

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

8 October 2002 \*

In Joined Cases T-185/00, T-216/00, T-299/00 and T-300/00,

**Métropole télévision SA (M6)**, established in Neuilly-sur-Seine (France), represented by D. Théophile, lawyer, with an address for service in Luxembourg,

applicant in Case T-185/00,

**Antena 3 de Televisión SA**, established in Madrid (Spain), represented by F. Pombo García, E. Garayar Gutiérrez and R. Alonso Pérez-Villanueva, lawyers, with an address for service in Luxembourg,

applicant in Case T-216/00,

**Gestevisión Telecinco SA**, established in Madrid, represented by S. Muñoz Machado and M. López-Contreras Gonzalez, lawyers, with an address for service in Luxembourg,

applicant in Case T-299/00,

**SIC — Sociedade Independente de Comunicação SA**, established in Linda-a-Velha (Portugal), represented by C. Botelho Moniz, lawyer,

applicant in Case T-300/00,

\* Languages of the case: French, Spanish and Portuguese.

supported by

Deutsches SportFernsehen GmbH (DSF), established in Ismaning (Germany), represented by K. Metzloff, lawyer, with an address for service in Luxembourg,

intervener in Case T-299/00,

and by

Reti Televisive Italiane Spa (RTI), established in Rome (Italy), represented by G. Amorelli, lawyer, with an address for service in Luxembourg,

intervener in Case T-300/00,

v

Commission of the European Communities, represented, in Case T-185/00, by K. Wiedner and B. Mongin, acting as Agents; in Cases T-216/00 and T-299/00, by K. Wiedner and É. Gippini Fournier, acting as Agents, assisted by J. Rivas Andrés, lawyer; and in Case T-300/00, by K. Wiedner and M. França, acting as Agents, with an address for service in Luxembourg,

defendant,

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supported by

**Union européenne de radio-télévision (UER)**, established in Grand-Saconnex (Switzerland), represented by D. Waelbroeck and M. Johnsson, lawyers, with an address for service in Luxembourg,

intervener in Cases T-185/00, T-216/00,  
T-299/00 and T-300/00,

and by

**Radiotelevisión Española (RTVE)**, established in Madrid, represented by J. Gutiérrez Gisbert, lawyer, with an address for service in Luxembourg,

intervener in Cases T-216/00 and T-299/00,

APPLICATION for annulment of Commission Decision 2000/400/EC of 10 May 2000 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case IV/32.150 — Eurovision) (OJ 2000 L 151, p. 18),

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

composed of: R.M. Moura Ramos, President, V. Tiili, J. Pirrung, P. Mengozzi and A.W.H. Meij, Judges,

Registrar: B. Pastor, Principal Administrator,

having regard to the written procedure and further to the hearing on 13 and 14 March 2002,

gives the following

## Judgment

### The European Broadcasting Union and the Eurovision system

- 1 The European Broadcasting Union (EBU) is a professional non-profit association of radio and television organisations set up in 1950 and with its headquarters in Geneva (Switzerland). In accordance with Article 2 of its Statutes as amended on 3 July 1992, the objectives of the EBU are to represent the interests of its members in the field of programming and in legal, technical and other areas, and in particular to promote the exchange of radio and television programmes by all means — for example, Eurovision and Euroradio — and any other form of cooperation among its members and with other broadcasting organisations or their associations, as well as to assist its active members in negotiations of all kinds and, when asked, to negotiate on their behalf.
  
- 2 Eurovision constitutes the main framework for the exchange of programmes among the active members of the EBU. It has been in existence since 1954 and is one of the main objectives of the EBU. According to Article 3(6) of the EBU Statutes, in the version of 3 July 1992, “Eurovision” is a television programme exchange system organised and coordinated by the EBU, based on the understanding that members offer to the other members, on the basis of reciprocity,... their coverage of sports and cultural events taking place in their countries and of potential interest to other members, thereby enabling each other to provide a high

quality service in these fields to their respective national audiences.’ Eurovision members include active members of the EBU as well as consortia of such members. All active members of the EBU may participate in a system of joint acquisition and sharing of television rights (and of the costs relating thereto) to international sports events, which are referred to as ‘Eurovision rights’.

- 3 To become an active member, a broadcasting organisation must satisfy the conditions relating, *inter alia*, to national coverage and to the nature and financing of programming (hereinafter ‘the membership conditions’).
- 4 Until 1 March 1988, the benefit of EBU and Eurovision services was exclusively reserved to their members. However, when the Statutes of the EBU were amended in 1988, a new paragraph (in the current version, paragraph 7) was added to Article 3, providing that contractual access to Eurovision may be granted to associated members as well as non-members of the EBU.

## Applicants

- 5 Métropole télévision (M6) is a company incorporated under French law, which operates a national television service broadcast free-to-air via a land radio relay channel as well as by cable and satellite.
- 6 Since 1987, M6 has lodged an application to join the EBU six times. Each time, its application has been rejected on the ground that it does not fulfil the membership conditions laid down by the EBU Statutes. Following the last refusal of the EBU, M6 filed a complaint with the Commission on 5 December 1997,

complaining of EBU's practices towards it, and in particular the refusal of its applications for admission. By decision of 29 June 1999, the Commission dismissed the applicant's complaint. The Court of First Instance, in its judgment in *Métropole télévision v Commission* (Case T-206/99 [2001] ECR II-1057), annulled that decision to reject the complaint on the grounds that the Commission infringed its obligations to state reasons and the obligations it has when dealing with complaints.

