

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

15 December 2005 *

In Case T-33/01,

Infront WM AG, formerly KirchMedia WM AG, established in Zug (Switzerland), represented initially by C. Lenz, A. Bardong, lawyers, and E. Batchelor, Solicitor, and subsequently by C. Lenz, E. Batchelor, R. Denton, Solicitor, F. Carlin, Barrister, and M. Clough QC, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by K. Banks and M. Huttunen, acting as Agents, and by J. Flynn QC, with an address for service in Luxembourg,

defendant,

* Language of the case: English.

supported by

French Republic, represented by G. de Bergues, acting as Agent, with an address for service in Luxembourg,

United Kingdom of Great Britain and Northern Ireland, represented initially by J. Collins and subsequently by R. Caudwell, acting as Agents, and finally by M. Berthell, acting as Agent, and by K. Parker QC, with an address for service in Luxembourg,

European Parliament, represented by C. Pennera and M. Moore, acting as Agents, with an address for service in Luxembourg,

Council of the European Union, represented by A. Lopes Sabino and M. Bishop, acting as Agents,

interveners,

APPLICATION for annulment of the alleged decision of the Commission adopted under Article 3a of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23), as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 (OJ 1997 L 202, p. 60),

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

composed of H. Legal, President, P. Lindh, P. Mengozzi, I. Wiszniewska-Białecka and V. Vadapalas, Judges,

Registrar: J. Plingers, Administrator,

having regard to the written procedure and further to the hearing on 7 July 2005,

gives the following

Judgment

Legal context

- ¹ Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States

concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23) was adopted on the basis of Article 57(2) of the EEC Treaty (now, after amendment, Article 47(2) EC) and Article 66 of the EEC Treaty (now Article 55 EC). That directive was amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 (OJ 1997 L 202, p. 60).

- 2 Directive 89/552 as amended provides the legal framework for television broadcasting in the common market. Its primary objective is to facilitate the free movement of television broadcasts within the European Community by laying down minimum rules with which the Member States are required to ensure that television broadcasters under their jurisdiction comply.
- 3 Recitals 18 to 21 in the preamble to Directive 97/36 read as follows:

(18) ... it is essential that Member States should be able to take measures to protect the right to information and to ensure wide access by the public to television coverage of national or non-national events of major importance for society, such as the Olympic games, the football World Cup and the European football championship; ... to this end Member States retain the right to take measures compatible with Community law aimed at regulating the exercise by broadcasters under their jurisdiction of exclusive broadcasting rights to such events;

(19) ... it is necessary to make arrangements within a Community framework, in order to avoid potential legal uncertainty and market distortions and to

reconcile free circulation of television services with the need to prevent the possibility of circumvention of national measures protecting a legitimate general interest;

(20) ... in particular, it is appropriate to lay down in this Directive provisions concerning the exercise by broadcasters of exclusive broadcasting rights that they may have purchased to events considered to be of major importance for society in a Member State other than that having jurisdiction over the broadcasters, and ... in order to avoid speculative rights purchased with a view to circumvention of national measures, it is necessary to apply these provisions to contracts entered into after the publication of this Directive and concerning events which take place after the date of implementation, and ... when contracts that predate the publication of this Directive are renewed, they are considered to be new contracts;

(21) ... events of major importance for society should, for the purposes of this Directive, meet certain criteria, that is to say be outstanding events which are of interest to the general public in the European Union or in a given Member State or in an important component part of a given Member State and are organised in advance by an event organiser who is legally entitled to sell the rights pertaining to that event.'

⁴ Article 1 of Directive 89/552 as amended ('the directive') provides:

'(a) "television broadcasting" means the initial transmission by wire or over the air, including that by satellite, in unencoded or encoded form, of television

programmes intended for reception by the public. It includes the communication of programmes between undertakings with a view to their being relayed to the public. It does not include communication services providing items of information or other messages on individual demand such as telecopying, electronic data banks and other similar services;

- (b) “broadcaster” means the natural or legal person who has editorial responsibility for the composition of schedules of television programmes within the meaning of (a) and who transmits them or has them transmitted by third parties.’

5 Article 3a of the directive provides:

‘1. Each Member State may take measures in accordance with Community law to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events via live coverage or deferred coverage on free television. If it does so, the Member State concerned shall draw up a list of designated events, national or non-national, which it considers to be of major importance for society. It shall do so in a clear and transparent manner in due and effective time. In so doing the Member State concerned shall also determine whether these events should be available via whole or partial live coverage, or where necessary or appropriate for objective reasons in the public interest, whole or partial deferred coverage.

2. Member States shall immediately notify to the Commission any measures taken or to be taken pursuant to paragraph 1. Within a period of three months from the notification, the Commission shall verify that such measures are compatible with

Community law and communicate them to the other Member States. It shall seek the opinion of the Committee established pursuant to Article 23a. It shall forthwith publish the measures taken in the [Official Journal] and at least once a year the consolidated list of the measures taken by Member States.

3. Member States shall ensure, by appropriate means, within the framework of their legislation that broadcasters under their jurisdiction do not exercise the exclusive rights purchased by those broadcasters following the date of publication of this Directive in such a way that a substantial proportion of the public in another Member State is deprived of the possibility of following events which are designated by that other Member State in accordance with the preceding paragraphs via whole or partial live coverage or, where necessary or appropriate for objective reasons in the public interest, whole or partial deferred coverage on free television as determined by that other Member State in accordance with paragraph 1.'

6 Under Article 23a(1) of the directive:

'A contact committee shall be set up under the aegis of the Commission. It shall be composed of representatives of the competent authorities of the Member States. It shall be chaired by a representative of the Commission and meet either on his initiative or at the request of the delegation of a Member State.'

Facts

7 Kirch Media GmbH & Co. KGaA, formerly known as TaurusFilm GmbH & Co., and KirchMedia WM AG, now Infront WM AG, are involved in the acquisition,

management and marketing of television broadcasting rights for sporting events and typically purchase such rights from the organiser of the sporting event concerned. They sell the rights acquired in this way to broadcasters.

- 8 On 10 September 1996, TaurusFilm GmbH & Co. and its co-licensee Sporis Holding AG signed a contract with the Fédération internationale de football association ('FIFA') for the worldwide (excluding the USA) exclusive broadcasting rights to the final-stage matches ('the finals') of the 2002 and 2006 FIFA World Cup. By an agreement between FIFA and TaurusFilm GmbH & Co. entered into on 26 May 1998 which replaced the preceding contract, the latter acquired the exclusive broadcasting rights to those matches in the countries of Europe including Russia, the former soviet socialist republics and Turkey for a minimum sum of CHF 1.4 billion.
- 9 On 14 October 1998, Kirch Media GmbH & Co. KGaA assigned its rights to broadcast the 2002 FIFA World Cup (excluding the rights to broadcast in Germany) to its Swiss affiliate FWC Medien AG, now KirchMedia WM AG. The broadcasting rights for the 2006 FIFA World Cup were subsequently also assigned to KirchMedia WM AG.
- 10 As required by Article 3a(2) of the directive, the United Kingdom notified the Commission on 25 September 1998 of the measures taken pursuant to Article 3a(1). Those measures included the list of events of major importance for society designated by that Member State.
- 11 On 2 November 1998, the Commission communicated those measures to the other Member States as required by Article 3a(2) of the directive and it received the

observations of the contact committee established pursuant to Article 23a(1) of that directive ('the Contact Committee') at a meeting on 20 November 1998.

- 12 By letter of 23 December 1998, the Commission informed the United Kingdom that there were doubts as to the scope of the measures notified which prevented it from assessing whether those measures were compatible with Community law.
- 13 The United Kingdom notified a new version of those measures to the Commission by letter of 5 May 2000.
- 14 By letter of 14 July 2000, addressed to the Commission, the applicant submitted that the list drawn up by the United Kingdom could not be approved because it was incompatible with both Article 3a of the directive and other provisions of Community law. It alleged inter alia in that letter that the list in question was not drawn up pursuant to a clear and transparent procedure, that it included events which were not of major importance for United Kingdom society and that the national and Community consultation procedures were marred by serious deficiencies, and it criticised the retroactive nature of the relevant legislation.
- 15 By letter of 28 July 2000, the Director-General of the Directorate-General (DG) for Education and Culture sent a letter to the United Kingdom, in which he stated as follows:

'By letter dated 5 May 2000, received by the European Commission on 11 May 2000, the UK Permanent Representation to the European Union notified [to] the

Commission a set of national measures concerning the television coverage of events of national interest in the UK. These measures include: sections 97, 98, 101, 103, 104 and 105 of Part IV of the Broadcasting Act [1996]; [paragraphs 1, 3 and 9 of Regulation 3 in] the Schedule to the Television Broadcasting Regulations 2000; the relevant provisions of the [Independent Television Commission] Code on Sports and other Listed Events published pursuant to section 104 of the Broadcasting Act 1996; the criteria for determining sporting and other events of national interest announced by the Secretary of State [for Culture, Media and Sport] (25 November 1997) and the Secretary of State's announcement to Parliament of the outcome of the review of sporting and other events of national interest made pursuant to section 97(3) of the Broadcasting Act 1996 (25 June 1998).

