JUDGMENT OF THE COURT OF FIRST INSTANCE
(Third Chamber, Extended Composition)
15 September 1998 *

In Case T-95/96,

Gestevisión Telecinco SA, a company governed by Spanish law, established in Madrid (Spain), represented by Santiago Muñoz Machado, of the Madrid Bar, with an address for service in Luxembourg at the Chambers of Carlos Amo Quiñones, 2 Rue Gabriel Lippmann,

applicant,

v

Commission of the European Communities, represented initially by Gérard Rozet, Legal Adviser, and Fernando Castillo de la Torre, of its Legal Service, and then by Mr Rozet and Juan Guerra Fernández, 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, Deputy Director of the Department of Legal Affairs at the Ministry of Foreign Affairs, and Gauthier Mignot, Secretary for Foreign Affairs, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

intervener,

* Language of the case: Spanish.

APPLICATION for a declaration under Article 175 of the EC Treaty that the Commission failed to fulfil its obligations under the Treaty, first, by failing to adopt a decision in relation to the complaints made by the applicant against the Kingdom of Spain for breach of Article 92 of the Treaty and secondly by failing to initiate the procedure provided for under Article 93(2) of the Treaty, alternatively, for annulment under Article 173 of the Treaty of the Commission's decision allegedly contained in a letter of 20 February 1996,

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

composed of: V. Tiili, President, C. P. Briët, K. Lenaerts, A. Potocki and J. D. Cooke, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 10 March 1998,

gives the following

Judgment

Background to the dispute

1 There are 10 television companies in Spain, of which three are in the private sector and seven of which are public service broadcasters.

2 The main source of finance for the private television companies is revenue generated by advertising. The public television companies, on the other hand, are only partially funded by advertising. They are managed either directly by the State through the intermediary of the public body RTVE, or governed by an indirect system of management which has branches in various regional channels created for that purpose in the various autonomous Spanish communities.

3 From the start of their activities, all the public television companies have received, in varying proportions, funds from the authorities within whose jurisdiction they fall. So, they receive funds from two sources; advertising revenue and State grants.

4 The applicant, Gestevisión Telecinco SA, a company incorporated under Spanish law in Madrid (Spain), is one of the three private commercial companies. On 2 March 1992, it lodged with the Commission a complaint (hereinafter 'the first complaint') seeking to have the grants which the regional television companies receive from their respective autonomous communities declared incompatible with the common market within the meaning of Article 92 of the EC Treaty (hereinafter 'the Treaty').

5 By letter dated 30 April 1992 the Commission acknowledged receipt of that complaint and informed the applicant that it had 'decided to ask the Spanish authorities for specific information in order to determine [...] whether or not the practices complained of were compatible with the Community provisions relating to State aid'. A request for information in that form was sent to the Spanish authorities on the same day.

6 On 25 November 1992, the applicant sent a letter to the Commission with a view to obtaining information on progress in relation to its complaint. In a letter dated 3 December 1992, the Commission informed it that, by letter dated 28 October

1992, it had reminded the Spanish authorities of their duty to reply to the request for information which had been sent to them.

7 On 12 November 1993, the applicant lodged another complaint seeking to have the subsidies granted by the central Spanish State to the public body RTVE declared incompatible with the common market under Article 92 of the Treaty (hereinafter 'the second complaint').

8 On 24 November 1993, the applicant sent a letter to Mr Van Miert, the member of the Commission with responsibility for competition matters, informing him of the existence of the two abovementioned complaints, of the fact that the aid being challenged in those complaints had not been notified, and of the irreversible consequences of the Commission's slowness in dealing with those complaints.

9 In December 1993, the Commission instructed a firm of outside consultants to carry out a study of the funding of public television companies in the Community as a whole.

10 In February 1994, it responded to a telephone request for information from the applicant by saying that it had decided to await completion of that study before continuing its investigation into the complaints concerned and so before taking any decision to initiate a procedure under Article 93(2) of the Treaty.

11 On 12 May 1995, it divulged, in response to a further telephone request for information, that the report from the outside firm of consultants, which had been corrected following various delays in its drafting, was to be sent to it before the end of the month. It received the final report in question during October 1995 at the latest.

