JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)
18 September 2001 *

In Case T-112/99,

Métropole télévision (M6), established in Neuilly sur Seine (France),

Suez-Lyonnaise des eaux, established in Nanterre (France),

France Télécom, established in Paris (France),

represented by D. Théophile, lawyer, with an address for service in Luxembourg,

and

Télévision française 1 SA (TF1), established in Paris, represented by P. Dunaud and P. Elsen, lawyers, with an address for service in Luxembourg,

applicants,

v

Commission of the European Communities, represented by E. Gippini Fournier and K. Wiedner, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: French.

supported by

CanalSatellite, established in Paris, represented by L. Cohen-Tanugi and F. Brunet, lawyers, with an address for service in Luxembourg,

intervener,

APPLICATION for annulment of Articles 2 and 3 of Commission Decision 1999/242/EC of 3 March 1999 relating to a proceeding pursuant to Article 85 of the EC Treaty (IV/36.237 — TPS) (OJ 1999 L 90, p. 6),

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

composed of: J. Azizi, President, K. Lenaerts and M. Jaeger, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 18 January 2001,

gives the following

Judgment

General background to the case

A — *Description of the operation*

1 This case relates to Commission Decision 1999/242/EC of 3 March 1999 relating to a proceeding pursuant to Article 85 of the EC Treaty (Case No IV/36.237 — TPS) (OJ 1999 L 90, p. 6) ('the contested decision') concerning the creation of Télévision par satellite (hereinafter 'TPS'), whose object is to devise, develop and broadcast, in digital mode by satellite, a range of television programmes and services, against payment, to French-speaking television viewers in Europe (point 76 of the contested decision).

2 TPS, which was set up in the form of a partnership (société en nom collectif) under French law by six major companies active in the television sectors (Metropole television (M6), Télévision française 1 SA (TF1), France 2 and France 3) or in the telecommunication and cable distribution sectors (France Telecom and Suez-Lyonnaise des Eaux) is a new entrant on markets that are very much dominated by a long-standing operator, namely Canal+ and its subsidiary CanalSatellite.

B — *The relevant markets and their structure*

3 According to the contested decision, the main product market affected by the creation of TPS is the pay-TV market (points 23 and 24 of the contested decision). The operation also affects the market in the acquisition of broadcasting rights and the marketing of special-interest channels.

4 As regards the relevant geographic market, the Commission stated in the contested decision that at the time when the decision was adopted, those various markets had to be assessed on a national basis, so that in the present case the markets were confined to France (points 40 to 43 of the contested decision).

1. *The pay-TV market in France*

5 According to point 25 of the contested decision, this market constitutes a product market that is separate from free-access television (also referred to as 'television in clear'). Unlike in the latter market, in which the trade relationship is between the broadcaster and the advertiser, in the case of pay-TV there is a trade relationship between the broadcaster and the viewer as subscriber. The conditions of competition are therefore different on those two markets.

6 The contested decision also states that, when the decision was adopted, the pay-TV market comprised three methods of transmission (terrestrial, satellite and cable) and that those three different transmission methods did not constitute separate markets (point 30 of the contested decision).

7 The longest-established competitor on the French pay-TV market is Canal+, which enjoys a strong brand image and highly developed know-how in the management of pay-TV (point 44 of the contested decision). The Canal+ group also operates in the cable distribution sector through its control of the NumériCâble network. Moreover, through its subsidiary CanalSatellite, Canal+ offers a bouquet of digital pay-TV satellite channels (hereinafter 'the digital bouquet') (point 46 of the contested decision). According to the contested decision, 'in terms of numbers of subscribers, the Canal+ group, including the premium channel Canal+, CanalSatellite and the NumériCâble network, accounted for approximately 70% of the French pay-TV market by 30 June 1998'.

8 Another operator on the pay-TV market, AB-Sat, was launched in April 1996 by the French AB group, whose main activity is programme production and the distribution of television rights. AB-Sat had 100 000 subscribers at the end of June 1998 (point 49 of the contested decision).

9 Finally, TPS had 457 000 subscribers at the end of July 1998 and estimated that it would have 600 000 by the end of that year (point 50 of the contested decision).

2. *The market for the acquisition of broadcasting rights, in particular with regard to films and sport*

10 Since films and sport are the two most popular pay-TV products, the acquisition of broadcasting rights for such programmes is necessary in order to put together a sufficiently attractive range of programmes to convince potential subscribers to pay for receiving television services (point 34 of the contested decision).

11 According to the contested decision, the main competitors of TPS on that market, in particular in the purchase of rights to broadcast French and American films and sporting events, are Canal+ and the special-interest channels in which Canal+ has a stake (point 58 of the contested decision). The Commission also explains in the contested decision that 'the Canal+ group enjoys a particularly strong position on this market' and that AB-Sat and the general channels are also present on it (ibidem).

3. *The market in the distribution and operation of special-interest channels*

12 According to the contested decision, special-interest channels are essential for putting together attractive pay-TV services and the market in the distribution and operation of special-interest channels is enjoying rapid growth in France, particularly with the appearance of digital technology (points 37 to 39 and 65 to 69 of the contested decision).

13 As regards the market structure, the contested decision states:

'since the emergence of satellite platforms, the companies involved in pay-TV all have holdings in special-interest channels operating on the market. The stakes held in special-interest channels are fairly evenly distributed among the main players on this market. Canal+ is a major player, however, since it has holdings in the longest-standing channels which have achieved the best penetration of the cable market and have the largest number of subscribers' (points 67 and 68 of the contested decision).

C — *The notification and the notified agreements*

14 The parties first contacted the Commission in connection with this operation in the summer of 1996, with a view to notification under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1990 L 257, p. 13, as last amended by Council Regulation (EC) No 1310/97 of 30 June 1997 (OJ 1997 L 180, p. 1)) (point 1 of the contested decision). However, having been informed by the Commission that TPS was not a joint venture in the sense of an undertaking under the joint control of its members, on 18 October 1996 they notified the operation to the Commission and requested negative clearance and/or exemption pursuant to Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (English Special Edition, Series I (1959-1962) p. 87) (ibidem).

15 Four agreements were notified. The basic principles governing the operation of TPS are set out in the Agreement of 11 and 18 April 1996 (hereinafter 'the Agreement'); they were expressed in more concrete and structured terms in the

subsequent Associates' Pact signed on 19 June 1996 and in the TPS and TPS Gestion Statutes of the same date (point 70 of the contested decision). The agreements were concluded for a period of 10 years (point 71 of the contested decision).

16 Three clauses contained in those agreements were the subject of the Commission's attention in the contested decision. They are, first, the non-competition clause, second, the clause relating to special-interest channels and, third, the exclusivity clause.

1. *The non-competition clause*

17 This clause is included in Article 11 of the Agreement and Article 5.3 of the Associates' Pact and, at the Commission's request, its scope was defined by a supplementary agreement of 17 September 1998. It specifies as follows:

'Except for ongoing cases as at the date of conclusion of the agreements, and except for the sale of new programmes and services that are not under contract to TPS, the parties undertake not to become in any way involved, even indirectly, and for as long as they remain TPS shareholders, in companies engaged in or whose object is the distribution and marketing of a range of television programmes and services for payment which are broadcast in digital mode by satellite to French-speaking homes in Europe' (point 77 of the contested decision).

2. *The clause relating to special-interest channels*

18 Article 6 of the Agreement (under the heading 'Digital programmes and services') and Article 5.4 of the Associates' Pact cited above, provide that TPS has a right of priority and a right of final refusal with regard to the production of special-interest channels and television services by its shareholders. The clause is worded as follows:

'In order to supply TPS with the programmes it requires, the parties have agreed to give TPS first refusal in respect of the programmes or services which they themselves operate or over which they have effective control within the producing company, and in respect of the programmes and services which they produce. TPS is also entitled to final refusal or acceptance on the best terms proposed by competitors with regard to any programmes or services which its shareholders offer to third parties. If it accepts them, whether on exclusive terms or not, TPS will apply financial and contractual terms which are at least equivalent to those which the programmes and services could receive elsewhere.