As required under Article 3a(2) of [the directive], the Commission communicated the [notified] measures to the other Member States and sought the opinion of the [Contact Committee].

I have the honour to inform you that pursuant to the examination of the conformity of the measures taken with the directive and on the basis of the facts available in relation to the audiovisual landscape in the United Kingdom, the European Commission does not intend to object to the measures notified by your authorities.

As required by Article 3a(2) of the directive, the Commission will proceed with the publication of the notified measures in the [Official Journal].'

¹⁶ By letter of 7 November 2000, the applicant informed the Commission that it was aware of the Commission's imminent approval of the list of events of major importance for society designated by the United Kingdom and complained in particular of the infringement of its property rights caused by the adoption by that State of those measures under Article 3a(1) of the directive.

- 17 Pursuant to Article 3a(2) of the directive, the Commission published on 18 November 2000 (OJ 2000 C 328, p. 2) the measures taken by the United Kingdom pursuant to Article 3a(1) of the directive and notified to the Commission in accordance with the procedure laid down in Article 3a(2).
- 18 Those measures include extracts from Part IV of the Broadcasting Act 1996 ('the 1996 Act'), extracts from Regulation 3 annexed to the Television Broadcasting Regulations 2000 ('the TBR 2000'), extracts from the Independent Television Commission Code on Sports and other Listed Events, as amended in January 2000 ('the ITC Code'), to which are appended a list of the events of major importance for society designated by the United Kingdom and a list of services meeting the qualifying conditions set out in the TBR 2000, together with the written replies of the United Kingdom Secretary of State for Culture, Media and Sport to two parliamentary questions of 25 November 1997 and 25 June 1998 concerning the revision of the list of sporting events set out in Part IV of the 1996 Act. Included in that list are the FIFA World Cup finals.
- 19 On 7 December 2000, the applicant wrote to the Commission, stating inter alia as follows:

'... I would appreciate if you could ... confirm that the Commission has completed the verification process under Article 3a [of the directive] in connection with the list drawn up by the United Kingdom and [the 1996 Act], and ... inform us of the outcome of this process, including any relevant Commission measures. In addition, we would appreciate having access to all relevant documentation.'

20 The applicant repeated its request to the Commission by letter of 22 December 2000.

21 By letter of 22 January 2001, the Commission replied to the applicant as follows:

‘In legal terms, pursuant to Article 3a(2) of the directive, the publication of measures is the consequence of a (positive) verification procedure performed by the Commission. Your assumption is therefore correct that the verification procedure by the Commission has been completed and that the UK list has been accepted as compatible with the Directive.’

22 The Commission annexed to that letter the opinion of the Contact Committee of 6 June 2000.

Procedure

23 On 12 February 2001, Kirch Media GmbH & Co. KGaA and KirchMedia WM AG brought the present action.

24 By letter of 5 April 2001, the Council sought leave to intervene in support of the forms of order sought by the Commission.

- 25 By separate document lodged at the Registry of the Court on 11 June 2001, the Commission brought an application for a decision on admissibility under Article 114 of the Rules of Procedure of the Court. On 26 July 2001, the applicants lodged their observations on that plea of inadmissibility, to which they attached, as Annex 6, excised versions of the agreements entered into with FIFA relating to the assignment of broadcasting rights to the 2002 and 2006 FIFA World Cup finals (see paragraph 8 above).
- 26 By letters of 14 and 20 June 2001 respectively, the United Kingdom and the Kingdom of Denmark sought leave to intervene in support of the forms of order sought by the Commission. By letters of 25 June 2001, the French Republic, the Communauté française de Belgique (the French Community of Belgium) and the Parliament also sought leave to intervene in support of the forms of order sought by the Commission.
- 27 By letter of 2 August 2001, the applicants submitted a request for confidential treatment in respect of the applicants for leave to intervene, in the event of the applications for leave to intervene being granted, of certain parts of Annex 6 to their observations on the plea of inadmissibility.
- 28 In their observations lodged at the Registry of the Court on 31 August 2001, the applicants requested the Court to reject the application by the Communauté française de Belgique for leave to intervene and to order it to pay the costs arising out of its application. The main parties did not object to the other applications for leave to intervene.
- 29 By letter of 7 November 2001, the Commission sought leave to submit observations on the fact that, in Annex 6 to their observations on the plea of inadmissibility, the applicants had supplied excised versions of the agreements entered into with FIFA and, by letter of 12 April 2002, the Commission requested production of complete copies of those agreements. By letter of 4 July 2002, the Court requested the

applicants to submit observations on the disclosure to the Commission of complete copies of the licence agreements entered into with FIFA.

30 By order of the Court of 11 March 2002, the decision on the application for a decision on admissibility made by the Commission was joined to the substance of the case and costs were reserved.

31 On 13 May 2002, the Court received complete copies of the agreements entered into with FIFA on 10 September 1996 and 26 May 1998.

32 By letter of 29 November 2002, the applicants requested, pursuant to Article 64(4) of the Rules of Procedure, that the Commission be asked to lodge documents. By letter of 20 January 2003, the Commission requested the removal of Annex 17 to the application from the file before the Court. By letter of 26 March 2003, the applicants made observations in that regard.

33 By letter of 11 February 2003, the Registry of the Court informed the parties that a ruling on the request for the removal of that item from the file before the Court would be given subsequently.

34 By letter of 26 March 2003, Kirch Media GmbH & Co. KGaA applied to discontinue its application. By order of 24 June 2003, the President of the Fifth Chamber of the Court ordered that that be done.

35 By order of 9 July 2003, the Court granted the Kingdom of Denmark, the French Republic, the United Kingdom, the Parliament and the Council leave to intervene in support of the forms of order sought by the defendant. By contrast, the

Communauté française de Belgique was refused leave to intervene. The parties granted leave to intervene lodged statements in intervention, with the exception of the Kingdom of Denmark and the Council. The applicant lodged observations on those statements in intervention.

- 36 By letter of 19 August 2003, the Registry of the Court invited the applicant to produce non-confidential versions of its pleadings.
- 37 By letter of 19 September 2003, the applicant applied for certain parts of the defence to be treated as confidential.
- 38 By order of 4 December 2003, the President of the Fifth Chamber of the Court ordered that a non-confidential copy of every procedural document served on the parties be served on the interveners and invited the interveners to lodge their observations in that regard. The interveners lodged no observations within the period allowed to them for that purpose, except for the United Kingdom, which did not raise any objections on that issue.
- 39 By decision of 13 September 2004 on the composition of the Chambers of the Court, the Judge-Rapporteur was assigned to the Fourth Chamber, to which this case was accordingly allocated by decision of 21 October 2004.
- 40 Pursuant to Article 14 of the Rules of Procedure and acting on a proposal from the Fourth Chamber, the Court decided, after the parties had been heard in accordance with Article 51 of those rules, to refer the case to a Chamber with an extended composition.

41 By letter lodged at the Registry of the Court on 1 July 2005, the Kingdom of Denmark informed the Court that it was withdrawing its intervention. As the applicant, the defendant and the United Kingdom did not object to the Kingdom of Denmark's withdrawal and the other interveners made no observations, the President of the Fourth Chamber, Extended Composition, by order of 31 August 2005, ordered that the Kingdom of Denmark's intervention be withdrawn and that each party bear its own costs in relation to that intervention.

42 Upon hearing the report of the Judge-Rapporteur, the Court (Fourth Chamber, Extended Composition) decided to open the oral procedure and, by way of measures of organisation of procedure as provided for in Article 64(3)(c) and (d) of the Rules of Procedure of the Court, requested the main parties and the United Kingdom to lodge certain documents and sent questions in writing to the applicant and the Commission, requesting that they reply to those questions prior to the hearing. The applicant, the defendant and the United Kingdom complied with those requests within the time-limit laid down.

43 With the exception of the French Republic, the parties submitted oral argument and answered the questions put by the Court at the hearing on 7 July 2005.

44 By letter of 22 August 2005, lodged at the Registry of the Court on 23 August 2005, the applicant requested that a document, which was enclosed with that letter and which the United Kingdom had only disclosed to it after the hearing, be added to the file.

