clear, as much from the content of that letter as from the context in which it was written, that, when the Commission addressed the letter of 15 May 1997 to the applicant, it took the view that the information it had obtained did not justify its upholding the part of the complaint which alleged infringement of Article 90 of the Treaty.

102 Moreover, as has been observed above, a claim that a statement of reasons is incorrect or insufficient is irrelevant to the question whether the Commission has defined its position within the meaning of Article 175 of the Treaty.

103 It follows that, by addressing the letter of 15 May 1997 to the complainant, the Commission defined its position within the meaning of the second paragraph of Article 175 of the Treaty and that there is no longer any need to adjudicate on the claim for a declaration of failure to act in so far as a declaration is sought that the Commission unlawfully failed to act pursuant to Article 90 of the Treaty.

The claim for annulment, made in the alternative

104 The applicant argues, in the alternative, that, in so far as the Commission's letter of 11 December 1995 constitutes a decision to reject the complaint of 10 March 1993, the Court should declare that decision unlawful because it does not find that Articles 85, 90 and 92 of the Treaty have been infringed. Whilst formally acknowledging in its reply that the Commission conceded that the letter of 11 December 1995 did not constitute the definition of a position within the meaning of Article 175 of the Treaty, the applicant nevertheless stated that,

should the Court take the contrary view, it wished to pursue its purely alternative claim for annulment.

105 As is clear both from the concordant opinions of the parties and from the Court's findings in relation to the action for failure to act, the letter of 11 December 1995 is merely informative and does not contain any definition of the Commission's position on the substantive merits of the case.

106 Given that it was presented entirely in the alternative, there is therefore no need to adjudicate on the claim for annulment.

Costs

107 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Furthermore, under Article 87(6) of those rules, where a case does not proceed to judgment, costs are in the discretion of the Court.

108 In the present case, the Commission has been essentially unsuccessful. It failed to act upon the letter of formal notice within the period laid down in Article 175 of the Treaty, and it was not until 15 May 1997, that is to say, after the present action was brought, that it notified the applicant of its definition of position in respect of the part of the complaint of 10 March 1993 alleging infringement of Articles 85 and 90 of the Treaty.

109 It follows from the foregoing that it is appropriate, in the circumstances of the case, to order the Commission to bear its own costs together with those incurred

by the applicant, with the exception of the costs incurred by the applicant as a result of the intervention of the French Republic.

110 Pursuant to Article 87(4) of the Rules of Procedure, the French Republic will bear its own costs, together with the costs incurred by the applicant as a result of its intervention.

On those grounds,

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

hereby:

1. **Declares that the Commission has failed to fulfil its obligations under the EC Treaty by failing to adopt a decision concerning the part of the complaint lodged by Télévision Française 1 SA on 10 March 1993 concerning State aid;**

2. **Holds that there is no need to adjudicate on the allegation that the Commission failed to act pursuant to Articles 85 (now Article 81 EC) and 90 (now Article 86 EC) of the EC Treaty;**

3. Declares the action inadmissible in so far as it is directed against the Commission's failure to act under Article 86 of the EC Treaty (now Article 82 EC);

4. Holds that there is no need to adjudicate on the alternative claim for annulment;

5. Orders the Commission to bear its own costs together with those incurred by the applicant, with the exception of the costs incurred by the applicant as a result of the intervention of the French Republic;

6. Orders the French Republic to bear its own costs, together with the costs incurred by the applicant as a result of its intervention.

Jaeger Lenaerts Tiili

Azizi Mengozzi

Delivered in open court in Luxembourg on 3 June 1999.

H. Jung M. Jaeger

Registrar President