As regards the acquisition of these channels and services, TPS will freely decide, on the basis of its own assessment, whether or not to agree to integrate them into its digital bouquet, either exclusively or non-exclusively; however, the parties underline their objective of having programmes and services in TPS's digital bouquet on an exclusive basis' (points 78 and 79 of the contested decision).

3. *The exclusivity clause*

19 Lastly, Article 6 of the Agreement provides that the general-interest channels (M6, TF1, France 2 and France 3, are to be broadcast exclusively by TPS

(point 81 of the contested decision). TPS is to meet the technical costs of transporting and broadcasting the programmes but will not pay any remuneration for them (ibidem).

D — *The contested decision*

20 On 3 March 1999, the Commission adopted the contested decision.

21 As is apparent from Article 1 of that decision, the Commission considered that on the basis of the facts in its possession it had no grounds for action pursuant to Article 85(1) of the EC Treaty (now Article 81(1) EC) in respect of the creation of TPS.

22 On the other hand, with regard to the contractual clauses described in paragraphs 17 to 19 above, the Commission concluded that:

— with regard to the non-competition clause, there were no grounds for action in respect of that clause for the period of three years, namely until 15 December 1999 (Article 2 of the contested decision);

— with regard to the exclusivity clause and the clause relating to special-interest channels, those provisions could benefit from an exemption under Article 85(3) of the Treaty for a period of three years, namely until 15 December 1999 (Article 3 of the contested decision).

Procedure and forms of order sought

23 By application lodged at the Registry of the Court of First Instance on 10 May 1999, the applicants brought the present action.

24 By document lodged at the Registry of the Court on 5 November 1999, CanalSatellite sought leave to intervene in these proceedings in support of the form of order sought by the Commission.

25 By order of 31 January 2000 the President of the Third Chamber of the Court granted leave to intervene and agreed in part to the request, lodged by the applicants, for confidential treatment of some information in the application and the annexes thereto.

26 The intervener lodged its statement in intervention on 24 March 2000. The Commission, TF1 and M6 lodged their observations on that statement on 4, 5 and 8 May 2000 respectively.

27 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure. As measures of organisation of procedure pursuant to Article 64 of its Rules of Procedure, the Court requested the parties to reply to certain written questions. They complied with that request within the prescribed period.

28 The parties presented oral argument and replied to the Court's questions at the hearing on 18 January 2001.

29 The applicants claim that the Court should:

— annul Articles 2 and 3 of the contested decision;

— order the Commission and the intervener jointly and severally to pay the costs.

30 The Commission and the intervener contend that the Court should:

— dismiss the action;

— order the applicants to pay the costs.

Law

A — *Admissibility of the action*

Arguments of the parties

31 The Commission, supported by the intervener, claims that the applicants' action is inadmissible. It states that it is settled law that the applicants may only contest measures which are capable of producing binding legal effects affecting their interests. It also observes that, as is apparent from the Court's judgments in Case T-138/89 *NBV and NVB* v *Commission* [1992] ECR II-2181, paragraph 31, and in Joined Cases T-125/97 and T-127/97 *Coca-Cola* v *Commission* [2000] ECR II-1733, paragraph 79, only the operative part of the measure is capable of producing legal effects and, therefore, of adversely affecting such interests. The grounds for the decision in question, on the other hand, are open to review by the Community judicature only to the extent to which, as grounds for an act adversely affecting a person's interests, they constitute the necessary support for its operative part.

32 According to the Commission, the operative part of a decision granting negative clearance and an exemption, such as that contested in the present action, does not adversely affect its addressee. The applicants' action for annulment is therefore inadmissible.

33 The Commission considers that this conclusion is all the more necessary because, since 15 December 1999, the contested decision has exhausted all the legal effects which it produced. The present case is therefore of purely theoretical interest.

34 The applicants dispute that the present action is inadmissible. They observe that the contested decision has binding legal effects which affect their interests (judgment in Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9) because the negative clearance and exemption are granted for only a period of three years. They observe, moreover, that in the judgment in Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others* v *Commission* [1998] ECR II-3141, which also concerned an action for annulment of an exemption decision brought by the persons to whom that exemption was granted, the actions were held admissible.

Findings of the Court

35 It is settled law that any measure which produces binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action under Article 173 of the EC Treaty (now, after amendment, Article 230 EC) for a declaration that it is void (*IBM* v *Commission*, cited above, paragraph 9, Joined Cases C-68/94 and C-30/95 *France and Others* v *Commission* [1998] ECR I-1375, paragraph 62, Case T-87/96 *Assicurazioni Generali and Unicredito* v *Commission* [1999] ECR II-203, paragraph 31, and *Coca-Cola* v *Commission*, cited in paragraph 27 above, paragraph 77).

36 Thus, any natural or legal person may bring an action for annulment of a decision of a Community institution which does not allow, in whole or in part, a clear and precise request from that person which falls within the competence of that institution (see, to that effect, as regards a request based on Article 3(2)(b) of Regulation No 17, Case 26/76 *Metro* v *Commission* [1977] ECR 1875, paragraph 13). In such a situation the total or partial rejection of the request produces binding legal effects capable of affecting the interests of its maker.

37 It is necessary to establish, in the light of those principles, whether the present action for annulment is admissible.

38 In the present case, the applicants notified to the Commission the agreements relating to the creation of TPS and the restrictions which they considered to be ancillary to that operation, with a view to obtaining, under Article 2 of Regulation No 17, negative clearance for the entire duration of those agreements, that is to say for a period of 10 years, or, failing that, to obtaining an individual exemption for the same period under Article 4(1) of that regulation.

39 It is apparent from the operative part of the contested decision that both the negative clearance relating to the non-competition clause (Article 2) and the individual exemption relating to the exclusivity clause and to the clause on special-interest channels (Article 3) are granted only for a period of three years.

40 It follows from that limitation on the duration of the negative clearance and of the exemption provided for in Articles 2 and 3 that the applicants benefit only for a much shorter period than that with which they initially reckoned in terms of legal certainty resulting from such decisions. Moreover, the applicants have claimed, without contradiction by the Commission in that regard, that this factual situation also affected the calculation of the profitability of the investments underlying the conclusion of the notified agreements.

41 That part of the operative part of the decision therefore produces binding legal effects capable of affecting the applicants' interests.

42 It is of little importance in that regard that the applicants might possibly, following a new notification of the restrictions at issue, obtain a new negative

clearance or exemption for a period that is less, equal, or even greater than that initially granted. Since they do not already enjoy the legal certainty which they would have enjoyed if the negative clearance and exemption provided for in Articles 2 and 3 of the contested decision had been granted for a period of 10 years, their interests are definitely affected by that part of the operative part of the contested decision.

43 Lastly, unlike in the applications in the cases which gave rise to the judgments in *NBV and NVB* v *Commission* and *Coca-Cola* v *Commission*, cited in paragraph 31 above, the action for annulment brought by the applicants is aimed at the operative part and not the grounds of the contested decision. In the form of order sought by the applicants, they seek annulment of Articles 2 and 3 of the operative part of the contested decision. Furthermore, although it is true that in the judgment in *NBV and NVB* v *Commission*, cited above (paragraph 32), the Court held that a decision to grant negative clearance 'satisfie[d] the applicant and, by its very nature, [could] neither change his legal position nor adversely affect his interests', it must be observed that in the case giving rise to that judgment the negative clearance had been issued for a period which corresponded to that sought by the interested parties. On the other hand, as has been observed above, in the present case the negative clearance was granted for only a period of three years, whereas the applicants had requested that it be granted for a period of 10 years.

44 It follows from the foregoing that the action is admissible.

B — *Merits*

45 The Court will first examine the pleas for annulment of Article 3 of the contested decision, that is to say, those relating to the exclusivity clause and the clause on

special-interest channels. The Court will then examine the plea directed at Article 2 of the contested decision, concerning the non-competition clause.