- 7 Meanwhile, on 6 March 2000, M6 filed a new complaint with the Commission, asking it to declare the EBU's membership conditions as amended in 1998 anti-competitive and not qualifying for an exemption under Article 81(3) EC. By letter of 12 September 2000, the Commission dismissed that complaint. The applicant brought an action for annulment of that dismissal. That action was held inadmissible by order of the Court of First Instance in Case T-354/00 *M6 v Commission* [2001] ECR II-3177.
- 8 Antena 3 de Televisión SA (hereinafter 'Antena 3') is a company governed by Spanish law set up on 7 June 1988, which has been granted by the competent Spanish authority a concession indirectly to operate the public television service.
- 9 On 27 March 1990, Antena 3 lodged an application to join the EBU. By letter of 3 June 1991, Antena 3 was notified of the decision by the EBU's administrative council to refuse that application.
- 10 Gestevisión Telecinco SA (hereinafter 'Telecinco') is a company governed by Spanish law which operates a terrestrial television channel with national coverage, broadcast free-to-air. In accordance with Spanish national law, that undertaking is one of three private operators to which the Spanish authorities granted a 10-year concession in 1989 to operate indirectly the public television service. The concession for Telecinco was renewed for an additional 10 years.

- 11 SIC — Sociedade Independente de Comunicação SA (hereinafter ‘SIC’) is a company governed by Portuguese law whose purpose is to carry out television-related activities and which has, since October 1992, operated one of the main national television stations broadcast free-to-air in Portugal.

## Background to the proceedings

- 12 In response to a complaint of 17 December 1987 by the company Screensport, the Commission examined the rules governing the Eurovision system of joint acquisition and sharing of sport television rights to see whether they were compatible with Article 81 EC. The complaint related, in particular, to the refusal by the EBU and its members to grant sub-licences for sporting events. On 12 December 1988, the Commission sent the EBU a statement of objections referring to the rules governing the acquisition and use, within the Eurovision system, of television rights for sporting events, which are generally exclusive. The Commission stated that it was prepared to consider an exemption for those rules, on the condition that a requirement to grant sub-licences to non-members be laid down for a substantial portion of the rights in question, under reasonable conditions.
- 13 On 3 April 1989, the EBU notified to the Commission the provisions of its Statute and other rules governing the acquisition of television rights to sporting events, the exchange of sports programmes within the framework of Eurovision and contractual access to such programmes for third parties, in order to obtain negative clearance or, alternatively, an exemption pursuant to Article 81(3) EC.
- 14 After the EBU revised its rules to make it possible to obtain sub-licences for the broadcasts in question (‘the 1993 access scheme for non-members of the EBU’,

hereinafter the ‘sub-licensing scheme’), the Commission adopted, on 11 June 1993, Decision 93/403/EEC relating [to] a proceeding pursuant to Article [81] of the EEC Treaty (IV/32.150 — EBU/Eurovision System) (OJ 1993 L 179, p. 23), under which it granted an exemption pursuant to Article 81(3). That decision was annulled by judgment of the Court of First Instance in Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93 *Métropole Télévision and Others v Commission* [1996] ECR II-649.

- 15 Subsequently, upon request by the Commission, the EBU adopted and submitted to the Commission, on 26 March 1999, rules granting access to Eurovision rights operated on pay-channel television (the ‘sub-licensing rules of 1999 relating to the exploitation of Eurovision rights on pay-TV channels of 26 March 1999’, hereinafter ‘the sub-licensing rules’).
  
- 16 On 10 May 2000, the Commission adopted Decision 2000/400/EC relating to a proceeding pursuant to Article 81 of the EC Treaty (Case IV/32.150 — Eurovision) (OJ 2000 L 151, p. 18, hereinafter ‘the contested decision’), by which the Commission granted a new exemption pursuant to Article 81(3).
  
- 17 In Article 1 of the contested decision, the Commission declared that, pursuant, *inter alia*, to Article 81(3) EC, the provisions of Article 81(1) EC are inapplicable from 26 February 1993 until 31 December 2005 to the following notified agreements:

(a) the joint acquisition of sport television rights;



(b) the sharing of the jointly acquired sport television rights;

(c) the exchange of the signal for sporting events;

(d) the sub-licensing scheme;

(e) the sub-licensing rules.

18 The sub-licensing scheme and the sub-licensing rules together constitute the access scheme for third parties to the Eurovision system.

19 In connection with the sub-licensing scheme, the contested decision states:

‘[T]he EBU and its members undertake to grant non-member broadcasters extensive access to Eurovision sports programmes the rights for which have been acquired on an exclusive basis through collective negotiations.... [That scheme] grants live and deferred transmission rights to third parties of jointly acquired Eurovision sports rights. In particular the non-EBU members have significant access to the unused rights, i.e. for the transmission of sporting events which are not transmitted by, or of which only a minor part are transmitted by, an EBU member. The terms and conditions of access are freely negotiated between the EBU (for transnational channels), or the member(s) in the country concerned (for national channels), and the non-member...’ (paragraph 28 of the contested decision).