Forms of order sought

45 The applicant claims that the Court should:

- annul, in whole or in part, the Commission's decision under Article 3(a) of the directive that the measures notified by the United Kingdom were compatible with Community law ('the contested decision');

- declare that Article 3(a) of the directive is inapplicable and could not serve as a legal basis for the adoption of the contested decision;

- order the Commission to pay the costs;

- order the French Republic, the United Kingdom and the Parliament to bear their own costs including those incurred by reason of their interventions.

46 The Commission contends that the Court should:

- dismiss the action as inadmissible;

— in the alternative, dismiss the action as unfounded;

— order the applicant to pay the costs.

⁴⁷ The Parliament, in support of the Commission, submits that the Court should:

— dismiss the action as inadmissible;

— in the alternative, dismiss the action as unfounded.

⁴⁸ The United Kingdom, in support of the Commission, contends that the Court should dismiss the action.

⁴⁹ The French Republic, in support of the Commission, contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law*A — The request for measures of organisation of procedure*

50 In its pleadings the applicant asks that the Commission be requested to produce various documents concerning the procedure for verifying that the measures adopted by the United Kingdom are compatible with Community law.

51 By way of measures of organisation of procedure pursuant to Article 64(3)(c) and (d) of the Rules of Procedure of the Court of First Instance, the Court requested the Commission and the United Kingdom to disclose those documents. At the hearing the applicant stated in reply to a question from the Court that it was satisfied with the response to its application for documents to be disclosed.

52 In those circumstances, the Court finds that there is no need to make a ruling in that regard.

B — The application to withdraw a document

53 By letter of 20 January 2003, the Commission requested the Court to remove from the proceedings a document produced by the applicant in Annex 17 to its application on the ground that it was a document drafted by its staff for the purposes of discussion within the Contact Committee which was confidential. The applicant objected to that removal.

- 54 The Commission's request seeks the removal from the proceedings of the document entitled 'Discussion paper for the Contact Committee on Art. 3(a) [of the directive]' with the reference number DOC CC TVSF (2000) 6. It should however be noted that the Commission has not expressly claimed that it is an internal document.
- 55 Furthermore, when questioned by the Court at the hearing on the confidential nature of that document, the Commission stated that the Contact Committee, the addressee of that document, no longer considered it to be confidential and that it could be assumed that it would therefore be disseminated widely.
- 56 In those circumstances, notwithstanding the fact that at the hearing the Commission sought to confirm its application for the removal of that document from the case-file, it cannot be considered that that document was or in any event remains an internal confidential document of the institution.
- 57 Consequently, the Commission's application for the removal of the document in question from the case-file must be rejected.

C — *Admissibility*

1. *Admissibility of the applicant's first claim*

- 58 The Commission claims that the application is inadmissible because, first, it did not adopt any measure on the basis of Article 3a(2) (of the directive) capable of being challenged, second, the contested measure is of neither direct nor individual

concern to the applicant and, third, as the applicant failed to communicate with its application copies of the contracts entered into with FIFA on 10 September 1996 and 26 May 1998, it was not able to prepare its defence.

- 59 In relation to that third plea of inadmissibility, it should be noted that during the proceedings before the Court the applicant did produce copies of the contracts in question (see paragraphs 25 and 31 above), which were disclosed to the Commission. When questioned on that point at the hearing the Commission, in reply to a request from the Court, withdrew the third plea of inadmissibility.
- 60 Furthermore, in its defence and following the applicant's disclosure of the contracts entered into with FIFA on 10 September 1996 and 26 May 1998, the Commission submitted that those contracts considerably limited the applicant's ability to exploit its rights by awarding exclusive sub-licences to television broadcasters. It considered that, given the content of certain clauses of those contracts, it is not clear that the loss which the applicant claims to have suffered results from the contested measure.
- 61 It should be noted that the Commission drew no conclusion from its contentions regarding the admissibility of the present action. In any event, in so far as the Commission sought by those allegations to challenge the applicant's interest in the annulment of the contested measure, it should be noted that it has not submitted that the content of the contracts in question deprived the applicant of such an interest and that that fact is by no means apparent from the file having regard, moreover, to the applicant's reply to the Court's written questions concerning in particular the extent of the contractual restrictions on the exercise of the applicant's broadcasting rights in respect of FIFA World Cup matches.
- 62 In the light of the foregoing, only the first and second grounds of inadmissibility advanced by the Commission need be examined.

(a) The legal nature of the contested decision

Arguments of the parties

- ⁶³ The Commission submits that, unlike Article 2a(2) of the directive, Article 3a(2) makes no mention of a 'decision' which it must adopt. The French Republic states in that regard that Article 3a does not confer decision-making power on the Commission. Its role is to carry out a preliminary check of the compatibility with Community law of the national measures notified.
- ⁶⁴ If the national measures notified do not appear to infringe Community law, the Commission informs the Member State concerned that it does not intend to object to those measures and proceeds to publish them in the Official Journal so that the other Member States may comply with their obligations under Article 3a(3) of the directive. The defendant and the French Republic state that, if those measures infringe Community law and assuming that the Member State does not introduce the necessary amendments, the Commission is obliged to initiate infringement proceedings pursuant to Article 226 EC.
- ⁶⁵ The preliminary finding that there has been no infringement of Community law is therefore a decision not immediately to initiate infringement proceedings against the Member State concerned. Private parties are not entitled to contest a refusal by the Commission to initiate infringement proceedings under Article 226 EC, since the Commission's adoption of a position on that question is not an act producing definitive legal effects (order of the Court of First Instance of 13 November 1995 in Case T-126/95 *Dumez v Commission* [1995] ECR II-2863, paragraph 37).

- 66 The French Republic states in that regard that according to Article 226 EC the rights and duties of Member States may be determined and their conduct appraised only by a judgment of the Court of Justice (Case C-393/98 *Gomes Valente* [2001] ECR I-1327). The position adopted by the Commission concerning the compatibility with Community law of a list of events of major importance for society does not therefore alter the legal situation of the Member State concerned. Moreover, the legally binding nature of the list in question, published in the Official Journal, does not flow from the Commission's letter to the United Kingdom of 28 July 2000 informing it that those measures are compatible with Community law but from national law alone. The Commission states in that regard that if there were a decision in the present case it would be that letter of 28 July 2000.
- 67 Whatever the Commission's position in relation to the national measures notified, it does not affect their implementation in the notifying Member State. The Commission has no power to declare the legislation of a Member State incompatible with Community law.
- 68 The Commission further points out that in its letter of 28 July 2000 to the United Kingdom it stated that, 'on the basis of the facts available', it did not intend to oppose the measures notified and that that finding did not constitute a decision. It points out in that regard that where it must be legally bound its decision must be adopted by the College of Commissioners and must be reasoned. Its letter of 28 July 2000 is therefore comparable to a comfort letter (Joined Cases 253/78 and 1/79 to 3/79 *Giry and Guerlain and Others* [1980] ECR 2327, and Case T-3/93 *Air France v Commission* [1994] ECR II-121, paragraph 50).
- 69 As for the obligation upon it to publish the approved national measures in the Official Journal, the Commission considers that it in no way alters the nature of its letter of 28 July 2000. The only purpose of such publication is to inform the other Member States so that they can comply with their obligation under Article 3a(3) of

the directive. It points out however that it is not its provisional approval of the notified measures which triggers the Member States' obligation to comply with the obligations on them under that article but rather that article itself, which refers to 'events which are designated by that other Member State in accordance with the preceding paragraphs' and not to 'events included in a list published by the Commission'. Therefore, both the notification of the measures in question to the other Member States and the publication of those measures in the Official Journal are administrative measures which in no way imply the exercise of any decision-making power whatsoever on the part of the Commission.

70 In that respect, concerning the reference in Article 3a(3) to the 'preceding paragraphs' and not to 'paragraph 1', it seems that the applicant's approach is to treat the obligation imposed on the Member States as subordinate to the description of the measures referred to in Article 3a(1) of the directive and to their notification and approval by the Commission pursuant to Article 3a(2) of that directive. However, the only requirement is that the Member State has complied with its obligations of designation and notification of the measures pursuant to Article 3a(1) and (2) of the directive, which is compatible with the apparent intention of the legislature to implement a system of mutual recognition of the measures adopted by the Member States whilst conferring on the Commission the role of arbitrator. The applicant's interpretation therefore confers binding force on a mere finding by the Commission, which does not give rise to legal effects for the other Member States. The obligation of mutual recognition arising from Article 3a(3) of the directive is not subject to the Commission's assessment of the compatibility with Community law of the measures notified.