1. *The pleas for annulment of Article 3 of the contested decision*

46 With regard to Article 3 of the contested decision, the applicants rely on two pleas, alleging infringement of Article 85(1) and (3) of the Treaty. In the first plea, they submit that the Commission infringed Article 85(1) of the Treaty in that the exclusivity clause and the clause relating to the special-interest channels do not constitute restrictions of competition within the meaning of that provision and, in the alternative, that those agreements must be classified as restrictions that are ancillary to the creation of TPS. In the second plea the applicants submit that the Commission infringed Article 85(3) of the Treaty in that it did not correctly apply the criteria for exemption under that provision and committed an error of assessment with regard to the duration of the exemption.

(a) The first plea: infringement of Article 85(1) of the Treaty

(i) The principal submission: the exclusivity clause and the clause relating to the special-interest channels do not constitute restrictions of competition within the meaning of Article 85(1) of the Treaty

47 The applicants submit that, in reaching its conclusion in the contested decision that the exclusivity clause and the clause relating to the special-interest channels

constitute restrictions of competition within the meaning of Article 85(1) of the Treaty, the Commission relied on incorrect assessments and misapplied that provision.

48 The Commission, supported by the intervener, disputes that those two objections are well founded.

— The existence of incorrect assessments

Arguments of the parties

49 The applicants state that in order to find that the exclusivity clause restricted competition the Commission tried to show, in points 102 to 107 of the contested decision, that the general-interest channels were attractive to viewers and that the effect of this clause was to deprive competitors of TPS of access to such programmes. According to the applicants, that finding is based on incorrect assessments.

50 They submit, first, that the Commission's finding that the attractiveness of the general-interest channels offered by TPS is explained by the existence of 'shadow zones' in France, that is to say zones in which reception by antenna of those channels is poor or deficient, is incorrect. The figures in the survey by Médiamétrie in November/December 1997 relating to the bi-monthly follow-up of initialisation ('the Médiamétrie survey') cited by the Commission are incorrect and do not take account of the fact that almost everyone in France

receives TF1, France 2 and France 3 under good conditions. In support of that assertion, the applicants submitted at the hearing that, first, the Médiamétrie survey did not explain the methodological principles on which it had been drawn up and, second, that the broadcasting quality of television programmes from French television channels was checked every five years by the Conseil supérieur de l'audovisuel in the course of the licensing or licence extension procedure.

51 Second, the applicants observe that, contrary to what is indicated by the Commission in the contested decision, it is apparent from the market surveys that television viewers opt for TPS more on account of the wealth of programmes offered than the reception in digital quality of the general-interest channels.

52 Third, the applicants submit that the Commission's assertion that the two 'digital bouquets' (CanalSatellite and AB-Sat) were able to be launched successfully without exclusive broadcasting of the general-interest channels is irrelevant in this case. They observe that CanalSatellite benefited from a number of exclusive rights to films and sporting events when it was launched and still has exclusive rights to broadcast the Canal+ channel and that AB-Sat is established on a different market segment.

53 Lastly, the applicants state that, contrary to the Commission's finding in the contested decision, the fact that the four general-interest channels, which account for 90% of all television viewers and around 75% of cable television viewers, are broadcast exclusively by TPS does not necessarily mean that the access of competitors to the programmes of those channels is restricted. They observe that the market in television in clear and the market in pay-TV are two separate markets, so that there cannot be such a link of cause and effect. Furthermore, it is not certain that, if the four general-interest channels had not entered into commitments upon the creation of TPS, they would have agreed to participate in another digital bouquet. They note, moreover, that, as is shown by the situation in the other European countries, in which a single operator has a monopoly on the pay-TV market, a new entry onto the pay-TV market in France is no longer possible.

54 The Commission, supported by the intervener, disputes that its finding that the exclusive right to broadcast the four general-interest channels constitutes a restriction of competition is based on erroneous assessments.

Findings of the Court

55 The factual evidence on which the applicants rely in order to show that the Commission's finding that the exclusivity clause restricts competition is based on erroneous assessments, is either incorrect or irrelevant.

56 First, in the absence of any supporting cogent evidence, it is not possible to agree with the applicants' assertion that the figures in the Médiamétrie survey relating to the existence of 'shadow zones' in France, reproduced in point 104 of the contested decision, are incorrect and that almost all television viewers in France receive TF1, France 2 and France 3 in good conditions.

57 The intervener explained at the hearing, without being contradicted by the applicants, that Médiamétrie is the only market research institute which draws up viewer surveys in France and that those surveys are the reference point for all French television channels, which use them in particular in order to calculate their advertising income.

58 Moreover, contrary to the applicants' assertion, the controls carried out every five years by the Conseil supérieur de l'audiovisuel in the course of the licensing or license extension procedure do not prove that those figures are incorrect. As the

applicants also accepted at the hearing, the control by the Conseil only relates to the broadcasting quality of the television channels and not the quality of the reception of those channels by French television viewers.

59 It should also be pointed out that the existence of large shadow zones in France, as shown by the Médiamétrie survey, appears to be confirmed by the market survey produced by the applicants, since it is apparent from that study that [...] % of persons questioned subscribed to TPS 'in order to receive the national channels correctly'.

60 Furthermore, the Commission clearly stated in the contested decision that the figures published in the Médiamétrie survey were, for it, 'only indicative... because in addition to the four general-interest channels broadcast exclusively on TPS they also include Arte and La Cinquième, for which the initialisation rate is 80.6% of households, and the terrestrial Canal+ service, which approximately [...] [1] households are thought to receive in poor conditions' (point 104 of the contested decision).

61 Second, the fact that according to the various market surveys commissioned by TPS (in particular the BVA survey) the reason why persons have subscribed to TPS is above all the richness of the range on offer and not the possibility of also receiving the general-interest channels, as the applicants submit, does not invalidate the Commission's finding. Since the programmes of the general-interest channels enrich what is offered by TPS, those channels contribute to the attractiveness of that offer. Furthermore, as has been found in paragraph 59 above, it is apparent from the same market surveys that a significant proportion of persons questioned stated that they had decided to subscribe to TPS in order to receive the general-interest channels correctly.

1 — Confidential data omitted.

62 Third, as regards the applicants' argument that it is irrelevant in the present case that CanalSatellite and AB-Sat were able to be launched on the market without the exclusive right to broadcast the general-interest channels, it must be pointed out that this factor was put forward by the Commission in order to show that the general-interest channels 'do not constitute a separate programme category or a type of content that is essential for pay-TV' (point 106 of the contested decision). Although it is true that this factor becomes of relatively secondary importance in regard to determining whether the exclusivity clause restricts competition, it nevertheless establishes that this clause is not objectively necessary for the creation of TPS, so that it cannot be regarded as an ancillary restriction (see, to this effect, paragraph 118 et seq. below).

63 Finally, it is necessary to reject the factual arguments submitted by the applicants in order to prove that the exclusivity clause does not have the effect, contrary to the Commission's finding in the contested decision, of denying 'TPS' competitors access to attractive programmes'.

64 It is in fact manifest that, as only TPS is authorised to transmit the general-interest channels owing to the exclusive rights which it enjoys, the competitors of TPS are denied access to the programmes which are considered attractive by numerous French television viewers.

65 Furthermore, the applicants have not adduced any evidence to support their assertion that it is possible that the general-interest channels would refuse to be broadcast as part of the other digital bouquets.

66 In the light of the foregoing, the applicants have not showed that the Commission relied on erroneous assessments in concluding that the exclusivity clause restricted competition within the meaning of Article 85(1) of the Treaty.