- 20 In connection with the sub-licensing rules, the contested decision specifies that a non-member of the EBU may buy television rights in order to broadcast on its pay-TV channel sports competitions which are identical or comparable to those presented by the members of Eurovision on their own pay-TV channels. The fee to be paid by the non-member is to fairly reflect the terms on which the rights were obtained by the Eurovision member (Annex II (iii) to the contested decision).
- 21 The declaration of exemption contained in Article 1 of the contested decision is subject to a condition and an obligation. The condition requires the EBU and its members collectively to acquire television rights to sporting events only under agreements which allow them to grant access to third parties in conformity with the access scheme or, subject to the approval of the EBU, on conditions more favourable to the non-member. The obligation requires the EBU to inform the Commission of any amendments and additions to the access scheme and of all arbitration procedures concerning disputes under the access scheme (Article 2 of the contested decision).

### Procedure and forms of order sought

- 22 M6, Antena 3, SIC and Telecinco brought their actions by applications lodged at the Registry of the Court of First Instance on 13 July, 21 August and 18 and 19 September 2000, respectively.
- 23 By applications lodged at the Registry of the Court of First Instance on 5, 17 and 26 January 2001, the EBU and Radiotelevisión Española (hereinafter 'RTVE') sought leave to intervene, the former in Cases T-185/00, T-216/00, T-299/00 and

T-300/00 and the latter in Cases T-216/00 and T-299/00, in support of the forms of order sought by the defendant. Those applications were granted by orders of the President of the Fourth Chamber of the Court of First Instance on 7 February, 29 March and 7 May 2001.

24 By letter of 22 February 2001, SIC lodged at the Registry of the Court of First Instance a request for confidentiality for parts of the application. The Court granted that request by order of the President of the Fourth Chamber of 30 April 2001.

25 By applications lodged at the Registry of the Court of First Instance on 7 March and 13 March 2001, Deutsches SportFernsehen GmbH (DSF) and Reti Televisive Italiane Spa (RTI) sought leave to intervene in Cases T-299/00 and T-300/00 respectively in support of the forms of order sought by the applicant. Those applications were granted by orders of the President of the Fourth Chamber of the Court of First Instance on 7 May and 7 June 2001.

26 Owing to a change in the composition of the Chambers of the Court of First Instance as of 20 September 2001, the Judge-Rapporteur was assigned to the Second Chamber and the present cases were therefore assigned to that Chamber.

27 By decision of the Court of First Instance of 20 February 2002, the cases were referred to a Chamber composed of five judges.

28 By order of 25 February 2002, the President of the Second Chamber (Extended Composition) joined the four cases for the purposes of the oral procedure and the judgment, pursuant to Article 50 of the Rules of Procedure of the Court of First Instance.

29 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber, Extended Composition) decided to open the oral procedure. Within the framework of the measures of organisation of procedure, he invited the parties to produce certain documents and to provide written responses to certain questions.

30 The oral arguments of the parties and their responses to the Court's questions were heard at the hearing on 13 and 14 March 2001.

31 In Case T-185/00, M6 claims that the Court should:

- annul the contested decision;
  
- order the Commission to pay the costs;
  
- order the EBU to pay the costs of its intervention.

32 In Case T-216/00, Antena 3 claims that the Court should:

- order the Commission to add several documents to the file;
  
- annul the contested decision;

— order the Commission to pay the costs;

— order the interveners to pay the costs of their interventions.

33 In Case T-299/00, Telecinco claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

34 In Case T-300/00, SIC claims that the Court should:

— order the Commission to produce certain documents;

— annul the contested decision;

— order the Commission to pay the costs;

— order the EBU to pay the costs of its intervention.

35 In the four joined cases, the Commission contends that the Court should:

— dismiss the applications;

— order the applicants to pay the costs.

36 DSF, intervener in support of the form of order sought by Telecinco in Case T-299/00, claims that the Court of First Instance should annul the contested decision.

37 RTI, intervener in support of the form of order sought by SIC in Case T-300/00, claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs, including those of the intervener.

38 The EBU, intervener in the four cases in support of the form of order sought by the Commission, claims that the Court should:

— dismiss the applications;

— order the applicants to bear the costs of their interventions.

39 The RTVE, intervener in Cases T-216/00 and T-299/00 in support of the form of order sought by the Commission, claims that the Court should:

— dismiss the application;

— order the applicants to bear the costs of their intervention.

## Law

### *Preliminary observations*

40 The applicants put forward seven pleas altogether in support of their action. The first plea, raised in the four cases, relates to infringement of the obligation to comply with the judgments of the Court of First Instance. The second plea, put forward in Cases T-216/00 and T-300/00, relates to an error as to the facts and

an infringement of the obligation to provide a statement of reasons. The third plea, raised in all the cases, alleges misapplication of Article 81(1) EC. The fourth plea, raised in the four cases, concerns infringement of Article 81(3) EC. The fifth plea, raised in all the cases, is based on errors in law relating to the material and temporal scope of the contested decision. The sixth plea, raised in Case T-216/00, relates to infringement of the principle of sound administration. Finally, the seventh plea, raised in all the cases, alleges misuse of powers.

41 It is appropriate to analyse first the fourth plea, raised in all four cases, concerning infringement of Article 81(3) EC.