71 Moreover, the other Member States cannot, as a matter of Community law, be obliged to apply another Member State's measures which are incompatible with Community law, notwithstanding the position adopted by the Commission with regard to those measures. The Commission refers in that context to its letter to the United Kingdom of 23 December 1998, in which it cast doubt on the compatibility

with Community law of the measures initially notified. It also points out that the national measures in question were published in the C series of the Official Journal and not the L series.

72 The Commission, supported by the Parliament, submits lastly that the applicant does not deny that the measures in question could have been challenged before the United Kingdom courts. The national court in the case which gave rise to the judgment of the House of Lords of 25 July 2001 in *R v ITC ex parte TV Danmark 1 Ltd* [2001] UKHL 42, cited by the applicant, merely stated that it would make no finding on the question of the balance between the interests of the organisers of sporting events and television broadcasters in maintaining a free market, on the one hand, and the interest of the citizen in being able to watch major sporting events on the other. It did not, however, hold that it would not reassess the legality of the measures adopted under Article 3a of the directive. If an action had been brought before the United Kingdom courts and a reference for a preliminary ruling had been made to the Court of Justice under Article 234 EC, no parallel could have been drawn by the applicant with the case which led to the judgment in Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833. In the present case, the applicant is time-barred from bringing an action before the United Kingdom courts. If the Court of First Instance were to declare admissible the present action brought against an alleged Commission decision it would sanction an abuse of procedure such as that condemned by the Court in *TWD Textilwerke Deggendorf*, cited above.

73 According to the Commission, it is not open to the Court of First Instance to review the validity of the United Kingdom measures or to interpret them. Moreover, it would be particularly difficult for a court other than one in the United Kingdom to interpret those measures, which include the ITC Code on Sports and other Listed Events, given their lack of clarity.

74 The Parliament states that it was open to the applicant to defend its rights by way of a reference for a preliminary ruling from the High Court in London to the Court of Justice (Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paragraphs 32 to 41).

75 Furthermore, the Parliament adds that an analogy may also be drawn between the present case and the circumstances which gave rise to the judgment in Joined Cases T-74/00, T-76/00, T-83/00, T-84/00, T-85/00, T-132/00, T-137/00 and T-141/00 *Artegodan and Others v Commission* [2002] ECR II-4945, paragraph 142, confirmed on appeal, which states that, in the absence of an express transfer of competence to the Commission, the matter in question remains within the residual competence of the Member States. It refers in that context to Article 7 EC, which provides that each institution is to act within the limits of the powers conferred on it by the Treaty. There is nothing in either Directive 89/552 or Directive 97/36 to suggest that the Member States have, by implication, deprived themselves of their competence. In particular, Article 3a of the directive does not expressly confer any competence on the Commission, as is confirmed by the absence of any comitology procedure. Furthermore, the duties of the Contact Committee do not amount to implementing powers under the third indent of Article 202 EC. In addition, neither the general structure, nor the essential purpose and wording of Article 3a of the directive, nor the intention of the legislature have the aim of conferring a specific decision-making power on the Commission.

76 In conclusion, the Commission considers that, in the light of the above, its assessment of the compatibility of the disputed measures does not constitute a challengeable act. In maintaining that the Commission should not have communicated the notified measures to the other Member States or published them in the Official Journal, the applicant is in fact challenging the validity of Article 3a(2) of the directive.

77 The applicant challenges the Commission's argument and submits, essentially, that the Commission's decision approving the measures notified produces legal effects both in the United Kingdom and in the other Member States.

78 The contested act is an act which produces binding legal effects, inasmuch as it is the outcome of the exercise, upon the conclusion of an internal procedure laid down by law, of a power provided for by law which is intended to produce legal effects of

such a nature as to affect adversely the interests of the applicant by modifying its legal position (Case 182/80 *Gauff v Commission* [1982] ECR 799, paragraph 18).

79 It refers, first, to the wording of Article 3a(2) of the directive which provides that the Commission is required to adopt a binding act after verifying the compatibility of the notified measures with Community law.

80 Second, it is clear from the purpose and objective of Article 3a(2) of the directive that that provision is intended to produce legal effects. The applicant refers in that context to recitals 18 and 19 to Directive 97/36 and notes that the drawing up of the national lists, in which Member States may be inclined to specify a large number of events, allows those States to favour television broadcasters established in their territory.

81 Third, the procedure for the application of Article 3a(2) of Directive 89/552 makes it clear that it leads to the adoption of a binding decision. The applicant refers in that regard to the time-limits and course of that procedure.

82 Furthermore, the applicant submits that neither the wording nor the purpose of Article 3a of the directive nor the relevant recitals to Directive 97/36 support the Commission's position that the act it adopted is comparable to a refusal to institute infringement proceedings under Article 226 EC. The present procedure requires the Commission to act as arbiter and to adopt a definitive decision on the legality of the notified measures. Such a decision cannot be withdrawn without affecting the legal position of the United Kingdom and of all individuals who have derived rights from the Commission's approval of those measures and their mutual recognition. The

applicant adds that the Commission's argument deprives the procedure laid down by Article 3a of the directive of any practical effect.

⁸³ The applicant also argues that the contested act produces legal effects in the other Member States, as the latter are required to enforce the United Kingdom measures against television broadcasters within their jurisdiction under Article 3a(3) of the directive. Accordingly, without a Commission decision approving the notified measures, the latter would produce no legal effects in other Member States. Any other interpretation would deprive the procedure laid down by Article 3a(2) of any practical effect and would be contrary to the purpose of Article 3a of the directive, which is to reconcile the free movement of television services with the need to prevent the possible circumvention of national measures designed to protect a legitimate general interest.

⁸⁴ The applicant submits lastly that it is clear from the file that mutual recognition is affected by the Commission's review of the compatibility with Community law of the measures notified and does not arise automatically from their notification.

Findings of the Court

⁸⁵ In its application, the applicant seeks annulment of the Commission decision finding, first, that the measures notified by the United Kingdom are compatible with Community law and providing, second, that those measures must be communicated to the other Member States so that the television broadcasters under their jurisdiction comply with them. It states in that respect that the only document available to the public is the Commission's publication of the measures adopted by the United Kingdom in the Official Journal of 18 November 2000 pursuant to Article 3a(2) of the directive.

86 In an annex to its plea of inadmissibility, the Commission however disclosed a letter from the Director-General of the Education and Culture DG dated 28 July 2000, informing the United Kingdom that pursuant to the examination of the conformity of the measures notified on 5 May 2000 and on the basis of the facts available in relation to the audiovisual landscape in the United Kingdom, the Commission did not intend to object to those and would publish them in the Official Journal (see paragraph 15 above). The Commission stated in that respect that if there were a decision in the present case, quod non, it would be that letter (see paragraph 66 above).

87 In those circumstances, it must be found that the letter of 28 July 2000 is, in substance, the contested measure in the present case, since it is the sole document expressly informing the United Kingdom of the Commission's position with regard to the compatibility with Community law of the measures it notified and of the forthcoming publication of those measures in the Official Journal. At the hearing, the applicant stated in answer to a question from the Court that its action in fact sought the annulment of that letter from the Commission to the United Kingdom.

88 It is therefore necessary to consider whether the Commission's letter of 28 July 2000 to the United Kingdom ('the contested letter') is an act susceptible to challenge.

89 According to settled case-law, any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action for annulment under Article 230 EC. The form in which such acts or decisions are cast is, in principle, immaterial as regards the question whether they are open to challenge by an action for annulment (Case 60/81 *IBM v Commission* [1981] ECR 2639, paragraph 9, and Case T-241/97 *Stork Amsterdam v Commission*

[2000] ECR II-309, paragraph 49). In order to ascertain whether or not a measure which has been challenged produces such effects it is necessary to look to its substance (Case C-147/96 *Netherlands v Commission* [2000] ECR I-4723, paragraphs 25 to 27).

90 In order to determine, in the light of the abovementioned principles, the legal nature of the contested letter and whether it produces legal effects, it is necessary to examine it in the context of the rules regarding events of major importance for society laid down by Article 3a of the directive.

91 It should be noted in that regard that the directive seeks to facilitate the free movement of television broadcasts within the Community whilst taking account of the specificities, particularly cultural and sociological, of audiovisual programmes.