67 That objection must therefore be rejected.

— Misapplication of Article 85(1) of the Treaty (failure to apply a rule of reason)

Arguments of the parties

68 The applicants submit that the Commission should have applied Article 85(1) of the Treaty in the light of a rule of reason rather than as an abstract rule. Under a rule of reason, an anti-competitive practice falls outside the scope of the prohibition in Article 85(1) of the Treaty if it has more positive than negative effects on competition on a given market. They submit that the existence of a rule of reason in Community competition law has already been confirmed by the Court of Justice (Case 258/78 *Nungesser and Eisele* v *Commission* [1982] ECR 2015 and Case 262/81 *Coditel and Others* [1982] ECR 3381, paragraph 20). They also assert that, contrary to the Commission's submission, those two judgments are relevant in the present case because the creation of TPS also took place in conditions and on a market that are wholly peculiar.

69 The applicants submit that the application of a rule of reason would have shown that Article 85(1) of the Treaty did not apply to the exclusivity clause and to the clause relating to the special-interest channels. They observe that, as follows implicitly from the reasoning adopted by the Commission in regard to Article 85(3) of the Treaty, those clauses, rather than restricting competition on the pay-TV market in France, in fact favour such competition as they allow a new operator to gain access to a market which was dominated until then by a single operator, CanalSatellite and its parent company Canal+ (the service offered by

AB-Sat not really being a competitor, but rather complementary to that of Canal+).

70 According to the applicants, the line of reasoning that Article 85(1) of the Treaty does not apply to the exclusivity clause and the clause relating to the special-interest channels is all the more compelling in the light of the case-law of the Court of Justice. It is apparent from that case-law that, first, a clause granting exclusive sales rights must be the subject of an economic assessment and is not necessarily caught by Article 85(1) of the Treaty (Case 56/65 *Société technique minière* [1966] ECR 235) and that, second, an exclusive right granted with a view to penetrating a new market is not caught by the prohibition laid down in that article (*Nungesser and Eisele* v *Commission*, cited in paragraph 68 above, and *Société technique minière*, cited above; more generally, on the scope of Article 85(1) and (3) of the Treaty, Case C-399/93 *Oude Luttikhuis and Others* [1995] ECR I-4515, paragraph 10, and Case T-77/94 *VGB and Others* v *Commission* [1997] ECR II-759, paragraph 140, and *European Night Services and Others* v *Commission*, cited in paragraph 34 above, paragraph 136).

71 The Commission disputes that it infringed Article 85(1) of the Treaty by not applying a rule of reason, as suggested by the applicants, when examining the compatibility with that provision of the exclusivity clause and of the clause relating to the special-interest channels.

Findings of the Court

72 According to the applicants, as a consequence of the existence of a rule of reason in Community competition law, when Article 85(1) of the Treaty is applied it is necessary to weigh the pro and anti-competitive effects of an agreement in order to determine whether it is caught by the prohibition laid down in that article. It

should, however, be observed, first of all, that contrary to the applicants' assertions the existence of such a rule has not, as such, been confirmed by the Community courts. Quite to the contrary, in various judgments the Court of Justice and the Court of First Instance have been at pains to indicate that the existence of a rule of reason in Community competition law is doubtful (see Case C-235/92 P *Montecatini* v *Commission* [1999] ECR I-4539, paragraph 133 ('... even if the rule of reason did have a place in the context of Article 85(1) of the Treaty'), and Case T-14/89 *Montedipe* v *Commission* [1992] ECR II-1155, paragraph 265, and in Case T-148/89 *Tréfilunion* v *Commission* [1995] ECR II-1063, paragraph 109).

73 Next, it must be observed that an interpretation of Article 85(1) of the Treaty, in the form suggested by the applicants, is difficult to reconcile with the rules prescribed by that provision.

74 Article 85 of the Treaty expressly provides, in its third paragraph, for the possibility of exempting agreements that restrict competition where they satisfy a number of conditions, in particular where they are indispensable to the attainment of certain objectives and do not afford undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. It is only in the precise framework of that provision that the pro and anti-competitive aspects of a restriction may be weighed (see, to that effect, Case 161/84 *Pronuptia* [1986] ECR 353, paragraph 24, and Case T-17/93 *Matra Hachette* v *Commission* [1994] ECR II-595, paragraph 48, and *European Night Services and Others* v *Commission*, cited in paragraph 34 above, paragraph 136). Article 85(3) of the Treaty would lose much of its effectiveness if such an examination had to be carried out already under Article 85(1) of the Treaty.

75 It is true that in a number of judgments the Court of Justice and the Court of First Instance have favoured a more flexible interpretation of the prohibition laid down in Article 85(1) of the Treaty (see, in particular, *Société technique minière* and *Oude Luttikhuis and Others*, cited in paragraph 70 above, *Nungesser and*

Eisele v *Commission* and *Coditel and Others*, cited in paragraph 68 above, *Pronuptia*, cited in paragraph 74 above, and *European Night Services and Others* v *Commission*, cited in paragraph 34 above, as well as the judgment in Case C-250/92 *DLG* [1994] ECR I-5641, paragraphs 31 to 35).

76 Those judgments cannot, however, be interpreted as establishing the existence of a rule of reason in Community competition law. They are, rather, part of a broader trend in the case-law acording to which it is not necessary to hold, wholly abstractly and without drawing any distinction, that any agreement restricting the freedom of action of one or more of the parties is necessarily caught by the prohibition laid down in Article 85(1) of the Treaty. In assessing the applicability of Article 85(1) to an agreement, account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned (see, in particular, *European Night Services and Others* v *Commission*, cited in paragraph 34 above, paragraph 136, *Oude Luttikhuis*, cited in paragraph 70 above, paragraph 10, and *VGB and Others* v *Commission*, cited in paragraph 70 above, paragraph 140, as well as the judgment in Case C-234/89 *Delimitis* [1991] ECR I-935, paragraph 31).

77 That interpretation, while observing the substantive scheme of Article 85 of the Treaty and, in particular, preserving the effectiveness of Article 85(3), makes it possible to prevent the prohibition in Article 85(1) from extending wholly abstractly and without distinction to all agreements whose effect is to restrict the freedom of action of one or more of the parties. It must, however, be emphasised that such an approach does not mean that it is necessary to weigh the pro and anti-competitive effects of an agreement when determining whether the prohibition laid down in Article 85(1) of the Treaty applies.

78 In the light of the foregoing, it must be held that, contrary to the applicants' submission, in the contested decision the Commission correctly applied Article 85(1) of the Treaty to the exclusivity clause and the clause relating to

the special-interest channels inasmuch as it was not obliged to weigh the pro and anti -competitive aspects of those agreements outside the specific framework of Article 85(3) of the Treaty.

79 It did, however, assess the restrictive nature of those clauses in their economic and legal context in accordance with the case-law. Thus, it rightly found that the general-interest channels presented programmes that were attractive for subscribers to a pay-TV company and that the effect of the exclusivity clause was to deny TPS' competitors access to such programmes (points 102 to 107 of the contested decision). As regards the clause relating to the special-interest channels, the Commission found that it resulted in a limitation of the supply of such channels on that market for a period of 10 years (point 101 of the contested decision).

80 This objection must therefore be rejected.

(ii) The alternative claim, alleging that the exclusivity clause and the clause relating to the special-interest channels are ancillary restrictions

— Arguments of the parties

The concept of an ancillary restriction

81 As regards the concept of an ancillary restriction, the applicants refer to the Commission's *XXIVth Report on competition policy*, 1994 (page 120, paragraph

166), according to which 'restrictions [of competition] in the context of joint ventures' are 'restrictions only imposed on the parties or the joint venture (not on third-parties) which are objectively necessary for the successful functioning of the joint venture and thus by their very nature inherent in the operation concerned...'.

82 The applicants also refer to the Commission's Notice of 16 February 1993 concerning the assessment of cooperative joint ventures pursuant to Article 85 of the EEC Treaty (OJ 1993 C 43, p. 2, 'the notice on cooperative joint ventures'), in which the Commission stated that agreements 'which are directly related to the [joint venture] and necessary for its existence must be assessed together with the [joint venture]. They are treated under the rules of competition as ancillary restrictions if they remain subordinate in importance to the main object of the [joint venture]' (point 66).