42 By that plea, the applicants claim that the Eurovision system does not satisfy any of the criteria for exemption laid down in Article 81(3) EC, in particular the absence of the possibility of eliminating competition in respect of a substantial part of the products in question. Further, the submissions put forward by M6 as regards the discriminatory nature of the sub-licensing scheme and the indispensable character of that discrimination should be amended, inasmuch as, by those arguments, M6 is essentially claiming that the sub-licensing scheme does not guarantee access for non-member channels to the rights acquired by the EBU, thereby leading to compartmentalisation of the market for televised rebroadcasting rights and, as a result, the elimination of competition in that market.

*The fourth plea, concerning infringement of Article 81(3) EC as regards the criterion relating to the absence of the possibility of eliminating competition in respect of a substantial part of the products in question*

#### Arguments of the parties

43 The applicants claim that the Commission misapplied Article 81(3)(b) EC in the present case, for two main reasons.



- 44 First, the Commission did not exactly define either the product market or the geographic market in question. In the absence of a definition of the relevant market, the Commission's conclusion that the agreements notified do not afford the undertakings benefiting from the exemption the possibility of eliminating competition in respect of a substantial part of the products in question can have no basis of reference. Without a preliminary definition it is impossible to determine whether the guarantees offered by the third party access scheme to the Eurovision system satisfy the condition in Article 81(3)(b) EC.
- 45 In addition, inasmuch as the contested decision accepts that major international sporting events, such as the Olympic Games or major football championships, constitute autonomous markets, the Commission should have concluded that, within those markets, the Eurovision system eliminates any competition.
- 46 Second, as regards the guarantees provided by the third-party access scheme to the Eurovision system which, according to the contested decision, makes it possible to avoid eliminating competition in the market, the applicants consider that if the Commission had correctly analysed the product market, it would have noted that the third-party access scheme could not avoid eliminating from competition general channels such as the applicants. First, that scheme in fact only authorises deferred transmission of sports programmes and, second, it does not really work in the case of general channels which, like the applicants, compete against EBU members.
- 47 The Commission, supported by the EBU, contends that it is settled practice for it to leave open the definition of the relevant product market or geographic market when, on the basis of the narrowest possible definition of the market, no problem of restriction on competition arises.

- 48 In the present case, the Commission considers it clear that the agreements notified affect trade between Member States (paragraph 81 of the contested decision) and that they restrict competition (paragraph 71 of the contested decision). However, the Commission considers that on the narrowest definition of the product market, such as the market for the acquisition of transmission rights for specific sporting events like the summer Olympics, and taking account of the structure of the market and all the rules governing sub-licensing for access to Eurovision sports programmes by broadcasting organisations which are not EBU members, the notified agreements do not give rise to any restriction on competition.
- 49 The Commission considers that, in the light of the narrowest possible definition of the market, the restrictive effects of the notified agreements have been resolved by the amendment of the agreements and by the conditions imposed by the Commission (relating to the third-party access scheme to the Eurovision system). There is therefore no need to define more precisely the markets concerned.
- 50 As regards the third-party access scheme to the Eurovision system, the Commission, supported by the EBU and RTVE, points out that following the changes made to that scheme, live transmission rights which are not used by EBU members are made available to their competitors. The access to deferred transmission rights imposed by the Commission was also greatly enlarged. That scheme functioned in practice and a number of competitors of EBU members had recourse to it for both live and deferred transmissions, as well as for the transmission of extracts. In short, as a result of that scheme, it was not possible to eliminate competition in a substantial part of the market, even by defining the market as narrowly as the transmission rights for the summer Olympics.

### Findings of the Court

- 51 In light of the arguments of the parties, the terms of the contested decision should first be set out as they relate to the definition of the market to which the notified

agreements refer. In that regard, the contested decision specifies, in paragraphs 38 to 49:

#### ‘4.1. Product market

The EBU considers that the relevant market for the assessment of the case is the market for the acquisition of the television rights to important sporting events in all disciplines of sport, irrespective of the national or international character of the event. The EBU is only active in the acquisition of television rights to sporting events of pan-European interest.

The Commission shares the EBU’s view that sports programmes have particular characteristics; they are able to achieve high viewing figures and reach an identifiable audience, which is a special target for certain important advertisers.

However, contrary to what the EBU suggests, the attraction of sports programmes and hence the level of competition for the television rights varies according to the type of sport and the type of event. Mass sports like football, tennis or motor-racing generally attract large audiences, the preferences varying from country to country. By contrast, minority sports achieve very low ratings. International events tend to be more attractive for the audience in a given country than national ones, provided the national team or a national champion is involved, while international events in which no national champion or team is participating can often be of little interest. In the last 10 years, with increased

competition in the television markets, the prices for television rights to sporting events have increased considerably...; this is particularly true with regard to outstanding international events such as the Football World Cup or the Olympic Games.

The preferences of viewers determine the value of a programme to advertisers and pay-TV broadcasters.... However, if we observe that sports broadcasts achieve the same or similar sized audiences whether or not they are competing with simultaneously broadcast sporting events, there is strong evidence that those events could determine the subscribers' or advertisers' choice of a certain broadcaster.

Indeed, data on viewer behaviour, among major sporting events, show that for at least some sporting events which have been analysed, such as the summer Olympics, the winter Olympics, the Wimbledon Finals and the Football World Cup, viewing behaviour does not appear to be influenced by the coincidence of other major sporting events being broadcast simultaneously, or nearly simultaneously. That is, viewing figures for the major sporting events appear to be largely independent of whatever other major sports are broadcast at a similar time. Therefore, the offer of such sporting events could influence the subscribers or advertisers to such an extent that the broadcaster would be inclined to pay much higher prices.