92 As for the specific system of audiovisual rights for events of major importance for society established by Article 3a of the directive, recital 18 to Directive 97/36 states that it is essential that Member States should be able to take measures to protect the right to information and to ensure wide access by the public to television coverage of national or non-national events of major importance for society. In that context, it is provided that Member States retain the right to take measures compatible with Community law to regulate the exercise by television broadcasters under their jurisdiction of the exclusive broadcasting rights to such events. For the purposes of their mutual recognition by the other Member States under Article 3a(3) of the directive, the measures adopted or to be adopted by a Member State must be notified to the Commission.

- 93 Article 3a(2) of the directive provides, in that regard, that within a period of three months from the notification, the Commission is to verify that such measures taken by States are compatible with Community law. In doing so it is to consult the Contact Committee which is to give an opinion.
- 94 In the present case, since the contested letter in substance informs the United Kingdom of the Commission's approval of the measures it notified to it and of their subsequent publication in the Official Journal, that letter closes the verification procedure which the Commission is required to carry out under that article. The publication in the Official Journal of those measures approved by the Commission informs the other Member States of their existence, as the Commission itself notes in its pleadings (see paragraph 69 above), and, therefore, enables them to comply with their obligations under Article 3a(3) of the directive pursuant to the mechanism for mutual recognition of those measures instituted by that article.
- 95 The contested letter therefore produces legal effects for the Member States in so far as it envisages the publication in the Official Journal of the national measures in question, since the effect of that publication is to trigger the mechanism for mutual recognition laid down by Article 3a(3) of the directive.
- 96 First, that analysis follows from the wording of Article 3a(3) of the directive, which provides for the mutual recognition of the measures adopted by the Member States so as to ensure free access by the public to the events designated 'in accordance with the preceding paragraphs', that is, in particular, those for which the national measures notified were considered by the Commission to be compatible with Community law and published in the Official Journal in accordance with Article 3a(2).

97 Furthermore, the course of the verification procedure as described in Article 3a(2) of the directive and the thoroughness of that verification prevent it from being considered as a 'preliminary' verification at the end of which an 'opinion' is given. First, the Commission is required to carry out that verification within a strict time-limit of three months from the notification of the measures by the Member State concerned and must, to that end, consult the Contact Committee which issues its own opinion, in accordance with the requirements of Article 3a(2) of the directive. Second, the Commission admitted at the hearing that it had to carry out a detailed assessment of the compatibility of those measures with Community law, since the Commission must *inter alia* be satisfied that the provisions of the directive and the rules on the freedom to provide services and competition law have been complied with.

98 Second, given the general scheme of the rules on events of major importance for society laid down by Article 3a of the directive, the Commission's allegation that it is neither the approval of those measures nor their publication in the Official Journal which triggers the obligation on the other Member States to comply with their duties under Article 3a(3) of the directive cannot be correct.

99 That is because, in the first place, the review procedure which the Commission is required to carry out under Article 3a(2) of the directive seeks to ensure the compatibility of those measures with Community law (recital 18 to Directive 97/36).

100 In that connection, regarding the course of the procedure for the verification of the measures notified by the United Kingdom, the Commission stated in its letter of 23 December 1998 (see paragraph 12 above) *inter alia* as follows:

'I enclose herewith the preliminary result of the examination by Commission services of the notified measures. ... [T]he Commission concludes that, pending

clarification of a number of important issues on which further information and comments from your authorities are needed, it is not in a position to formally start the evaluation of conformity with Community law of the measures for which the UK is seeking mutual recognition by other Member States.'

- 101 The wording of that letter from the Commission confirms the interpretation of Article 3a(2) and (3) of the directive set out in paragraphs 98 and 99 above, according to which the mutual recognition of the national measures notified is subject to the verification of their compatibility with Community law.
- 102 Moreover, the verification of the compatibility with Community law of the measures notified, which the Commission is required to carry out, would have no practical effect if their mutual recognition by the other Member States was not dependent upon the approval of those measures. Even if the mechanism of mutual recognition were to apply to national measures considered by the Commission to be incompatible with Community law, the risk of legal uncertainty and market distortion would not be avoided, whereas such risks are proscribed by recital 19 to Directive 97/36. Mutual recognition of national measures incompatible with Community law would equally not serve to ensure reconciliation of the free movement of television services with the need to prevent the possibility of circumventing national measures protecting a legitimate public interest, as recital 19 to that directive also provides.
- 103 In the second place, the fact that the publication of the national measures in the Official Journal, which informs the other Member States of those measures so that they can comply with the obligations imposed by Article 3a(3), can only occur after the Commission has, following its verification, established their compatibility with Community law is further corroborated by various documents in the file.

- 104 Firstly, the course of the procedure for verifying the measures notified by the United Kingdom supports that interpretation. The United Kingdom notified measures to the Commission for the first time on 25 September 1998 and, as stated above, by letter of 23 December 1998 the Commission informed that Member State that certain aspects of those measures raised problems of compatibility with Community law. By letter of 5 May 2000, the United Kingdom notified an amended version of those measures. Only those latter measures, held by the Commission to be compatible with Community law, were published in the Official Journal, after the Commission informed the United Kingdom by means of the contested letter that they were compatible with Community law.
- 105 In its letter of 22 January 2001, the Commission further replied to the applicant that ‘in legal terms, pursuant to Article 3a(2) of the directive, the publication of measures is the consequence of a (positive) verification procedure performed by the Commission’ (see paragraph 21 above).
- 106 Secondly, the Commission’s position in that regard is shown by several documents annexed to the file of which it is the author. Thus on the page of its internet site devoted to Article 3a of the directive, produced by the applicant as an annex to its observations on the plea of inadmissibility, the Commission states that ‘a positive decision on the measures [as to their compatibility with Community law] is ratified by their publication in the Official Journal’. The Commission’s position is also apparent from its working document CCTVSF (97) 9/3, produced at the Court’s request, which states that ‘this need of legal certainty requires that the compatibility with Community law of the relevant measures be assessed under a fast-track procedure and — if positively evaluated — be published in the Official Journal’, that ‘it follows that only specific national measures falling within the scope of Article [3a(1)] ... will be subject to the procedure of notification to the Commission and to the subsequent assessment and eventual publication’ or again that ‘in the event of a positive outcome of the evaluation process it will have the relevant measures published in the Official Journal’.

- 107 It is clear from all of the foregoing that under Article 3a(2) of the directive the Commission has the power to make a decision and that the contested letter produces definitive legal effects, notwithstanding the fact that Article 3a of Directive 89/552 does not expressly refer to the adoption by the Commission of a 'decision'.
- 108 The argument of the Commission and the French Republic that the contested letter is a decision not to initiate infringement proceedings forthwith against the Member State concerned must therefore be rejected. In any event, even if the Commission were to find that the measures notified were incompatible with Community law and the notifying Member State does not remedy that incompatibility, it suffices for the Commission not to publish those measures in the Official Journal for them not to take effect under the mechanism of mutual recognition established by Article 3a(3) of the directive.
- 109 The argument that the applicant was able to challenge the measures in question before the United Kingdom courts cannot succeed because the review which the Court of First Instance is being invited to carry out in the present case concerns solely the legality of the Commission's finding that those measures are compatible with Community law for the purposes of implementing the mechanism of mutual recognition of events of major importance established by Article 3a(3) of the directive. The reference in that context to the judgment of the House of Lords in *R v ITC ex parte TV Danmark 1 Ltd* [2001] UKHL 42 (cited above) is irrelevant, since the action in that case was brought by a Danish broadcaster subject to United Kingdom law, against the decision of the relevant authorities of that Member State refusing to allow it exclusive broadcasting rights to five qualifying matches for the FIFA World Cup which appear on the list of events of major importance for society nominated by the Kingdom of Denmark. The purpose of that action was therefore to challenge the application by the United Kingdom, under the principle of mutual recognition, of the Danish measures and not, as in the present case, the Commission's decision establishing their compatibility with Community law.

110 Lastly, the defendant's argument that the fact that it is not legally bound is confirmed by the nature of the wording used in the contested letter, by the failure by the College of Commissioners to adopt a reasoned decision and by the choice to publish the measures notified which are found to be compatible with Community law in the C series, 'Information and Notices', and not in the L series, 'Legislation', of the Official Journal must also be rejected. It suffices to note that, according to settled case-law, the form in which acts or decisions are cast is, in principle, immaterial as regards the question whether they are open to challenge by way of an action for annulment, and it is necessary to look to their substance in order to ascertain whether they are actionable measures for the purposes of Article 230 EC (see paragraph 89 above).

111 It follows from all the foregoing considerations of law and of fact that the contested letter produces binding legal effects and therefore constitutes a decision within the meaning of Article 249 EC. Accordingly, since the contested letter is an act susceptible to challenge for the purposes of Article 230 EC, the present plea of inadmissibility must be rejected.