83 The applicants further observe that it is clear from the notice on cooperative joint ventures, first, that an exclusive operating license granted to the joint venture without time-limit was regarded as indispensable for its creation and operation and second, that the theory of ancillary restrictions will, in general, be applied in the case of a joint venture which undertakes new activities in respect of which the parent companies are neither actual nor potential competitors (point 76 of the notice on cooperative joint ventures).

84 According to the applicants, the Commission's actual decisions show that those principles have been faithfully applied.

85 The applicants state that in Commission Decision 94/895/EC of 15 December 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty and

Article 53 of the EEA Agreement (IV/34.768 — International Private Satellite Partners) (OJ 1994 L 354, p. 75, point 61) the Commission took the view that clauses restricting competition had to be regarded as ancillary where they are indispensable to the joint venture and do not exceed what the creation and operation of the joint venture requires (see also Commission Decision 97/39/EC of 18 December 1996 relating to a proceeding under Article 85 of the EC Treaty and Article 53 of the EEA Agreement (Case IV/35.518 — Iridium) (OJ 1997 L 16, p. 87, point 48 et seq.) and, with regard to concentrations, the Commission Decision of 6 April 1995 declaring a concentration compatible with the common market on the basis of Regulation No 4064/89 (IV/M.564 — Havas Voyages/ American Express) (OJ 1995 L 117, p. 8)).

86 The applicants submit, moreover, that the decisions and judgments cited by the Commission are, in general, irrelevant to the present case.

87 They state that the judgment in *Pronuptia* (cited in paragraph 74 above) and the judgment in Case 42/84 *Remia* v *Commission* [1985] ECR 2545 relate to the criteria for the application of Article 85(1) and (3) of the Treaty but make no reference to the problem of ancillary restrictions. They observe, next, that Commission Decision 87/100/EEC of 17 December 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.340 — Mitchell/Cotts/Sofiltra) (OJ 1987 L 41, p. 31, paragraph 23) does not add anything new. As to Commission Decision 90/410/EEC of 13 July 1990 relating to a proceeding under Article 85 of the EEC Treaty (IV/32.009 — Elopak/Metal Box — Odin) (OJ 1990 L 209, p. 15, point 31) that decision, in the applicants' opinion, confirms rather than contradicts the principle prominent in the decisions to which they have referred.

88 Lastly, the applicants submit that, contrary to the submission of the Commission and the intervener, classification of a clause as an ancillary restriction should not be by way of abstract analysis of the restriction but requires in-depth analysis of the market.

89 The applicants submit, moreover, that the Commission carried out such an examination in the contested decision. They also state that all the decisions and judgments cited by the intervener illustrate the fact that the market context is taken into account when classifying 'ancillary restrictions'. Thus, in the judgment in *Remia* v *Commission*, cited in paragraph 87 above, the Court of Justice refused, in the light of the circumstances of the case, to classify a non-competition clause for a period exceeding four years as an ancillary restriction. In Commission Decision 1999/329/EC of 12 April 1999 relating to a proceeding pursuant to Articles 85 and 86 of the EC Treaty and Articles 53 and 54 of the EEA Agreement (Cases No IV/D-1/30.373 — P & I Clubs, IGA and No IV/D-1/37.143 — P & I Clubs, Pooling Agreement (OJ L 125, p. 12) it was decided, after an examination of the prices and terms of sale on the reinsurance market, that the joint purchase of reinsurance was, in the case in point, an ancillary restriction. In Commission Decision 1999/574/EC of 27 July 1999 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case IV/36.581 — Télécom développement) (OJ L 218, p. 24, 'the Télécom développement Decision') the Commission carried out an assessment of the economic and competitive position of Télécom développement on the market for voice telephony and concluded that the clauses notified were to be classified as ancillary restrictions. Lastly, in Decision 97/39 the Commission decided to classify the clauses notified to it as ancillary restrictions, again in the light of the specific conditions of that case.

90 The Commission, supported by the intervener, disputes that the concept of an ancillary restriction should be interpreted in the manner suggested by the applicant.

The consequences of classification as an ancillary restriction

91 The applicants submit that it is apparent from both the Commission's publications and its previous decisions that the commitments classified as ancillary restrictions must be treated in the same way as the main operation.

92 The applicants point out that in its *XXIVth Report on competition policy* the Commission stated that ancillary restrictions are not 'assessed separately under Article 85(1) of the Treaty if the joint venture itself does not infringe Article 85(1) or is exempted under Article 85(3). While ancillary restrictions are normally only accepted for a limited period of time, in the context of joint ventures they are usually allowed for the whole duration of the joint venture.' Likewise, they observe that in the notice on cooperative joint ventures the Commission stated that 'if a [joint venture] does not fall within the scope of Article 85(1), then neither do any additional agreements which, while restricting competition on their own, are ancillary to the [joint venture] in the manner described above' (point 67) and that they 'must be assessed together with the [joint venture]' (point 66).

93 The applicants also submit that the Commission has applied those principles in its previous decisions. Thus, in point 62 of Decision 94/895 the Commission took the view that, inasmuch as the joint venture did not fall within the scope of Article 85(1) of the Treaty, then neither did the clauses at issue (see also Decision 97/39, point 48).

94 The Commission states that, although it is true that the legal consequence of applying the concept of an ancillary restriction is to cause contractual clauses that are *a priori* restrictive of competition and capable of affecting trade between Member States to an appreciable extent to fall outside the scope of Article 85(1), that does not mean that those clauses necessarily benefit from negative clearance for the same period as the main operation. As is apparent from the judgment in *Remia* v *Commission*, cited in paragraph 87 above, and from the contested decision, the duration of a restriction may be an essential criterion for determining whether or not it is ancillary.

Classification of the exclusivity clause as an ancillary restriction

95 The applicants submit that there is no doubt that the Commission should have classified the exclusivity clause as an ancillary restriction.

96 They state that, in the light of the dominant position of Canal+, in particular in the market for broadcasting rights for French and American films, that exclusivity was the only means of entering the pay-TV market in France and of remaining on it by retaining an attractive range of programmes. The wholly peculiar nature of that advantage is also clear from the fact that it was granted to TPS by its shareholders, without payment on either side, in order to ensure its success on the market.

97 According to the applicants, the Commission's main argument to show that the exclusivity clause is not ancillary, namely that the creation of a venture that is active in the digital satellite TV sector would be conceivable even if it did not have the exclusive right to broadcast the four general-interest channels, is incorrect. They state that they did not have — and still have only very few — exclusive rights to broadcast films and sporting events when they decided to create TPS, so that their only competitive weapon was (and still is) the exclusive right to broadcast the general-interest channels. That clause is therefore directly linked to the creation of TPS and is necessary for its proper functioning.

98 The Commission disputes that it committed an error of assessment in not classifying the exclusivity clause as an ancillary restriction.

Classification of the clause relating to the special-interest channels as an ancillary restriction

99 The applicants submit that the Commission committed an error of assessment in failing to classify the clause relating to the special-interest channels as an ancillary restriction.

100 They state that the Commission did not in fact take account of the fact that this clause was indispensable to the creation and operation of TPS, in as much as that privileged access to the channels and programmes of its shareholders and the right of last refusal was the only means by which TPS could secure its acquisition of special-interest channels, having regard in particular to the especially strong position of the Canal+ group on the market in those channels.

101 The applicants submit that it is appropriate to refer to Commission Decision 1999/573/EC of 20 May 1999 relating to a proceeding under Article 81 of the EC Treaty (Case IV/36.592 — Cégétel + 4) (OJ 1999 L 218, p. 14, 'the Cégétel Decision') and to the Télécom Développement Decision. Those decisions relate to competitive situations that are quite similar to the present case (markets dominated by a long-standing operator) and in those decisions the Commission's analysis related to clauses comparable to the clause relating to the special-interest channels, the clause at issue in the Télécom développement Decision providing for preferential access to an infrastructure and, in the Cégétel Decision, the clause providing for preferential purchasing by the joint venture from its shareholders. The applicants observe that, unlike in the present case, the Commission did not hesitate to classify those clauses as ancillary restrictions and to treat them in exactly the same way as the joint venture (see also Decision 1999/329).