In conclusion, the Commission's investigation shows that the market definition proposed by the EBU is too large and that there is a strong likelihood that there are separate markets for the acquisition of some major sporting events, most of them international.

However, it is not necessary for the purposes of this case to exactly define the relevant product markets. Taking into account the present structure of the market and the sub-licensing... rules granting access to non-EBU members to Eurovision sport programmes, these agreements do not raise competition concerns, even on the basis of markets for the acquisition of particular sporting events such as the summer Olympics.

...

#### 4.2. Geographic market

Some sporting events rights are acquired on an exclusive basis for the whole European territory and, regardless of the technical means of transmission, are to be resold thereafter per country, [while] others are acquired on a national basis. The kind of major sporting event rights for which the EBU bids, which have a pan-European interest from the viewers' perspective, such as the Olympic Games, will normally fall within the first category of European licences.

Nevertheless, irrespective of the scope of the licences... the preferences of viewers can significantly vary from country to country depending on the type of sport and the type of event and, therefore, the conditions of competition for the television rights can vary accordingly.

With regard to the downstream markets affected by the present notification, the free-to-air and pay-TV broadcasting markets should be considered, largely for

linguistic, cultural, licensing and copyright reasons, generally national or extending to single linguistic areas.

However, for the purposes of this case it is not necessary to define the relevant geographic market exactly. Taking into account the present structure of the market and the sub-licensing rules granting non-EBU members access to the Eurovision sport programmes, these agreements do not raise competition concerns even on the basis of national markets for the acquisition of sports rights, nor for the downstream markets of free-to-air and pay-TV broadcasting.’

- 52 It follows from the contested decision, and particularly those passages reproduced in the preceding paragraph, that the Commission’s position with respect to defining the markets concerned may be summarised as follows: the Eurovision system gives rise to effects in two distinct markets, that of the acquisition of television rights, where the EBU is in competition with other large European multimedia groups (the upstream market), and that of the transmission of purchased sports rights, where EBU members are competing, for each country or linguistic area, with other television channels, for the most part national.
- 53 As regards the upstream market, the Commission admits that ‘there is a strong likelihood’ (in English, which is the only authentic text) that there are separate markets for the acquisition of rights to some major international sporting events which are normally acquired for the whole European territory. Concerning the downstream market, even if the Commission does not make it clear as regards the definition of the product market, its analysis nevertheless shows that, with respect to the preference of television viewers and their influence on the value of programmes for announcers and pay-TV companies, a specific market for the transmission of major sporting events exists. That market, which according to the Commission is subdivided into a free-to-air TV market and a pay-TV market, is generally limited to the national territory or to a homogeneous linguistic area.

54 None the less, the Commission considered it unnecessary to define exactly either the product market or the geographic market affected by the Eurovision system, since even if the narrowest possible market is taken as a reference point — that is, the market for acquiring rights to certain sporting events such as the Olympic Games — the Commission takes the view that the Eurovision system, given the structure of the market and the third-party access scheme to the system, does not give rise to competition concerns.

55 Second, the Commission states, in paragraphs 100 to 103 of the contested decision, relating to the non-elimination of competition in respect of a substantial part of the products in question as regards the joint acquisition of rights, that despite the fact that the EBU is facing increasing competition from media groups and brokers, ‘the Commission was concerned that some of the jointly acquired rights affect sporting events, for instance the Olympic Games, of particular economic and popular importance, which could constitute a... market... exclusively held by the Eurovision members’. It goes on:

‘To address these concerns the EBU has modified the notified agreements to include a set of sub-licensing rules which make sure that non-EBU members have extensive access to the Eurovision sports rights. This counterbalances the restrictive effects of the joint acquisition of the sports rights. The schemes will provide extensive live and deferred transmission access for non-members on reasonable terms.’

56 Moreover, as regards the restriction arising from the sharing of Eurovision rights between EBU members competing for the same audience, the Commission concludes, in paragraph 104 of the contested decision, that there will be no elimination of competition ‘given the current market structure and considering that non-EBU members will be able to participate in the broadcast of the sporting events in question following the EBU sub-licensing schemes’.

- 57 It thus appears from the contested decision that, even if the Commission did not consider it necessary exactly to define the product market concerned, it nevertheless assumed the existence of a market consisting entirely of certain major international sporting events, such as the Olympic Games, in order to verify whether the Eurovision system complies with the conditions for exemption provided for in Article 81(3) EC. Therefore, the absence of such an exact definition has not, in the present case, affected the Commission's analysis of whether the Eurovision system satisfies the condition for exemption laid down in Article 81(3)(b) EC and, consequently, that part of the applicants' reasoning must be held to have no bearing on the issue.
- 58 Second, it should be determined whether and, if necessary, to what extent the defendant made a manifest error of assessment when applying the relevant condition for exemption in concluding that, even in a market made up of specific international sporting events, the third-party scheme for access to the Eurovision system made it possible to compensate for restrictions on competition in relation to third parties and thus to avoid competition being eliminated to their detriment.
- 59 Before analysing that scheme, it is necessary first to set out the structure of the markets at issue and the restrictions on competition to which the Eurovision system gives rise.
- 60 As far as the structure of the markets is concerned, the contested decision indicates, *inter alia*, that television rights to sporting events are granted for a given territory, normally on an exclusive basis. That exclusivity is considered necessary by broadcasters in order to guarantee the value of a given sports programme in terms of viewing figures and advertising revenues (paragraph 51 of the contested decision).