(b) The applicant's standing

112 The fourth paragraph of Article 230 EC provides that any natural or legal person may institute proceedings against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to him.

113 In the present case, since the Commission claims that the action is inadmissible by reason of the applicant's lack of standing, it is necessary to determine whether the applicant is directly and individually concerned by the contested letter.

Whether the applicant is directly concerned

— Arguments of the parties

- ¹¹⁴ The Commission, supported by the French Republic, refers to Case C-386/96 P *Dreyfus v Commission* [1998] ECR I-2309 and Case T-69/99 *DSTV v Commission* [2000] ECR II-4039, paragraph 24.
- ¹¹⁵ It submits that in this case the applicant's legal situation is not affected, since both the directive and the United Kingdom legislation concern solely the rights and obligations of television broadcasters and they may broadcast live an event which appears on the list only in certain circumstances. The applicant suffers only the indirect economic consequences of those constraints, which are linked to the risk that broadcasters may refuse to pay as high a price as that which the applicant had hoped to obtain in selling sub-licences to broadcast FIFA World Cup matches.
- ¹¹⁶ The Commission also states that only some of the provisions of the Broadcasting Act 1996, read in conjunction with the ITC Code on Sports and other Listed Events, have directly affected the applicant. The French Republic observes that the effects felt by the applicant do not result from the contested letter, but from the legislation in force in the United Kingdom, which includes the list of events of major importance for society. Although the applicant's economic situation was clear as soon as the 1996 Act came into force, as the list of events had already been drawn up and included the FIFA World Cup finals, it never challenged the United Kingdom legislation or the list of events of major importance for society drawn up by the United Kingdom.

- 117 In adopting the contested measures, the United Kingdom authorities were exercising full legislative discretion. Article 3a(1) confers on Member States the right to adopt the provisions relating to events of major importance for society. As regards the verification that the provisions notified are compatible with Community law, the Commission and the Parliament submit that that is comparable to the procedure laid down in Article 2a(2) of the directive, in relation to which the Court of First Instance has held that an applicant may not be directly affected by the measure adopted by the Commission on that basis (*DSTV v Commission*, paragraphs 26 and 27).
- 118 The Commission points out that it carried out its assessment as to the compatibility with Community law of the measures notified by the United Kingdom in the present case after the adoption of those measures, and that solely those measures directly affected the economic interests of the applicant.
- 119 The Commission disputes the applicant's contention that the publication in the Official Journal of the measures notified by the United Kingdom had the consequence of imposing obligations on the other Member States. In any event, that circumstance does not mean that the applicant is directly concerned by the contested act. The other Member States are required to ensure that broadcasters in their jurisdiction respect the United Kingdom's list of events of major importance for society, but they do this by application of their domestic rules. The implementation of the Commission's decision as to the compatibility of the measure notified is therefore not 'purely automatic' and does not result from Community rules alone.
- 120 The Commission also observes that even if its preliminary verification of the measures notified were to cause other Member States to ensure that broadcasters in their jurisdiction respected the list of events of major importance for society, that would have no effect in the present case. It is inconceivable that the applicant would

sub-licence its television rights for the United Kingdom to a television broadcaster not established in the United Kingdom, as those rights are granted on a national basis. At the national level, the income of television broadcasters is generated from advertising directed at the national audience, national licence fees or national subscription fees for pay television. As their interest is in providing programmes to a national audience, only those broadcasters reaching a high proportion of the national population are prepared to pay very large amounts for the broadcasting rights held by the applicant. Therefore, since potential sub-licensees of such rights for the United Kingdom are entities under the jurisdiction of the United Kingdom authorities, only the national measures directly affect the applicant.

121 The Commission notes in that context that in the United Kingdom the television broadcasting market is one of the most competitive in Europe and that 25% of broadcasters operating in the sector are licensed in the United Kingdom.

122 In those circumstances, even if it is accepted that publication of the measures in the Official Journal obliges the other Member States to comply with their obligation under Article 3a(3) of the directive, that fact is irrelevant for the purposes of the present case.

123 The Commission concludes therefore that verification and publication in the Official Journal of the measures notified by the United Kingdom do not directly concern the applicant.

124 The applicant challenges all the Commission's arguments.

- 125 It submits, essentially, that its legal position is directly affected, since the United Kingdom measures approved by the contested letter affect the terms on which it may resell the rights to broadcast the FIFA World Cup live in the United Kingdom. It refers in that regard to sections 99 and 101 of the 1996 Act.
- 126 As to the effects in the other Member States, the applicant alleges that the consequence of the contested letter is that those Member States are required to ensure that their television broadcasters respect the measures in question. The obligations placed in that respect on broadcasters under the jurisdiction of the other Member States are automatic and result from Community rules alone without the application of other intermediate rules. Those States are not required to ensure that the broadcasters under their jurisdiction comply with the measures adopted by the United Kingdom as long as the Commission has not adopted the decision finding that the measures notified are compatible with Community law. Article 3a(3) of the directive was thus transposed into national law by the majority of the Member States and applies automatically to all notified national measures which have been approved and published by the Commission.
- 127 According to the applicant it is precluded from granting an exclusive license of its rights to a television broadcaster based in another Member State, and the Commission cannot validly allege in those circumstances that the contested letter produces legal effects only with regard to television broadcasters.
- 128 The applicant also argues that, contrary to what the Commission contends, the judgment in *DSTV v Commission* (paragraph 27) regarding Article 2a(2) of the directive is not applicable in these proceedings since the measures were notified to the Commission in accordance with Article 3a(2) of the directive prior to their entry

into force. Thus it cannot be found that the measures notified by the United Kingdom existed independently of the Commission's decision, since their existence depended on the outcome of the verification which that institution was required to carry out.

129 Lastly, the applicant challenges the Commission's argument that it is implausible that a television broadcaster not based in the United Kingdom would wish to acquire rights to broadcast the FIFA World Cup finals live in the United Kingdom.

— Findings of the Court

130 It has consistently been held that, in order to be of direct concern to an individual within the meaning of the fourth paragraph of Article 230 EC the contested Community measure must directly affect the applicant's legal situation and its implementation must be purely automatic and result from Community rules alone without the application of other intermediate rules (see *Dreyfus v Commission*, paragraph 43 and the case-law there cited).

131 In the present case, in order to determine in the light of that case-law whether the applicant is directly concerned by the contested letter it is necessary to examine the two cases envisaged by the applicant, namely that in which the rights to broadcast the matches of the FIFA World Cup finals which it holds for 2002 and 2006 are sold for retransmission in the United Kingdom to a television broadcaster under the jurisdiction of the United Kingdom, and that in which those rights are sold to a television broadcaster established in another Member State.

132 As regards the first case, the applicant alleges that the measures notified ‘fundamentally undermine the market for [its] products amongst its UK-based customers’. To comply with the legislation in force in the United Kingdom the applicant could no longer grant an exclusive licence to a broadcaster established in the United Kingdom.

133 However, where the television broadcaster in question is established in the United Kingdom, it should be noted that, strictly speaking, it is the measures adopted by the United Kingdom which are directly applicable, since the Commission’s approval of those measures for the purposes of their mutual recognition has no bearing on their applicability in that Member State.

134 Furthermore, it should be noted that pursuant to Article 3a(2) of the directive, the Member States are to notify to the Commission any measures taken or to be taken. However, in the present case, the measures adopted by the United Kingdom entered into force prior to their notification to the Commission on 5 May 2000, as that institution confirmed at the hearing, and were therefore already capable of producing legal effects in that State at the time of their notification.

135 By the contested letter the Commission could not in those circumstances grant the United Kingdom prior authorisation to adopt those measures. Furthermore, the Commission did not authorise the retrospective maintenance of those measures for the purposes of their application to the United Kingdom (see, to that effect, Case 62/70 *Bock v Commission* [1971] ECR 897) but enabled that Member State to profit from the recognition of those measures by the other Member States.

136 In that respect, the applicant's argument that the United Kingdom first notified measures to the Commission by letter of 25 September 1998 is irrelevant as the latter considered, by letter of 23 December 1998, that they raised problems of compatibility with Community law and did not publish them in the Official Journal. In addition to the fact that some of the measures initially notified came into force upon their notification, it remains the case that all of the measures declared compatible with Community law by the Commission by means of the contested letter were, in any event, in force in the United Kingdom at the time of that notification.