102 The Commission disputes that it has committed an error of assessment in not classifying the clause relating to the special-interest channels as an ancillary restriction.

— Findings of the Court

103 It is necessary, first of all, to define what constitutes an 'ancillary restriction' in Community competition law and point out the consequences which follow from classification of a restriction as 'ancillary'. It is then necessary to apply the principles thereby established to the exclusivity clause and to the clause relating to the special-interest channels in order to determine whether, as the applicants' assert, the Commission committed an error of appraisal in not classifying those commitments as ancillary restrictions.

The concept of 'ancillary restriction'

104 In Community competition law the concept of an 'ancillary restriction' covers any restriction which is directly related and necessary to the implementation of a main operation (see, to that effect, the Commission Notice of 14 August 1990 regarding restrictions ancillary to concentrations (OJ 1990 C 203, p. 5, hereinafter 'the notice on ancillary restrictions', point I.1), the notice on cooperative joint ventures (point 65), and Articles 6(1)(b) and 8(2), second paragraph, of Regulation No 4064/89).

105 In its notice on ancillary restrictions the Commission rightly stated that a restriction 'directly related' to implementation of a main operation must be

understood to be any restriction which is subordinate to the implementation of that operation and which has an evident link with it (point II.4).

106 The condition that a restriction be necessary implies a two-fold examination. It is necessary to establish, first, whether the restriction is objectively necessary for the implementation of the main operation and, second, whether it is proportionate to it (see, to that effect, *Remia* v *Commission*, cited in paragraph 87 above, paragraph 20; see also points II.5 and II.6 of the notice regarding ancillary restrictions).

107 As regards the objective necessity of a restriction, it must be observed that inasmuch as, as has been shown in paragraph 72 et seq. above, the existence of a rule of reason in Community competition law cannot be upheld, it would be wrong, when classifying ancillary restrictions, to interpret the requirement for objective necessity as implying a need to weigh the pro and anti-competitive effects of an agreement. Such an analysis can take place only in the specific framework of Article 85(3) of the Treaty.

108 That approach is justified not merely so as to preserve the effectiveness of Article 85(3) of the Treaty, but also on grounds of consistency. As Article 85(1) of the Treaty does not require an analysis of the positive and negative effects on competition of a principal restriction, the same finding is necessary with regard to the analysis of accompanying restrictions.

109 Consequently, as the Commission has correctly asserted, examination of the objective necessity of a restriction in relation to the main operation cannot but be relatively abstract. It is not a question of analysing whether, in the light of the competitive situation on the relevant market, the restriction is indispensable to

the commercial success of the main operation but of determining whether, in the specific context of the main operation, the restriction is necessary to implement that operation. If, without the restriction, the main operation is difficult or even impossible to implement, the restriction may be regarded as objectively necessary for its implementation.

110 Thus, in the judgment in *Remia* v *Commission*, cited in paragraph 87 above (paragraph 19), the Court of Justice held that a non-competition clause was objectively necessary for a successful transfer of undertakings, inasmuch as, without such a clause, 'and should the vendor and the purchaser remain competitors after the transfer, it is clear that the agreement for the transfer of the undertaking could not be given effect. The vendor, with his particularly detailed knowledge of the transferred undertaking, would still be in a position to win back his former customers immediately after the transfer and thereby drive the undertaking out of business.'

111 Similarly, in its decisions, the Commission has found that a number of restrictions were objectively necessary to implementing certain operations. Failing such restrictions, the operation in question 'could not be implemented or could only be implemented under more uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerably less probability of success' (point II.5 of the notice regarding ancillary restrictions; see also, for example, Decision 90/410, point 22 et seq.)

112 Contrary to the applicants' claim, none of the various decisions to which they refer show that the Commission carried out an analysis of competition in classifying the relevant clauses as ancillary restrictions. On the contrary, those

decisions show that the Commission's analysis was relatively abstract. Thus point 77 of Decision 1999/329 states as follows:

'Actually, a claim-sharing arrangement cannot function properly without at least one level of cover to be offered being agreed by all its members. The reason is that no member would be willing to share claims brought to the pool by other clubs of a higher amount than the ones it can bring to the pool.'

113 Where a restriction is objectively necessary to implement a main operation, it is still necessary to verify whether its duration and its material and geographic scope do not exceed what is necessary to implement that operation. If the duration or the scope of the restriction exceed what is necessary in order to implement the operation, it must be assessed separately under Article 85(3) of the Treaty (see, to that effect, Case T-61/89 *Dansk Pelsdyravlerforening* v *Commission* [1992] ECR II-1931, paragraph 78).

114 Lastly, it must be observed that, inasmuch as the assessment of the ancillary nature of a particular agreement in relation to a main operation entails complex economic assessments by the Commission, judicial review of that assessment is limited to verifying whether the relevant procedural rules have been complied with, whether the statement of the reasons for the decision is adequate, whether the facts have been accurately stated and whether there has been a manifest error of appraisal or misuse of powers (see, to that effect, with regard to assessing the permissible duration of a non-competition clause, *Remia* v *Commission*, cited in paragraph 87 above, paragraph 34).

Consequences of classification as an ancillary restriction

115 If it is established that a restriction is directly related and necessary to achieving a main operation, the compatibility of that restriction with the competition rules must be examined with that of the main operation.

116 Thus, if the main operation does not fall within the scope of the prohibition laid down in Article 85(1) of the Treaty, the same holds for the restrictions directly related and necessary for that operation (see, to that effect, *Remia* v *Commission*, cited in paragraph 87 above, paragraph 20). If, on the other hand, the main operation is a restriction within the meaning of Article 85(1) but benefits from an exemption under Article 85(3) of the Treaty, that exemption also covers those ancillary restrictions.

117 Moreover, where the restrictions are directly related and necessary to a concentration within the meaning of Regulation No 4064/89, it follows from both Article 6(1)(b) and Article 8(2), second subparagraph, of that regulation that those restrictions are covered by the Commission's decision declaring the operation compatible with the common market.

Classification of the exclusivity clause as an ancillary restriction

118 It is necessary to examine, in the light of the principles set out in paragraphs 103 to 114 above, whether in the present case the Commission committed a manifest error of assessment in not classifying the exclusivity clause as a restriction that was ancillary to the creation of TPS.

119 The applicants submit that the exclusivity clause is ancillary to the creation of TPS as the clause is indispensable to allow TPS to penetrate the pay-TV market in France because TPS does not enjoy any exclusive rights to films and sporting events of the first rank.

120 It must, however, be observed, first of all, that the fact that the exclusivity clause would be necessary to allow TPS to establish itself on a long-term basis on that market it is not relevant to the classification of that clause as an ancillary restriction.

121 As has been set out in paragraph 106 above, such considerations, relating to the indispensable nature of the restriction in the light of the competitive situation on the relevant market, are not part of an analysis of the ancillary nature of the restrictions. They can be taken into account only in the framework of Article 85(3) of the Treaty (see, in that regard, *Pronuptia*, cited in paragraph 74 above, paragraph 24, and *Dansk Pelsdyravlerforening* v *Commission*, cited in paragraph 113 above, paragraph 78).

122 Next, it must be observed that although, in the present case, the applicants have been able to establish to the requisite legal standard that the exclusivity clause was directly related to the establishment of TPS, they have not, on the other hand, shown that the exclusive broadcasting of the general-interest channels was objectively necessary for that operation. As the Commission has rightly stated, a company in the pay-TV sector can be launched in France without having exclusive rights to the general-interest channels. That is the situation for CanalSatellite and AB-Sat, the two other operators on that market.