12 However, by the beginning of February 1996, it had still not ruled on the applicant's complaints. Consequently, in a registered letter dated 6 February 1996, received on 8 February 1996, the applicant formally called upon the Commission to rule on the two complaints in accordance with Article 175 of the Treaty and to initiate the procedure under Article 93(2) of the Treaty.

13 In a letter dated 20 February 1996, the Commission replied as follows:

'Having considered your complaint in the light of Article 92 et seq. of the Treaty and following completion of a study commissioned in December 1993 on the funding of public television in other Member States, the Directorate-General for Competition, by letters dated 18 October 1995 and 14 February 1996, requested the Spanish authorities to provide a number of further details and explanations necessary for investigating this case'.

14 After that letter, the Commission did not adopt a decision on the two complaints filed by the applicant.

Procedure

15 The applicant brought this action by an application lodged with the Registry of the Court of First Instance on 17 June 1996.

16 By application lodged with the Registry of the Court of First Instance on 8 November 1996, the French Republic applied to intervene in support of the defendant. That application was granted by an order of the President of the Third Chamber (Extended Composition) dated 4 February 1997.

17 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber, Extended Composition) decided to open the oral procedure without preparatory inquiry. However, as a measure of organisation of procedure, provided for in Article 64 of the Rules of Procedure, the parties were requested to respond to certain questions at the hearing.

18 The parties made their submissions and replied to the questions posed by the Court of First Instance at the hearing on 10 March 1998.

Forms of order sought

19 The applicant requests that the Court of First Instance should:

— declare that the Commission failed to fulfil its obligations under the Treaty by not adopting a decision on the two complaints lodged by it and by not initiating the procedure laid down in Article 93(2) of the Treaty;

— alternatively, annul the Commission's decision contained in its letter of 20 February 1996;

— order the defendant to pay the costs;

— order the intervener to pay its own costs and the costs incurred by the applicant as a result of its intervention.

20 The Commission requests that the Court of First Instance should:

— declare the claim for a declaration of failure to act inadmissible, alternatively, dismiss it as unfounded;

— declare the claim for annulment inadmissible;

— order the applicant to pay the costs.

21 The French Republic supports the form of order sought by the Commission.

Failure to act

Arguments of the parties

Admissibility

22 The Commission states first of all that the decision it will adopt at the end of the administrative procedure, pursuant to Article 92 et seq. of the Treaty, will be sent to the Kingdom of Spain. The procedure for supervising State aid is based on dialogue between the Commission and the Member State concerned, unlike the procedure for applying Articles 85 and 86, which follows different rules under which a complainant has a decisive role (judgment of the Court of First Instance in Case T-277/94 *AITEC* v *Commission* [1996] ECR II-351, paragraph 71). Since the complainant does not have any status in this context, it is inconceivable that a decision

should be addressed to it directly (Opinion of Advocate General Tesauro in Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487).

23 Furthermore, the provisions of the third paragraph of Article 175 of the Treaty cannot be interpreted so broadly as to allow interested third parties the possibility of bringing an action. In this regard, the defendant observes that the capacity to bring an action under Article 175 of the Treaty is more limited than the capacity to bring an action under Article 173 of the Treaty. Only the person to whom an act is potentially addressed has the capacity to bring an action under Article 175 and that is not the position here (judgment of the Court in Case 246/81 *Lord Bethell* v *Commission* [1982] ECR 2277, paragraph 16, and judgment in *AITEC* v *Commission*, cited above, paragraph 62).

24 Secondly, the Commission considers that the fact of this action being inadmissible does not necessarily mean that the applicant is deprived of the right to legal protection. It observes that it does not have exclusive jurisdiction to adjudge a State measure to be State aid. National courts can also rule on this question in order to determine the consequences of the illegality of measures in question under national law (judgments of the Court of Justice in Case 78/76 *Steinike and Weinlig* [1977] ECR 595, paragraph 14, Case C-354/90 *Fédération Nationale du Commerce Extérieur des Produits Alimentaires et Syndicat National des Négociants et Transformateurs de Saumon* [1991] ECR I-5505 and Case C-39/94 *SFEI and Others* [1996] ECR I-3547, paragraphs 31 to 53). It also challenges the applicant's claim that it has no remedies under Spanish law.