137 Consequently, once the applicant assigns its broadcasting rights for the FIFA World Cup finals to a television broadcaster established in the United Kingdom for the purposes of broadcasting those matches in that State, the measures adopted by the United Kingdom authorities exist in law independently of the contested letter (see, to that effect, *DSTV v Commission*, paragraph 25). In so far as the measures notified are applicable to the television broadcasters established in the United Kingdom under the national law in force in that Member State and not by virtue of the Commission's decision, the applicant is not directly concerned by the contested letter within the meaning of the fourth paragraph of Article 230 EC and may not therefore bring an action for annulment of that measure.

138 As regards the second case, in which the applicant assigns its broadcasting rights for the FIFA World Cup finals to a television broadcaster established in a Member State other than the United Kingdom for the purposes of broadcasting those matches in the latter State, it must be held that that other Member State will be required under Article 3a(3) of the directive to satisfy itself that that broadcaster does not circumvent the measures approved by the Commission and published in the Official Journal.

- 139 It should be noted in that regard that the obligation imposed on the other Member States is to ensure by appropriate means, within the framework of their legislation, that broadcasters under their jurisdiction do not exercise the exclusive rights purchased by those broadcasters following the date of publication of the directive in such a way that a substantial proportion of the public in another Member State is deprived of the possibility of following, in the manner determined by that other Member State in accordance with Article 3a(1), events which are designated by that other Member State in accordance with Article 3a(1) and (2).
- 140 The Member States to which a directive is addressed are thus required to adopt, within the framework of their national legal orders, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective that it pursues and, in that context, to implement *inter alia* Article 3a(3).
- 141 In the context of that control exercised by their authorities under the mechanism of mutual recognition, the other Member States must ensure that the measures notified by the United Kingdom are not circumvented by television broadcasters subject to their jurisdiction wishing to broadcast an event designated by that Member State.
- 142 However, as previously stated (see paragraph 94 above), only the Commission's decision finding that the measures notified by the United Kingdom are compatible with Community law and providing for the subsequent publication of those measures in the Official Journal enables the mechanism of mutual recognition to operate effectively, by triggering the obligation for the other Member States to comply with their obligations under Article 3a(3) of the directive.
- 143 It follows that, in this case, the contested letter validates *ex nunc* the measures adopted by the United Kingdom for the sole purposes of their mutual recognition by the other Member States.

- 144 As regards the Commission's citation in that context of the judgment in *DSTV v Commission*, it should be noted that the second paragraph of Article 2a(2) of the directive, at issue in the case giving rise to that judgment, requires a posteriori verification of the compatibility with Community law of the measures adopted by a Member State in order to prevent the broadcast on its territory of programmes from other Member States and not verification of compatibility with Community law giving rise to the mutual recognition of national measures.
- 145 Moreover, unlike the specific provision at issue in the case giving rise to the judgment in *Artogodan and Others v Commission*, cited by the Parliament, Article 3a(2) of the directive confers on the Commission power to make decisions ensuring the effectiveness of the mechanism of mutual recognition and does not seek merely to establish a consultative procedure.
- 146 Furthermore, since the mutual recognition of the measures adopted by the United Kingdom is subject to their approval by the Commission and their subsequent publication in the Official Journal, it is clear that the contested letter does not leave the national authorities any discretion, once that publication has occurred, as to the performance of their obligations. Although the detailed rules for the control which the national authorities are required to exercise under the mechanism of mutual recognition are determined by each Member State in the framework of its legislation implementing Article 3a(3) of the directive, those authorities must ensure that broadcasters under their jurisdiction comply with the conditions for broadcasting the events in question as defined by the Member State in its measures approved and published in the Official Journal by the Commission.
- 147 Lastly, as regards the Commission's argument that only broadcasters established in the United Kingdom would be interested in purchasing from the applicant the rights to broadcast the FIFA World Cup finals in order to broadcast them in the United Kingdom, it should be noted that such an assumption deprives Article 3a(3) of the directive of all practical effect. According to recitals 18 and 19 to Directive 97/36,

the purpose of that article is to ensure wide access by the public to television coverage of events considered to be of major importance for society by the Member States and, on the basis of the principle of mutual recognition, to require the Member States to ensure that broadcasters under their jurisdiction respect the list of events established by another Member State so as not to deprive a substantial proportion of the public in that State of the possibility of following the events designated by that State.

148 The facts of the case which gave rise to the judgment of the House of Lords in *R v ITC ex parte TV Danmark 1 Ltd* [2001] UKHL 42 (cited above), although relating to events designated by the Kingdom of Denmark, also confirm the existence of situations implementing the mechanism of mutual recognition established by Article 3a(3) of the directive. Furthermore, the 2001 Third Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the Application of [the directive] (COM(2001) 9 final) states that in three cases, television broadcasters under the jurisdiction of the United Kingdom have broadcast events listed by the Kingdom of Denmark in a way that prevented a substantial part of the Danish population from seeing those events.

149 In those circumstances, notwithstanding the Commission's unsupported allegations as to the specificity of the television broadcasting market in the United Kingdom (see paragraph 121 above), it cannot be assumed that the rights to broadcast the FIFA World Cup finals in that State will be acquired by broadcasters established in that State.

150 It follows that the applicant is directly concerned by the contested letter in so far as it enables the implementation of the mechanism of mutual recognition by the other Member States of the measures notified by the United Kingdom, and that the plea of inadmissibility raised by the Commission must be rejected.

Whether the applicant is individually concerned

— Arguments of the parties

- 151 The Commission challenges the applicant's argument that it is individually concerned because it belongs to a 'closed group' of undertakings which were holders, even prior to the entry into force of Article 3a of the directive, of exclusive broadcasting rights for events of major importance for society designated by the United Kingdom.
- 152 According to the Commission, that criterion of holding exclusive rights is irrelevant, as all other organisations and undertakings holding rights to broadcast any of the events listed by the United Kingdom would have to be taken into account. Those other holders of television rights may have been more radically affected by the list than was the applicant.
- 153 Furthermore, unlike the holders of the television rights to events of major importance for society listed by the United Kingdom, the undertakings and organisations which may have entered into licensing agreements with one of those holders may be numerous and are impossible for the Commission to identify. It cannot therefore be accepted that the applicant forms part of a closed group of undertakings.
- 154 In addition, neither the applicant nor the holders of television rights in relation to events of major importance for society listed by the United Kingdom can be individually concerned by a Commission measure solely on the ground that it affects their economic activity (see, to that effect, the order in Case T-113/99 *Galileo and Galileo International v Council* [2000] ECR II-4141). The economic activities of the

applicant were affected by the measures notified and, indirectly, by the acceptance of those measures by the Commission. There is, however, no question of any impact on its legal situation.

155 The applicant also maintains that an undertaking which has written on several occasions to the Commission to inform it of that undertaking's concerns as to the United Kingdom's application of Article 3a(1) of the directive is individually concerned. According to the Commission, only the applicant's letter of 14 July 2000 can be taken into account in that context, as its other letters were written after the Commission had adopted its position in relation to the compatibility with Community law of the measures notified. In any event, none of those letters can be characterised as a complaint, as their purpose was not to ask the Commission to take action against the Member State concerned, but merely to influence it in its consideration of the compatibility with Community law of the measures notified. The sending of those letters to the Commission therefore cannot suffice to distinguish an undertaking individually.

156 The French Republic refers, inter alia, to Case 25/62 *Plaumann v Commission* [1963] ECR 95 and Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677 and points out that the general scope, and hence the legislative nature, of a measure are not called into question by the fact that it is possible to determine the number or even the identity of the persons to whom it applies at a given moment with a greater or lesser degree of precision, as long as it is established that it is applied by virtue of an objective legal or factual situation defined by the measure in relation to the objective of the latter (order in Case T-183/94 *Cantina cooperativa fra produttori vitivinicoli di Torre di Mosto and Others v Commission* [1995] ECR II-1941, paragraph 48). Although the applicant is the holder of the broadcasting rights for the 2002 and 2006 FIFA World Cup finals, that is not sufficient to distinguish it individually, for the purposes of the fourth paragraph of Article 230 EC, from all other economic operators which might acquire or hold broadcasting rights in relation to the sporting events included in that list.

157 The applicant replies in essence that it is individually concerned given, first, that it belongs to a 'closed group' of undertakings which acquired broadcasting rights for an event on the United Kingdom list prior to the proposal for the adoption of Article 3a of the directive and prior to the entry into force of the measures notified by the United Kingdom to the Commission. It is specifically affected within that group in a manner different from the other rights holders. It is also individually concerned by reason of its participation in the Commission's procedure to verify the compatibility with Community law of the measures notified. It alleges in that regard inter alia that the United Kingdom failed to comply with its obligation to draw up its list of events of major importance for society in a clear and transparent manner, as required by Article 3a(1) of the directive.