123 Even if the exclusivity clause was objectively necessary for the creation of TPS, the Commission did not commit a manifest error of assessment in taking the view that this restriction was not proportionate to that objective.

124 The exclusivity clause is for an initial period of 10 years. As the Commission finds in point 134 of the contested decision, such a period is deemed excessive as 'TPS [has] to establish itself on the market before the end of that period'. It is quite probable that the competitive disadvantage of TPS (principally with regard to access to exclusive rights to films and sporting events) will diminish over time (see, to that effect, point 133 of the contested decision). It cannot, therefore, be ruled out that the exclusive broadcasting of the general-interest channels, although initially intended to strengthen the competitive position of TPS on the pay-TV market might ultimately allow it, after some years, to eliminate competition on that market.

125 Moreover, the exclusivity clause is also disproportionate in so far as its effect is to deprive TPS' actual and potential competitors of any access to the programmes that are considered attractive by a large number of French television viewers (see, to that effect, the judgment in *Oude Luttikhuis and Others*, cited in paragraph 70 above, paragraph 16). This excessiveness of the commitment is also reinforced by the existence of 'shadow zones'. The television viewers living in those zones who wish to subscribe to a pay-TV company which also broadcasts the general-interest channels can turn only to TPS.

126 It must therefore be held that the Commission did not commit a manifest error of assessment in not classifying the exclusivity clause as a restriction that was ancillary to the creation of TPS.

127 That limb of the applicants' argument must, therefore, be rejected.

Classification of the clause relating to the special-interest channels as an ancillary restriction

128 It is also necessary to examine, in the light of the principles set out in paragraphs 103 to 114 above whether, in the present case, the Commission committed a manifest error of assessment in not classifying the clause relating to the special-interest channels as an ancillary restriction.

129 In that regard, it must be pointed out that in the contested decision (point 101) the Commission stated:

'The obligation on the members to give TPS first refusal over their special-interest channels might possibly be regarded as ancillary to the launch of the platform; this obligation, which is imposed for a period of 10 years, nevertheless results in a limitation of the supply of special-interest channels and television services. In this respect, the clause in question falls within the scope of Article 85(1).'

130 It is clear from point 101 of the contested decision that the main reason why the Commission refused to classify the clause as an ancillary restriction was that it had a negative impact on the situation of third parties over quite a long period.

131 The applicants, despite having the burden of proof in that regard, have not adduced any evidence to invalidate that assessment.

132 They merely assert that on account of the exclusivity policy operated by CanalSatellite, the special-interest channels operated or created by them are the only channels to which TPS has access, so that the clause at issue is indispensable for its survival. Even accepting that such an assertion is correct, a consideration of that kind relating to the competitive situation of TPS cannot be taken into account for the purpose of classifying that clause as an ancillary restriction. As explained in paragraphs 107 to 112 above, the objectively necessary nature of the clause is established without reference to the competitive situation.

133 Furthermore, as the market for the operation of special-interest channels is enjoying rapid growth (point 65 of the contested decision), the Commission did not commit a manifest error of assessment in taking the view that the obligation on the shareholders of TPS, for a period of 10 years, to offer their special-interest channels first to TPS exceeded what was necessary for the creation of TPS.

134 Finally, as the Commission has correctly submitted, the applicants are wrong in referring to the decisions in Cégétel and Télécom développement inasmuch as those decisions relate to different factual situations. Thus, the situation of TPS cannot be compared to that of a new entrant on a market dominated by a company with a long-standing monopoly and which requires access to essential infrastructure. Canal+ does not enjoy a long-standing monopoly on the market for the operation of the special-interest channels and entry onto that market does not require access to essential infrastructure. Furthermore, in the Cégétel and Télécom développement decisions, the effect of the clauses considered was not to deprive third-parties of any possibility of access to the services of the shareholders. It was merely a question of preferential treatment.

135 It must therefore be held that the Commission did not commit a manifest error of assessment in not classifying the clause relating to the special-interest channels as a restriction that was ancillary to the creation of TPS.

136 That part of the applicants' alternative argument must therefore be rejected.

(iii) Conclusion

137 In the light of the foregoing, the present plea must be rejected as unfounded.

(b) The second plea: infringement of Article 85(3) of the Treaty

(i) The argument alleging misapplication of the criteria for exemption laid down in Article 85(3) of the Treaty

Argument of the parties

138 The applicants submit, first, that the Commission infringed Article 85(3) of the Treaty by taking into account, when applying that provision, assessments relating

to competition on the pay-TV market which, they claim, fall within the scope of Article 85(1).

139 They observe, next, that according to the case-law (judgment in Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93 *Métropole télévision and Others* v *Commission* [1996] ECR II-649, paragraph 114), the factors taken into account by the Commission in applying Article 85(3) of the Treaty must be relevant and relate to that article. According to the applicants, instead of examining whether the exclusivity clause and the clause relating to the special-interest channels, which it had held to be contrary to Article 85(1) of the Treaty, satisfied the conditions for exemption laid down in Article 85(3), the Commission in fact analysed whether the creation of TPS on the market satisfied those conditions.

140 The Commission disputes that it misapplied the exemption criteria laid down in Article 85(3) of the Treaty.

Findings of the Court

141 As regards the applicants' argument that the Commission is under an obligation, when applying Article 85(1) of the Treaty rather than Article 85(3) of the Treaty, to weigh the pro and anti-competitive effects of a restriction, the Court refers to the findings set out in paragraph 72 et seq. above.

142 As regards the question whether the Commission correctly verified whether the conditions for exemption were satisfied with respect to the exclusivity clause and the clause relating to the special-interest channels, it must be observed, first, that, contrary to the applicants' assertion, the Commission examined whether those conditions were satisfied with regard to each of those clauses.

143 Thus, with regard to the condition that there should be a contribution to the improvement of production or distribution of goods or promotion of technical or economic progress, the Commission found that this condition was satisfied inasmuch as 'by facilitating the successful launch of a new platform on the pay-TV market [the exclusivity clause and the clause relating to the special-interest channels] enable a new operator to emerge and increase the range of pay-TV services available to French viewers' (point 114 of the contested decision).

144 Those clauses also benefit consumers inasmuch as they led to 'an increase in the range of services on offer and to the development of new services based on the use of new technology' (point 118 of the contested decision) and 'extremely keen competition that developed as soon as TPS was created between that platform and CanalSatellite/Canal+' (point 119 of the contested decision).

145 As to the indispensability of the clauses at issue, the Commission found, in particular, that 'without preferential access to those [special-interest] channels, TPS would have had to produce a large number of channels itself, which would have greatly increased the already extremely high costs of launching the platform'

(point 122 of the contested decision) and that 'the exclusive transmission of the general-interest channels, by making the TPS package attractive to consumers and differentiating it from other services, is indispensable to its penetration of the French pay-TV market' (point 132 of the contested decision).

146 It is true that, as regards the fourth condition laid down by Article 85(3) of the Treaty, the requirement that there be no possibility of eliminating competition in respect of a substantial part of the products in question, the Commission did not explicitly refer to the exclusivity clause and the clause relating to the special-interest channels. It merely found that 'far from eliminating competition, the TPS agreements are pro-competitive' (point 135 of the contested decision). It is, however, implicit from the Commission's analysis that, in reaching that conclusion, it took account of those clauses and found that they were indispensable to the success of TPS.

147 Second, it is appropriate to point out that, even though the Commission rightly considered that the exclusivity clause and the clause relating to the special-interest channels could not be regarded as restrictions ancillary to the creation of TPS for the reasons set out in paragraphs 118 to 137 above, those restrictions are, however, directly linked to that operation. The analysis of whether the various conditions laid down by Article 85(3) of the Treaty were satisfied had therefore to be made in the light of the main operation to which those clauses were attached.