25 Finally, the Commission states that the legal protection afforded by the Court of First Instance cannot in any event serve to cure the deficiencies in legal protection at national level (Opinion of Advocate General Gulmann in Cases C-15/91 and C-108/91 *Buckl and Others* v *Commission* [1992] ECR I-6061, paragraph 27, and judgment of the Court of First Instance in Case T-398/94 *Kahn Scheepvaart* v *Commission* [1996] ECR II-477, paragraph 50).

26 The applicant observes that, more than four years after the lodging of the first complaint and more than two and a half years after the second, the Commission's failure to define its position in relation to the two complaints and to initiate a procedure under Article 93(2) of the Treaty persists.

27 It points out that, in a letter dated 6 February 1996, received on 8 February 1996, it formally called upon the Commission to take action under the second paragraph of Article 175 of the Treaty. It considers that, in view of the excessive length of time which elapsed from the time when the two complaints were lodged, the Commission wrongfully failed to act and was under a duty to define its position within two months. That period expired without the Commission having defined its position.

28 In its letter of 20 February 1996, the Commission did not adopt a position. On the contrary, it avoided taking any position on the basis that it had requested supplementary information from the Spanish Government and that the complaints were still being examined. The Court has ruled in this regard that where an institution is called upon to define its position, a letter from that institution stating that the questions raised are in the process of being considered does not amount to the definition of a position releasing the institution from its wrongful failure to act (judgment of the Court in Joined Cases 42/59 and 49/59 *Snupat* v *High Authority* [1961] ECR 99).

29 The applicant further observes that the Commission seeks to justify its inaction by the unacceptable argument that the preliminary investigation into the State measures to which the complaints relate is not yet complete. Such a method of proceeding infringes the fundamental right to effective legal protection.

30 The applicant also observes that the Commission was under a duty in this case to initiate *inter partes* proceedings under Article 93(2) of the Treaty and then to rule on the compatibility of the aid. Such steps and the resulting failure to adopt any such decisions affected it directly and individually in its capacity as complainant and as a competitor of the companies benefiting from the aid (judgment of the Court of Justice in Case 169/84 *Cofaz and Others* v *Commission* [1986] ECR 391;

judgments of the Court of First Instance in Case T-49/93 *SIDE* v *Commission* [1995] ECR II-2501 and Case T-95/94 *Sytraval et Brink's France* v *Commission* [1995] ECR II-2651). The coherence of the Community system of legal protection requires that its *locus standi* in this case should also be recognised.

31 The applicant also observes that the conditions for admissibility under Article 175 of the Treaty are comparable to those imposed by Article 173 of the Treaty, as the Court stated in its judgment in Case 15/70 *Chevalley* v *Commission* [1970] ECR 975).

32 It also takes the view that there is no possibility of bringing an action before the national court in this case since the aid of which it complains is granted pursuant to budgetary laws against which an individual cannot bring an action under Spanish law. Furthermore, the fact that the beneficiaries of the aid are public companies means that the instruments implementing those laws are internal and unpublished and also incapable of challenge. Even if that were not the case, no national court would be bold enough to hold that the grants made to the public television companies amounted to State aid, knowing that the matter had been before the Commission for four years without it having initiated an *inter partes* procedure under Article 93(2) of the Treaty. Finally, because of the attitude of the Commission in this case, no national court could require the grants concerned to be repaid if they were found to be incompatible (judgment of the Court of Justice in Case 223/85 *RSV* v *Commission* [1987] ECR 4617).

33 The French Republic, as intervener, referring to the operative part of the judgment in *SFEI and Others*, cited above, challenges the applicant's argument that no national court would be minded to classify a measure which has been the subject of investigation by the Commission for several years as State aid. Under the operative part of that judgment, a national court may rule on such a question even if it is pending before the Commission at the same time. Moreover, the national court may request clarification from the Commission or refer a question to the Court of Justice for a preliminary ruling under Article 177 of the Treaty.

Substance

34 The applicant emphasises that it is settled case-law that the procedure under Article 93(2) of the Treaty is indispensable where the Commission experiences serious difficulties in assessing whether aid is compatible with the common market. The Commission cannot confine itself to the preliminary stage provided for by Article 93(3) so as to take a favourable decision in relation to aid unless it is in a position to reach the firm view, following a preliminary investigation, that the aid is compatible with the Treaty (judgments in *Cook* v *Commission*, cited above, and Case 84/82 *Germany* v *Commission* [1984] ECR I-1451; and in *SIDE* v *Commission*, cited above).