- 61 Television rights are normally held by the organiser of a sporting event, who controls access to the premises where the event is staged. In order to control the televising of the event and to guarantee exclusivity, the organiser admits only one broadcaster or a limited number of broadcasters to produce the television signal. Under their contract with the organiser, they are not allowed to make their signal available to any third party who has not acquired the relevant television rights (paragraph 52 of the contested decision).
- 62 The Commission observes that the EBU has lost significant market share in the relevant markets over the past 10 years. With regard to the acquisition of television rights to certain sporting events, the EBU has faced competition from the big European media groups as well as from international brokers. The EBU has also lost a large number of important sporting events during the past years as the result of higher competitive offers (paragraphs 54 and 55 of the contested decision). However, the EBU remains in a strong market position in the acquisition of rights to major international sporting events with a very strong appeal for European viewers, in respect of which the rights owners still insist that the events must not be broadcast on pay television. In addition, the EBU still has a unique one-stop-shop position, which guarantees the organisers the widest possible viewing audience in Europe. The fact that the European television rights for the Olympic Games have always been sold to the EBU is of particular importance (paragraphs 55 to 57 of the contested decision).
- 63 As regards the effects of the Eurovision system on competition, the contested decision shows (paragraphs 71 to 80) that there are two types of restrictions. First, the joint acquisition of television rights to sporting events, their sharing and the exchange of signal restricts or even eliminates competition among EBU members which are competitors on both the upstream market, for the acquisition of rights, and for the downstream market, for televised transmission of sporting

events. In addition, that system gives rise to restrictions on competition as regards third parties since those rights, as set out in paragraph 75 of the contested decision, are generally sold on an exclusive basis, so that EBU non-members would not in principle have access to them.

- 64 While it is true that the purchase of televised transmission rights for an event is not in itself a restriction on competition likely to fall under Article 81(1) EC and may be justified by particular characteristics of the product and the market in question, the exercise of those rights in a specific legal and economic context may none the less lead to such a restriction (see, by analogy, Case 262/81 *Coditel v Ciné-Vog Films* [1982] ECR 3381, paragraphs 15 to 17).
- 65 In that vein, the Commission states, in paragraph 45 of the contested decision, that ‘the acquisition of exclusive TV rights to certain major sporting events has a strong impact on the downstream television markets in which the sporting events are broadcast’.
- 66 In addition, it appears from the analysis of the documents in the case and the arguments of the parties that the acquisition of transmission rights to a major international sporting event such as the Olympics or the football World Cup cannot fail to affect strongly the market in sponsorship and advertising, which is the main source of revenue for television channels which broadcast free-to-air, since those programmes attract a very wide audience.
- 67 Moreover, as pointed out by SIC, the effects which restrict competition for third parties as a result of the Eurovision system are accentuated, first, by the level of vertical integration of the EBU and its members, which are not merely purchasers of rights but also television operators which broadcast the rights purchased, and second, by the geographic extent of the EBU, whose members broadcast in all the

countries of the European Union. As a result, when the EBU acquires transmission rights for an international sporting event, the access to that event is in principle automatically precluded for all non-member operators. By contrast, the situation appears to be different when the transmission rights for sporting events are acquired by an agency which buys those rights in order to resell them, or when they are bought by a media group which only has operators in certain Member States, since that group will tend to enter into negotiations with operators in other Member States in order to sell those rights. In that case, despite the exclusive purchase of the rights, other operators still have the opportunity to negotiate their acquisition for their respective markets.

68 In light of those facts — that is, the structure of the market, the position of the EBU in the market for certain international sporting events and the level of vertical integration of the EBU and its members — there is reason to determine whether the scheme for third-party access to the Eurovision system makes it possible to counterbalance the restrictions on competition affecting those third parties and thus to avoid their exclusion from competition.

69 Before that analysis is made, it should be noted that the contested decision indicates (*inter alia*, in paragraphs 106 to 108) that, when the Commission concluded, in paragraphs 103 and 104 of the contested decision (see paragraphs 55 and 56 above) that restrictions on competition resulting from the Eurovision system are compensated for by a series of sub-licensing rules, it was referring to the full scheme for access by third parties to the Eurovision system, which includes the sub-licensing scheme and the sub-licensing rules (see paragraph 18 above). However, as the applicants are television channels which transmit free-to-air, only the sub-licensing scheme is likely to counterbalance the restrictions on competition of which they complain. Therefore, the Court's analysis will apply only to that scheme.

70 In paragraph 107 of the contested decision, the Commission states that, under the sub-licensing scheme, 'the EBU and its members undertake to grant non-member

broadcasters extensive access to Eurovision sports programmes for which the rights have been acquired through collective negotiations...'. According to the Commission, '[t]he 1993 scheme grants live and deferred transmission rights to third parties of jointly acquired Eurovision sports rights'. In addition, in paragraph 28 of the contested decision, it is suggested in that regard that 'the non-EBU members have significant access to the unused rights, i.e. for the transmission of sporting events which are not transmitted by, or of which only a minor part are transmitted by, an EBU member'.