148 It must also be observed that the applicants' argument in that regard is contradictory. They assert that the Commission should have regarded those clauses as restrictions ancillary to the creation of TPS and, on the other hand, that it should have verified, without reference to the main operation, whether the conditions laid down in Article 85(3) of the Treaty were satisfied in regard to them.

149 That contradiction is due to a misinterpretation of the concept of 'ancillary restriction'. According to the applicants, where a restriction cannot be classified as an ancillary restriction, it must necessarily be analysed separately. However, as has been pointed out in paragraph 147 above, such a view does not take account of the fact that when certain restrictions directly linked to an operation cannot be classified as ancillary restrictions because they are not objectively necessary or not proportionate to the achievement of the main operation, they nevertheless remain inextricably linked to that operation. It is, therefore, normal that they should be analysed by taking into account the economic and legal context of that transaction.

150 That part of the applicants' argument must, therefore, be rejected.

(ii) The argument alleging erroneous assessment of the duration of the individual exemption

Arguments of the parties

151 The applicants submit that the Commission committed an error of assessment in taking the view in the contested decision that the duration of the exemption in respect of the exclusivity clause had to be fixed at three years. The grounds put forward by the Commission namely that the restriction is indispensable for TPS only during the launch period and its indispensability will lessen over time inasmuch as TPS will be able to sign up subscribers, gain experience in the pay-TV sector and so improve its offer, are erroneous.

152 They state that the indispensability of the exclusivity will not diminish but, quite to the contrary, will increase, having regard to the unassailable positions which the Canal+ group holds on the market. They observe that without exclusive rights to transmit the general-interest channels the viability of TPS is in danger.

153 The applicants consider that it is necessary to refer to the Cégétel decision, in which an exclusive distribution clause for certain telephony services was exempted for a period of 10 years, in particular on the ground that Cégétel would not be able to make the investments in those telecommunication services pay until an extremely long period had expired.

154 The applicants also submit that the Commission committed an error of assessment in restricting to three years, that is to say to the launch period, the duration of the exemption for the clause relating to the special-interest channels. They submit that this clause is indispensable not merely during the launch period, as the Commission asserts, but also throughout the period of operation of TPS inasmuch as that clause is, for TPS, the only means of securing its supply of special-interest channels.

155 The Commission disputes that it committed an error of assessment in fixing the exemption period at three years.

Findings of the Court

156 It must be observed, first, that it is settled law that the exercise of the Commission's powers under Article 85(3) of the Treaty necessarily involves complex evaluations on economic matters, which means that judicial review of

those evaluations must confine itself to an examination of the relevance of the facts and of the legal consequences which the Commission deduces from them (see, in particular, the judgment in Case 56/64 and 58/64 *Consten and Grundig* v *Commission* [1966] ECR 382 and *Matra Hachette* v *Commission*, cited in paragraph 74 above, paragraph 104).

157 That principle applies especially with regard to the Commission's determination of the period during which a restriction is considered indispensable (*Remia* v *Commission*, cited in paragraph 87 above, paragraph 34).

158 Second, it must be observed that in *Matra Hachette* v *Commission*, cited in paragraph 74 above (paragraph 104), the Court held that 'it is incumbent upon notifying undertakings to provide the Commission with evidence that the conditions laid down by Article 85(3) are met (judgment in Joined Cases 43/82 and 63/82 *VBVB* and *VBBB* v *Commission* [1984] ECR 19), an obligation which, in the proceedings before the Court, must be assessed in the light of the onus which falls on the applicant to provide information to challenge the Commission's appraisal'.

159 However, the applicants merely assert that the Commission committed an error of assessment inasmuch as, according to them, the indispensability of the exclusivity will increase rather than diminish, having regard to the unassailable positions held by the Canal+ group on the market. As to the clause relating to special-interest channels, they submit that it is necessary in order to secure the supply to TPS of channels of that type. They do not, however, adduce any cogent

evidence to show that this assertion is correct, an assertion which, moreover, does not take account of changes in the market. Lastly, the applicants do not dispute any of the facts on the basis of which the Commission took the view that the indispensability of those clauses would necessarily diminish over time and held that three years was the minimum period during which they were indispensable for TPS (point 134 of the contested decision).

160 Third, it must be observed that the applicants are wrong in referring to the Cégétel decision. As the Commission correctly states, only the exclusive distribution of certain products was the subject of an exemption in that decision and the distribution of those products was merely a small part of Cégétel's activities, whereas the exclusive right to transmit the general-interest channels is an essential element of the services offered by TPS.

161 It must therefore be found that the Commission did not commit a manifest error of assessment in limiting the period of exemption to three years.

162 That part of the applicants' argument must therefore be rejected.

(iii) Conclusion

163 In the light of the foregoing, the present plea must be rejected as unfounded.

2. The plea relating to Article 2 of the contested decision, alleging infringement of the principle of legal certainty

Arguments of the parties

164 The applicants submit that, by issuing a negative clearance for a period limited to three years on the ground that the non-competition clause could be classified as a restriction ancillary to the creation of TPS only during the launch period, the Commission did not comply with the rules which it had set out in its *XXIVth Report on competition policy*. They observe that the Commission stated in that document, which is binding on it, that 'in the context of joint ventures, [the ancillary restrictions] are usually allowed for the whole duration of the joint venture' (page 120, point 166).

165 According to the applicants, it is clear from the case-law (Case T-7/89 *Hercules Chemicals* v *Commission* [1991] ECR II-1711, and Case T-9/89 *Hüls* v *Commission* [1992] ECR II-499) that by failing to observe that rule in the present case the Commission infringed the principle of legal certainty.

166 The applicants observe that the Commission's position in the present case is all the more open to criticism because that rule is still current, as is apparent from the Cégétel and Télécom Développement decisions. In those decisions two non-

competition clauses were classified as ancillary restrictions and were treated in the same way as the joint venture.

167 The Commission disputes that it infringed the principle of legal certainty or committed an error of assessment in taking the view that the non-competition clause was an ancillary restriction only during the launch period, that is to say during the first three years.

Findings of the Court

168 In the first place, it must be observed that it is apparent from the extract from the *XXIVth Report on competition policy* cited by the applicants, namely that 'the ancillary restrictions are usually allowed for the whole duration of the joint venture' and from the specific context in which it is found (the analysis of the establishment of five joint ventures in the research and development sector) that the part of the report in which that extract is found does not lay down strict rules which the Commission is alleged to have imposed on itself with regard to classification of an agreement as an ancillary restriction. It is more in the nature of a simple description of a number of principles which the Commission normally follows when assessing certain clauses which it considers to be ancillary to a main operation.

169 Contrary to the applicants' assertion, the present case cannot therefore be compared to the case which gave rise to the judgment in *Hercules Chemicals* v *Commission*, cited in paragraph 165 above. In that case the Commission had in fact made known, through its annual report on competition policy, a number of rules which it had imposed on itself relating to access to the file in competition proceedings.

170 It is also apparent from the extract from the *XXIVth Report on competition policy* cited by the applicants that the extract merely reproduces, almost literally, the principles set out by the Commission in paragraph 67 of the notice on cooperative joint ventures. However, as that notice makes clear, it has only indicative value as regards the way in which the Commission will apply the theory of ancillary restrictions in practice.

171 It follows that the applicants cannot rely on the above extract in order to prove that the Commission infringed the principle of legal certainty in regard to them.

172 In the light of the foregoing, the present plea must be rejected as unfounded.

173 As all the pleas on which the applicants rely are unfounded, the application must be dismissed.

Costs

174 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. Since the applicants have been unsuccessful and the Commission has applied for costs, they must be ordered to pay the costs of the Commission and of the intervener in addition to bearing their own.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber),

hereby:

1. **Dismisses the application;**

2. **Orders the applicants to bear their own costs and to pay those incurred by the Commission and by the intervener.**

Azizi Lenaerts Jaeger

Delivered in open court in Luxembourg on 18 September 2001.

H. Jung J. Azizi

Registrar President

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