35 In this case, the length of time which elapsed from the time when the complaints were lodged in itself shows that the Commission is having serious difficulties in assessing the compatibility of the aid concerned with the common market. The fact that it requested an external report on the funding methods for public television companies only confirms that hypothesis. Even once that report was produced, the Commission continued to experience difficulties in assessing the aid concerned given that, several months later, it had still not adopted a position in relation to the facts complained of and was still requesting supplementary information from the Spanish authorities.

36 In its judgment in Case 120/73 *Lorenz* [1973] ECR 1471 the Court of Justice furthermore recognised that the Commission has a reasonable period of two months to make an initial assessment of any aid notified to it. The Commission also has a duty to carry out a preliminary investigation within a reasonable period where a Member State has not only failed to notify the aid but also implemented it in breach of its Community obligations.

37 In adopting the attitude which it has assumed in this case, the Commission is also failing to observe its procedural rights under the Treaty in the context of the procedure under Article 93(2) of the Treaty. The applicant's rights can only be

respected if it is able to challenge decisions made by the Commission without initiating the procedure under Article 93(2) (judgments of the Court of Justice in *Cook* v *Commission*, cited above, and judgment of the Court in Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203). Those procedural rights are also meaningless if the Commission is allowed to prolong its preliminary investigation into State measures indefinitely.

38 The applicant further disputes that the obligation to initiate an administrative procedure under Article 93(2) is subject to a prior finding of aid under Article 92(1) of the Treaty. The Commission's administrative practice shows that it has in the past initiated such procedures where it was in doubt as to whether the State measures in question could be regarded as aid (judgment in *Sytraval and Brink's France* v *Commission*, cited above, paragraph 79). In any event, in its judgment in Case T-106/95 *FFSA and Others* v *Commission* [1997] ECR II-229, the Court of First Instance stated that granting public funds to a company constituted State aid even if Article 92 might subsequently prove to be inapplicable by virtue of Article 90(2) of the Treaty.

39 Finally, the applicant considers that account must be taken of the fact that, since no procedure has been initiated under Article 93(2), the Spanish authorities are still disbursing the contested grants to the Spanish public television companies even though those grants were challenged several years ago. The applicant submits that, in these circumstances, the Commission was under a duty to act which it has failed to fulfil contrary to the Treaty.

40 The Commission argues that, whilst it is true that it has not made any decision as to the existence of State aid or the initiation of the procedure under Article 93(2) of the Treaty, it has none the less taken a number of actions to enable it to analyse all facets of a particularly complex problem, common as it is to a large number of Member States.

41 It points out that it entered into correspondence with the Spanish authorities between 30 April 1992 and 8 February 1993 and that it subsequently commissioned a study on the exploitation and operation of public television channels in the Community in December 1993. Following receipt of that study, it again

entered into correspondence with the Spanish authorities between 18 October 1995 and 5 July 1996. During the period when the study was being drafted, it temporarily refrained from taking other initiatives which might overlap with the study.

42 In these circumstances, the procedure relating to the measures concerned cannot be considered as having been 'suspended'. In fact, most of the period of two and a half years which passed between the time when the second complaint was lodged and the time when the applicant called upon the Commission to act was spent on producing the external study referred to above.

43 The Commission points out that neither the Treaty nor secondary legislation provides for a time-limit within which it is obliged to react to a complaint relating to non-notified State aid.

44 In this case, account must also be taken of the complexity, both legal and political, of the matter in question. The manner in which this case was dealt with called for a particularly cautious approach because of the recent opening-up of televisual activity to competition. The first complaint was the first ever of its kind and related to seven different regional grants. The complaints lodged by the applicant furthermore raised delicate problems relating to effects on intra-Community trade, offsetting the cost of public service obligations and classification in terms of aid, particularly because of the lack of accounting transparency prevailing at times in the public companies in question.

45 The time taken in dealing with this case cannot therefore be considered as constituting a wrongful failure to act, contrary to the rules of the Treaty and in particular to the obligation to initiate the procedure under Article 93(2) of the Treaty.