- 71 As is apparent from Annex I to the contested decision, the sub-licensing scheme, applicable to free-to-air television channels, provides that sub-licences may be granted for live and deferred transmissions. Live transmissions (Annex I, Part IV(1)) are stipulated only for residual transmissions, that is, for transmissions of those competitions or parts of competitions which are not reserved for live transmission by EBU members, since an 'event is considered to be transmitted live if the majority of the principal competitions constituting it are transmitted live' (Annex I, Part IV(1.3)). Therefore, an EBU member need only reserve the live transmission of the majority of the competitions of an event for non-members competing for the same market to be refused sub-licences for live transmission of the entire event, including competitions in that event which no EBU member will transmit live.

- 72 The answers given by SIC to the questions posed by the Court of First Instance indicate that, in application of that rule, the Portuguese public operator (RTP-Radiotevisão Portuguesa SA, hereinafter 'RTP'), an EBU member, refused to sell SIC sub-licences for the live broadcast of 1994 World Cup matches, including for matches that RTP did not intend to broadcast, on the ground that RTP intended to broadcast live the majority of the matches in that competition, that is, 47 matches out of 52.

- 73 However, even if it proves necessary, for reasons linked to exclusive transmission rights for sporting events and the guarantee of their economic value (see paragraph 60 above), for EBU members to reserve for themselves live transmission of the programmes acquired by the EBU, none of these reasons justifies their being able to extend that right to all the competitions which are part of the same event, even when they do not intend to broadcast all those competitions live.
- 74 In addition, as a result of the joint application of the sub-licensing scheme (applicable to channels which transmit free-to-air) and the sub-licensing rules (applicable to pay-TV channels), even when an EBU member transmits less than the majority of the competitions of a sporting event but nevertheless broadcasts the remaining competitions of that event on its pay-TV channel, the non-member of EBU has access only to deferred transmission, unless it itself is a pay-TV channel — in which case, under the sub-licensing rules, it may purchase sub-licences for live transmissions of competitions identical or comparable to that being transmitted by the EBU member.
- 75 As a result, as the documents in the case make clear, in particular the correspondence between M6 and the Groupement de radiodiffuseurs français de l'union européenne de radio-télévision (GRF) and the correspondence between SIC and the RTP, the opportunity for non-members of the EBU to transmit the main sporting events live is rendered inoperative to the extent that EBU members can themselves either transmit the events live or make use, under the sub-licensing scheme, of a right of reserve which also applies to events which they do not intend to transmit live.
- 76 Those restrictions are all the more severe in view of the fact that, as these proceedings show, generally only live transmission is of real interest to the applicants, which are general television channels transmitting free-to-air with national coverage, since televised broadcasts of sporting competitions — at least the most important of them — are able to attract a wide audience and thereby

justify their economic cost only as long as the result of those competitions remains unknown and, therefore, only if the broadcast is live. The deferred broadcast of sporting events, by contrast, is of no real interest in economic terms for general television channels, such as the applicants, whose financing depends exclusively on broadcast publicity and sponsorship.

- 77 Added to those restrictions — at least in the case of France, where several television channels are EBU members — are questions of a practical nature which make it difficult for non-members to have access both to the 'direct' purchase of sub-licences and to the purchase in auction of EBU rights which have not been used by its members (that was the case for the television transmission rights for the Sydney Olympic Games on French television). Those difficulties are in essence linked to the fact that television channels which are not members of the EBU do not have available to them sufficiently early the information they need in order to set up the technical facilities necessary, first, to televise transmissions of sporting events and, second, to adapt both their programming and their public information so as to attract large enough audiences to justify the investment.
- 78 Thus, following the request by M6 by letter of 18 January 1996 that it be notified of the events of the Atlanta Olympic Games (July 1996) which it could broadcast, it was not until a discussion on 7 June 1996 that the GRF informed it, in very vague terms, that the French members of the EBU were going to broadcast those games live for 15 hours a day and that, as a result, access by M6 to direct transmissions 'might possibly apply to a few football matches or events of little interest, such as softball'.
- 79 In the light of all the preceding considerations, the first conclusion to be made is that, contrary to what the Commission contends, the sub-licensing scheme does not guarantee that live transmission rights which are not used by EBU members are made available to their competitors.

- 80 As regards the possibility of acquiring sub-licences to cover deferred events or to provide roundups of these, and keeping in mind the fact that those modes of transmission are of limited interest for general channels which transmit free-to-air with national coverage, it is clear that this possibility is also subject to several restrictions. First, competitions the rights for which have been purchased by the EBU may not be broadcast until, at the earliest, one hour after the end of the event (the one-hour embargo) or of the last competition of the day, but never before 22.30 local time. Second, as is clear from the documents included in the file by the applicants, in reality, the members of the EBU, in any case in the countries where the applicants operate, impose even stricter conditions on embargo times and the editing of programmes.
- 81 Lastly, the scheme under analysis enables non-members of the EBU to purchase the rights to transmit news commentaries (two per event or per day of competition, of 90 seconds each), called 'News Access'. However, as pointed out by the applicants, that opportunity is always guaranteed them in the countries where they operate, independently of the sub-licensing scheme. In Spain and Portugal, the option to broadcast roundups of sporting events for public information is guaranteed under the constitutional right to information. In France, that opportunity exists under the code of good conduct which applies to French television channels.
- 82 In answer to the questions put by the Court of First Instance as to what information led the Commission to state that the scheme for third-party access to Eurovision rights, in force for channels transmitting free-to-air since 1993, gives 'extensive possibilities for live and deferred transmissions for non-members under reasonable conditions', the Commission placed on the file a list issued by the EBU which sets out the sub-licences granted up until 13 May 1997. Nevertheless, far from confirming the statements by the Commission and the EBU as regards the scheme for third-party access to the Eurovision system, the data in that list invalidate them. They show that while in certain States, such as The Netherlands, Sweden and Norway, EBU members appear to grant sub-licences to competing television channels, in other Member States the granting of sub-licences remains