— Findings of the Court

158 As regards first the attributes peculiar to it, the applicant submits that it acquired rights to broadcast an event on the list drawn up by the United Kingdom prior to its entry into force and prior even to the proposal for the adoption of Article 3a of the directive.

159 According to well-established case-law, persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by virtue of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person to whom the decision is addressed (*Plaumann v Commission*, p. 107; Case C-309/89 *Codorniu v Council* [1994] ECR I-1853, paragraph 20; Case T-435/93 *ASPEC and Others v Commission* [1995] ECR II-1281, paragraph 62).

160 In this case it should be noted that the applicant holds exclusive rights to broadcast the 2002 and 2006 FIFA World Cup finals, which are included in the list of events of major importance for society adopted by the United Kingdom and approved by the Commission in the contested letter.

161 Television broadcasters under the jurisdiction of the Member States other than the United Kingdom must therefore necessarily deal with the applicant in its capacity as broker of the broadcasting rights to that event, for the purposes of obtaining licences to broadcast that event.

162 Whilst the measures adopted by the United Kingdom under Article 3a(1) of the directive and approved by the contested letter, in accordance with Article 3a(2), impose restrictions on television broadcasters as to the exclusive broadcasting of the events of major importance which appear on that list, with the exception of those which had already acquired rights prior to the entry into force of the measures in question, those restrictions are linked to the circumstances, considered generally and in the abstract, in which those broadcasters obtain those exclusive rights from those who hold them.

163 Sections 98 and 101 in Part IV of the Broadcasting Act 1996, as amended by the Television Broadcasting Regulations 2000, provide as follows:

‘98(1) For the purposes of this Part, television programme services and EEA [European Economic Area] satellite services shall be divided into two categories as follows:

- (a) those television programme services and EEA satellite services which for the time being satisfy the qualifying conditions, and
 - (b) all other television programme services and EEA satellite services.
- (2) In this section “the qualifying conditions”, in relation to a service, means the conditions:
- (a) that the service is provided without any consideration being required for reception of the service, and
 - (b) that the service is received by at least 95% of the population of the United Kingdom.

101(1) A television programme provider providing a service falling within either of the categories set out in subsection (1) of section 98 (“the first service”) for reception in the United Kingdom or in any area of the United Kingdom shall not, without the previous consent of the Commission, include in that service live coverage of the whole or any part of a listed event unless:

- (a) another person, who is providing a service falling within the other category set out in that subsection (“the second service”) has acquired the right to include in

the second service live coverage of the whole of the event or of that part of the event, and

- (b) the area for which the second service is provided consists of or includes the whole, or substantially the whole, of the area for which the first service is provided.

...

(4) Subsection (1) shall not have effect where the television programme provider providing the first section is exercising rights acquired before the commencement of this section.'

¹⁶⁴ In that context, as regards the consent which must be obtained from the ITC referred to in section 101 of the 1996 Act as amended, and cited above, it is clear from all of the measures approved by the Commission, and more particularly from the ITC Code on Sports and other Listed Events, that the factors on which the ITC's consent depends are essentially that the sale of broadcasting rights has been the subject of a public announcement and that the broadcasters have had a genuine opportunity to acquire those rights on terms which were fair and reasonable. In that respect, the ITC may in particular verify that the offer for sale was communicated openly and simultaneously to the two categories of broadcasters defined in section 98 of the 1996 Act, that the price sought is fair, reasonable and non-discriminatory as between the two categories of broadcasters and that the broadcasters are given a reasonable time, thereby giving them a genuine opportunity to acquire those rights.

¹⁶⁵ Thus, although the applicant in its capacity as broker of the rights to broadcast the 2002 and 2006 FIFA World Cup finals is not expressly covered by those provisions, they impede its ability freely to dispose of its rights by restricting their transfer

exclusively to a broadcaster established in a Member State other than the United Kingdom which wishes to broadcast that event in the latter State.

166 Furthermore, although the legal validity of the contracts which the applicant entered into with FIFA are not affected by the contested letter, since the performance of those contracts could in no way be prevented by that letter within the meaning of the case-law to that effect (Case 11/82 *Piraiki-Patraiki and Others v Commission* [1985] ECR 207 and Case C-152/88 *Sofrimport v Commission* [1990] ECR I-2477), the applicant acquired exclusively the rights in question before the entry into force of Article 3a of the directive and, a fortiori, before the adoption of the contested letter.

167 In those circumstances, it must be held that the contested letter concerns the applicant by reason of a characteristic peculiar to it, namely its capacity as the exclusive holder of the broadcasting rights for one of the events designated by the United Kingdom.

168 It follows that the applicant, as the holder of the broadcasting rights for an event included in the list of measures notified by the United Kingdom and having acquired those rights prior to the adoption of the measures applicable in the United Kingdom and, a fortiori, prior to their approval by the Commission, must be considered, for the purposes of assessing the admissibility of the present action, to be individually concerned by the contested letter.

169 The plea of inadmissibility raised by the Commission must therefore be rejected.

2. *The admissibility of the applicant's second plea*

170 Included in the form of order which the applicant asks the Court to make is a declaration that Article 3(a) of the directive is inapplicable and cannot serve as a legal basis for the adoption of the contested letter.

171 It suffices in this regard to note that in proceedings before the Community judicature there is no remedy whereby the Court can adopt a position by means of a general declaration or statement of principle (see, to that effect, Case T-62/99 *Sodima v Commission* [2001] ECR II-655, paragraph 28, and the order of 7 June 2004 in Case T-338/02 *Segi and Others v Council* [2004] ECR II-1647, paragraph 48; see also, by analogy, Case T-76/03 *Meister v OHIM* [2004] ECR II-1477, paragraph 38).

172 That plea is therefore inadmissible.

D — *Substance*

173 In support of its action, the applicant relies on four pleas in law alleging, first, infringement of general principles of Community law, second, infringement of Article 3a(2) of the directive, third, inapplicability of Article 3a(3) of that directive and fourth, infringement of essential procedural requirements.

174 It is appropriate, first of all, to examine the fourth plea alleging infringement of essential procedural requirements.

- 175 By that plea, the applicant claims, inter alia, that the author of the contested letter, namely the Director-General of the Education and Culture DG, lacked the necessary competence. It alleges in that connection that the contested letter was not adopted in conformity with the Commission's rules on collegiate procedure, delegation and enforcement of decisions.
- 176 To counter that argument the Commission in its pleadings and in response to a question from the Court merely submitted that the contested letter was not a decision within the meaning of Article 249 EC and that it was not therefore required to comply with the relevant rules of procedure.
- 177 Thus, the Commission admitted in reply to a written question from the Court and at the hearing that the College of Commissioners had not been consulted and that the Director-General who signed the contested letter had received no specific power from the College.
- 178 In those circumstances, the contested letter, which, as has been held in the course of the assessment of admissibility, constitutes a decision within the meaning of Article 249 EC, is vitiated by lack of powers and must, on that ground and without there being any need to consider the other argument in support of that plea and the other three pleas in law in support of the action, be annulled.
- 179 In that context, the Court finds that there is no need to grant the request made by the applicant in its letter of 22 August 2005 (see paragraph 44 above), which is not pertinent to the resolution of the dispute (see, to that effect, Case T-311/00 *British American Tobacco (Investments) v Commission* [2002] ECR II-2781, paragraph 50).

Costs

180 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the other party's pleadings. Under the first subparagraph of Article 87(4), the Member States and institutions which have intervened in the proceedings are to bear their own costs.

181 The French Republic, the United Kingdom, the Parliament and the Council shall bear their own costs. The French Republic, the United Kingdom and the Parliament shall also bear the costs of the applicant arising from their interventions, in accordance with the latter's pleadings to that effect.

182 Since the Commission has been unsuccessful, it must be ordered to pay the costs in accordance with the form of order sought by the applicant, with the exception of the costs of the applicant arising from the interventions of the French Republic, the United Kingdom and the Parliament.

On those grounds,

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

hereby:

- 1. Annuls the decision of the Commission contained in its letter of 28 July 2000 to the United Kingdom of Great Britain and Northern Ireland;**

2. **Dismisses the remainder of the action;**

3. **Orders the French Republic, the United Kingdom of Great Britain and Northern Ireland and the Parliament to bear the applicant's costs arising from their interventions;**

4. **Orders the Commission to bear its own costs and those of the applicant, apart from those referred to at 3, above;**

5. **Orders the interveners to bear their own costs.**

Legal

Lindh

Mengozzi

Wiszniewska-Białecka

Vadapalas

Delivered in open court in Luxembourg on 15 December 2005.

E. Coulon

Registrar

H. Legal

President

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