46 The Commission also draws attention to the serious repercussions which a decision to initiate the procedure under Article 93(2) of the Treaty would have on public television companies throughout the Community. Indeed, in such a case, the grant of such aid would have to be suspended (judgment of the Court of Justice in Case C-312/90 *Spain* v *Commission* [1992] ECR I-4117), a step which would be contrary to the principle of sound administration.

47 Finally, it states that it must first of all rule on the question whether the contested grants can be classified as aid within the meaning of Article 92(1) of the Treaty before being able to rule on their compatibility with the common market. In that connection, it disputes that it has developed a practice whereby it initiates the procedure under Article 93(2) in order to determine whether the State measures can be classified as 'aid' within the meaning of Article 92(1) of the Treaty.

48 It concludes from those considerations that it was not able to define its position or to take the decisions requested by the applicant at the time when it was formally called upon to do so. In this regard, it refers to the Opinion of Advocate General Edward in Case T-24/90 *Automec* v *Commission* [1992] ECR II-2223.

Findings of the Court

Preliminary observations

49 Article 93 of the Treaty provides for a special procedure of constant review and supervision of state aid by the Commission. In relation to new aid which Member States may intend to institute, there is a procedure without which no aid can be

considered properly granted and the Commission must be informed of any plans to grant or alter aid prior to such plans being put into effect.

50 The Commission then proceeds to carry out a preliminary investigation into the planned aid. If, at the end of that investigation, it appears that a plan is not compatible with the common market, it must initiate the procedure provided for in the first subparagraph of Article 93(2) of the Treaty forthwith.

51 In the context of that procedure, a distinction must therefore be drawn between, on the one hand, the preliminary stage of investigating aid, instituted under Article 93(3) of the Treaty, whose aim is solely to enable the Commission to form an initial view on the compatibility, in part or in whole, of the aid in question and, on the other hand, the analysis stage referred to in Article 93(2) of the Treaty, which is intended to give the Commission full information on all the details of the case (see the judgments in *Cook* v *Commission*, cited above, paragraph 22, and *Matra* v *Commission*, cited above, paragraph 16).

52 The procedure under Article 93(2) is indispensable if the Commission experiences serious difficulties in assessing whether aid is compatible with the common market. The Commission cannot therefore limit itself to the preliminary phase under Article 93(3) 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 measure cannot be classified as aid within the meaning of Article 92(1) or that the measure, whilst constituting aid, is compatible with the common market. On the other hand, if the initial analysis has resulted in the Commission taking the contrary view or has not even enabled all the difficulties raised by the assessment of the measure in question to be overcome, the institution has a duty to gather all necessary views and to that end to initiate the procedure under Article 93(2) (see, on this point, the judgments of the Court of Justice in *Germany* v *Commission*, cited above, paragraph 13, *Cook* v *Commission*, cited above, paragraph 29, *Matra* v *Commission*, cited above, paragraph 33 and Case C-367/95 P *Commission* v *Sytraval et Brink's France* [1998] ECR I-1719, paragraph 39).

53 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 above, 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, which may make it necessary for it to examine matters not expressly raised by the complainants (judgment in *Commission* v *Sytraval et Brink's France*, cited above, paragraph 62).

54 Finally, it must be remembered that the Commission has exclusive jurisdiction to determine whether aid is incompatible with the common market (judgments in *Steinike and Weinlig*, cited above, paragraphs 9 and 10, and *Fédération Nationale du Commerce Extérieur des Produits Alimentaires and Syndicat National des Négociants et Transformateurs de Saumon*, cited above, paragraph 14).

55 It follows from all those rules that, at the end of the preliminary stage of the investigation into a State measure, the Commission has a duty to adopt one of the following three decisions vis-à-vis the Member State concerned: it may decide that the State measure at issue does not constitute 'aid' within the meaning of Article 92(1) of the Treaty; or it may decide that the measure, although constituting aid within the meaning of Article 92(1), is compatible with the common market under Article 92(2) or (3); or it may decide to initiate the procedure under Article 93(2).

56 As the law so stands, it is appropriate first of all to consider whether the claim for a declaration that the Commission has failed to act is admissible and then, if appropriate, whether it is well founded.