extremely restricted, limited to the sub-licences granted to regional television channels which operate in narrowly limited markets, as in Spain (that is, moreover, confirmed by the list of sub-licences which RTVE has provided in the context of its intervention), or to sub-licences which are for the most part limited to the transmission of news commentaries for public information ('News Access'), as in Italy or Germany. For the countries where two of the applicants operate, France and Portugal, no sub-licence is mentioned.

83 All the information provided to the Court of First Instance thus goes to show that, contrary to what the Commission concludes in the contested decision, the sub-licensing scheme does not guarantee competitors of EBU members sufficient access to rights to transmit sporting events held by the latter on the basis of their participation in that purchasing association. Apart from a few exceptions, nothing in the rules or mode of implementation of the scheme enables competitors of EBU members to obtain sub-licences for the live broadcast of unused Eurovision rights. In reality, the scheme merely permits the acquisition of sub-licences to transmit roundups of competitions under extremely restrictive conditions.

84 That conclusion is not invalidated by the argument put forward by the EBU to the effect that the proof of the proper functioning of the scheme for access by third parties to the Eurovision system is the absence of recourse to the arbitration procedures which it provides for. First, that argument proves incorrect, inasmuch as the correspondence between SIC and the RTP shows that those operators had recourse to arbitration, at least in relation to the purchase of sub-licences for the 1994 world football championships. In addition, recourse to arbitration is foreseen in the scheme analysed only for disputes concerning the price of sub-licences, which implies that the parties will resort to it only when they agree on all the other conditions of access (see Annex I, Part IV(5.1) and Annex II(iii) to the contested decision). Therefore, the failure to use that procedure cannot show that the sub-licensing scheme allows genuine access to the programmes acquired by the EBU.



- 85 It follows from all the preceding considerations that the Commission made a manifest error of assessment in the application of Article 81(3)(b) EC in determining that, even if a product market limited to certain major international sports events exists, the sub-licensing scheme guarantees access for third parties which are competitors of the EBU's members to Eurovision rights and consequently avoids the elimination of competition in that market.
- 86 Since the Commission's decision to grant individual exemption assumes that the agreement or the decision of the association of undertakings satisfies all four conditions laid down in Article 81(3) EC and that an exemption must be refused if any of the four conditions is not met (see, *inter alia*, Joined Cases 56/64 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299, 347 and Case T-17/93 *Matra Hachette v Commission* [1994] ECR II-595, paragraph 104), the contested decision must be annulled without there being any need to rule on the other pleas put forward or to deal with the requests for production of documents made by the applicants in Cases T-216/00 and T-300/00.

## Costs

- 87 Under Article 87(2) of the Rules of Procedure, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings.
- 88 Since the Commission has been unsuccessful and the applicants, as well as the RTI, the intervener in Case T-300/00, have applied for costs, the Commission must be ordered to pay its own costs and to bear the costs incurred by the applicants and the RTI. Since DSF has not applied for the Commission to be ordered to pay the costs of its intervention in Case T-299/00, that intervener must bear its own costs.

- 89 Since Antena 3 has claimed that the EBU and RTVE should be ordered to bear the costs of their interventions in Case T-216/00, the EBU and RTVE must be ordered to pay their own costs as well as those incurred by Antena 3 in its intervention. Since M6 and SIC have requested that the EBU be ordered to pay the costs of its intervention in Cases T-185/00 and T-300/00, the EBU must be ordered to pay its own costs as well as those incurred by M6 and SIC in their interventions. As Telecinco did not request that the EBU and RTVE be ordered to pay the costs of their interventions in Case T-299/00, those interveners need only pay their own costs in that case.

On those grounds,

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

hereby:

1. Annuls Commission Decision 2000/400/EC of 10 May 2000 relating to a proceeding pursuant to Article 81 of the EC Treaty (IV/32.150 — Eurovision);
2. Orders the Commission to pay its own costs, together with those of the applicants and of the intervener Reti Televisive Italiane Spa;

3. Orders DSF Deutsches SportFernsehen GmbH to bear the costs of its intervention;
4. Orders the intervener Union européenne de radio-télévision to bear its own costs, together with those incurred by Métropole télévision SA, Antena 3 de Televisión SA and SIC — Sociedade Independente de Comunicação SA for their interventions;
5. Orders the intervener Radiotelevisión Española to bear its own costs, together with those incurred by Antena 3 de Televisión SA for its intervention;
6. Orders Gestevisión Telecinco SA to bear the costs it incurred in connection with the intervention of the Union européenne de radio-télévision and of Radiotelevisión Española.

Moura Ramos

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Delivered in open court in Luxembourg on 8 October 2002.

H. Jung

R.M. Moura Ramos

Registrar

President