Admissibility

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

58 In its judgment in Case C-68/95 *T. Port* [1996] ECR I-6065, paragraph 59, the Court stated that, just as the fourth paragraph of Article 173 allows individuals to bring an action for annulment against a measure of an institution not addressed to them provided that the measure is of direct and individual concern to them, the third paragraph of Article 175 must be interpreted as also entitling them to bring an action for failure to act against an institution which they claim has failed to adopt a measure which would have concerned them in the same way.

59 The Commission is therefore wrong to consider that the claim for a declaration of failure to act is inadmissible on the sole ground that the applicant is not the potential addressee of any measures it might adopt in this case (see paragraph 55 above).

60 In this case, it is appropriate to examine to what extent the measures which the Commission allegedly failed to adopt can be considered to be of direct and individual concern to the applicant.

61 In that connection, it follows from the judgment of the Court of First Instance in Case T-435/93 *ASPEC and Others* v *Commission* [1995] ECR II-1281, paragraph 60, that an undertaking must be considered to be directly affected by a decision of the Commission relating to State aid where there is no doubt that the national authorities intend to implement their plan to grant aid. In the present case, it is common ground that the various grants at issue have already been granted by the Spanish authorities concerned and continue to be granted. In those circumstances, it must be considered as established that the applicant is directly affected.

62 As to whether it is individually affected, it is settled case-law that natural or legal persons are individually concerned by a decision where that decision affects them by reason of the attributes peculiar to them or by reason of factual circumstances differentiating them from all other persons (judgment of the Court in Case 25/62 *Plaumann* v *Commission* [1963] ECR 197, 226; judgments of the Court of First Instance in Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens*

and Others v *Commission* [1995] ECR II-2941, paragraph 51, and in Case T-266/94 *Skibsværftsforeningen and Others* v *Commission* [1996] ECR II-1399, paragraph 44).

63 It is therefore appropriate to consider in this case whether the applicant would be individually affected by a decision which the Commission might adopt in relation to the Member State concerned at the end of the preliminary stage of investigation, to the effect that the State measure at issue does not constitute aid, or to the effect that it does constitute aid but is compatible with the common market, or to the effect that it necessitates the procedure under Article 93(2) of the Treaty to be initiated.

64 It is settled case-law that where, without initiating the procedure under Article 93(2), the Commission finds, on the basis of Article 93(3), that a State measure does not constitute aid, or that such a measure, although constituting aid, is compatible with the common market, the persons concerned, beneficiaries of the procedural guarantees laid down in Article 93(2), may secure compliance therewith only if they are able to challenge such a Commission decision before the Community judicature (see, most recently, the judgment in *Commission* v *Sytraval et Brink's France*, cited above, paragraph 37, and, previously, the judgments in *Cook* v *Commission*, cited above, paragraph 23, and *Matra* v *Commission*, cited above, paragraph 17). The same would apply, in this case, in the event that the Commission took the view that the grants made to the Spanish public television companies amounted to aid but that they did not fall within the prohibition laid down in Article 92 of the Treaty by virtue of Article 90(2) thereof (judgment in *FFSA and Others* v *Commission*, cited above, paragraphs 172 and 178, confirmed on appeal by order of the Court of Justice in Case C-174/97 P *FFSA and Others* v *Commission* [1998] ECR I-1303).

65 The persons concerned for the purposes of Article 93(2) of the Treaty, who are thus to be considered as directly and individually concerned, are those persons, undertakings or associations whose interests might be affected by the grant of the aid, in particular competing undertakings and trade associations (see the judgment in Case 323/82 *Intermills* v *Commission* [1984] ECR 3809, paragraph 16).

66 In the present case, the Commission has not disputed that the applicant is a party concerned within the meaning of Article 93(2), this position ensuing from its status as manager of one of the three private television channels in competition with the public television channels to which the contested grants were made and from the fact that both complaints lodged by it prompted the preliminary investigation carried out by the Commission in relation to those grants.

67 Furthermore, the applicant properly brought an action before the Community judicature which has sole jurisdiction, to the exclusion of any national court, to determine whether the Commission failed, in breach of the Treaty, to initiate the procedure under Article 93(2) of the Treaty, which is a necessary precondition for the adoption of a final decision which would be of direct and individual concern to the applicant, such as a decision declaring compatible with the common market, an aid whose classification has until that point raised serious difficulties.

68 In that connection, the possible existence of a remedy at domestic level, whereby the applicant could challenge the grant of the disputed allowances to the public channels, cannot affect the admissibility of the applicant's claim for a declaration of failure to act (see the judgment in *Kahn Scheepvaart* v *Commission*, cited above, paragraph 50).

69 Accordingly, the failure by the Commission to take any decision following its initiation of the preliminary investigation procedure in relation to the grants made by the various Spanish State bodies to the public television companies must be considered to be of direct and individual concern to the applicant.

70 It follows that the claim for a declaration that the Commission failed to act is admissible.

Substance

71 In order to rule on the substance of the claim for a declaration that the Commission has failed to act, it is necessary to determine whether, at the time when the Commission was formally called upon to define its position within the meaning of Article 175 of the Treaty, it was under a duty to act (orders of the Court of First Instance in Case T-126/95 *Dumez* v *Commission* [1995] ECR II-2863, paragraph 44 and Case T-286/97 *Goldstein* v *Commission* [1998] ECR II-2629, paragraph 24).

72 Since it has exclusive jurisdiction to assess the compatibility of State aid with the common market, the Commission must, in the interests of sound administration and the fundamental rules of the Treaty relating to State aid, conduct a diligent and impartial examination of a complaint alleging aid to be incompatible with the common market (see the judgment in *Commission* v *Sytraval et Brink's France*, cited above, paragraph 62).

73 As regards the period within which the Commission must rule on such a complaint, it is appropriate to note that, in relation to Article 85 of the Treaty, the Court of First Instance has already ruled that the Commission cannot postpone indefinitely defining its position in relation to an application for clearance under Article 85(3) (judgment in Joined Cases T-213/95 and T-18/96 *SCK and FNK* v *Commission* [1997] ECR II-1739, paragraph 55), an area in which it has exclusive jurisdiction. In that case, the Court of First Instance held it to be a general principle of Community law that the Commission must act within a reasonable time in adopting decisions following administrative procedures relating to competition policy (ibid., paragraph 56, and the cases cited therein).

74 It follows that the Commission cannot 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.

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

76 In this case, it is appropriate first of all to examine whether the Commission should, as the applicant claims, have undertaken a preliminary investigation of the disputed grants made to the public television companies within a 'reasonable time' of two months, such as the period specified in the judgment in *Lorenz*, cited above (paragraph 4).

77 In referring to a period of two months, that judgment was based on the need to take into account the legitimate interests of the Member State concerned in quickly ascertaining for certain the position as to the legality of measures which have been notified to the Commission.

78 That consideration cannot be entertained where the Member State concerned has implemented aid without having notified the Commission beforehand. If the State had doubts as to whether the aid planned was State aid, it would be at liberty to safeguard its interests by informing the Commission of the planned aid which would place the Commission under an obligation to define its position within a period of two months (judgment in *SFEI and Others*, cited above, paragraph 48).

79 So, the two-month period referred to in *Lorenz* cannot apply as it stands in a case such as this, where the aid in dispute has not been notified to the Commission.

80 Next, it is appropriate to note that the applicant's first complaint was lodged on 2 March 1992 and the second complaint on 12 November 1993. It follows that, at the time when the Commission was formally called upon to act pursuant to Article 175 of the Treaty, that is to say on 8 February 1996, the date when the applicant's letter of 6 February 1996 inviting the Commission to act was received, the Commission's preliminary investigation had so far taken 47 months for the first complaint and 26 months for the second.

81 Those periods are so long that they should have been sufficient to enable the Commission to close the preliminary stage of investigation into the aid in question and thus be in a position to adopt a decision thereon (see paragraph 55 above), unless it could show exceptional circumstances justifying such periods.

82 In that connection, the Commission points out that the first complaint was the first of its kind it had ever received, that Member States may legitimately pursue non-commercial aims in the televisual sector and that delicate problems were raised in relation to the effect on intra-Community trade and the offsetting of costs of performing public-service obligations under Article 90(2) of the Treaty. At the hearing, it referred to the existence of the Protocol on the System of Public Broadcasting in the Member States annexed to the EC Treaty by the Treaty of Amsterdam of 2 October 1997 (OJ 1997 C 340, p. 109).

83 However, it is apparent from the submissions and pleadings of the parties that the only real difficulty facing the Commission in this case relates to the extent to which the disputed grants made to the Spanish public television companies are intended to compensate them in respect of specific public-service obligations imposed upon them by national legislation. When assessing that issue, the Protocol cited above cannot be taken into consideration as it was adopted almost 19 months after the applicant called upon the Commission to act, which was even before the opening, on 29 March 1996, of the inter-Governmental conference which led to the Treaty of Amsterdam being concluded.

84 The Commission furthermore attempts to justify the length of the delays in question by reference to the steps it took after the applicant filed its complaints.

85 On this point, it is appropriate to note that before the applicant called upon the Commission to act, it twice, on 30 April 1992 and 18 October 1995, formally requested information from the Spanish authorities in relation to the grants in question. In December 1993, it also commissioned a firm of consultants to produce an in-depth study on the funding of public television companies in the Community as a whole.

86 However, those steps in no way justify the Commission having prolonged to the extent that it did its preliminary investigation into the aid in question, thereby considerably exceeding the period of deliberation reasonably necessary to assess the aid under Article 90(2) of the Treaty. Accordingly, and even if it is accepted that the above Protocol annexed to the EC Treaty by the Treaty of Amsterdam shows the politically sensitive nature of the subject-matter in question for the Member States, the Commission should, at the time when it was called upon to act, have been in a position to adopt a decision declaring that the grants in question did not constitute aid, or that they did constitute aid but were compatible with the common market or that serious difficulties obliged it to initiate the procedure under Article 93(2), thus allowing all parties concerned, and in particular the Member States, to submit their observations. Furthermore, it could equally have adopted within the periods concerned, a hybrid decision combining, according to the circumstances, one or more of the decisions of principle set out above in respect of different aspects of the State measures in question (see, on this point, the judgments in Case 74/76 *Iannelli & Volpi* [1977] ECR 557, paragraphs 14 to 17, and Case T-107/96 *Pantochim* v *Commission* [1998] ECR II-311, paragraph 51).

87 At this stage, it is now appropriate to consider further the extent to which the Commission defined its position upon the applicant's request to act contained in its letter of 20 February 1996.

88 The applicant has rightly pointed out that that letter does not in any way define the Commission's position in relation to the complaints in question because the Commission simply states that, having examined the complaints and following completion of an outside study, it asked the Spanish authorities for supplementary information. A letter from an institution called upon to act under Article 175 of the Treaty stating that the questions raised are being examined does not in fact amount to the defining of a position such as to release it from its duty to act (judgments in *Snupat* v *High Authority*, cited above, and Case 13/83 *Parliament* v *Council* [1985] ECR 1513, paragraph 25).

89 It is, furthermore, common ground that the Commission had still not adopted any of the decisions mentioned above at the time when this action was being considered.

90 It follows from the foregoing that the Commission had, by 8 April 1996, failed to act, this date being two months from receipt by it, on 8 February 1996, of the letter calling upon it to act on the ground that it 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), or that the procedure until Article 93(2) of the Treaty had to be initiated, or from adopting a combination of these various possible decisions according to the circumstances.

91 Therefore, the claim for a declaration of failure to act must be considered to be well founded.

92 Accordingly, as it was only made in the alternative, there is no reason to rule on the claim for annulment.

Costs

93 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.

94 Since the Commission is the unsuccessful party, it will be ordered to pay the costs incurred by the applicant, as sought by the applicant, other than the costs incurred as a result of the intervention by the French Republic.

95 Pursuant to Article 87(4) of the Rules of Procedure, the French Republic shall bear its own costs. In addition, it shall bear 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 failed to fulfil its obligations under the EC Treaty by failing to adopt a decision following the two complaints lodged by the applicant on 2 March 1992 and 12 November 1993;

2. Orders the Commission to pay the applicant's costs other than those incurred as a result of the intervention by the French Republic;

3. Orders the French Republic to bear its own costs together with the costs incurred by the applicant by reason of its intervention.

Tiili Briët Lenaerts

Potocki Cooke

Delivered in open court in Luxembourg on 15 September 1998.

H. Jung V. Tiili

Registrar President