JUDGMENT OF THE COURT OF FIRST INSTANCE
(First Chamber, Extended Composition)
8 July 1999 *

In Case T-266/97,

Vlaamse Televisie Maatschappij NV, a company incorporated under Belgian law, established in Vilvoorde (Belgium), represented by Francis Herbert and Dirk Arts, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Carlos Zeyen, 56-58 Rue Charles Martel,

applicant,

v

Commission of the European Communities, represented by Wouter Wils, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the Chambers of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of Commission Decision 97/606/EC of 26 June 1997 pursuant to Article 90(3) of the EC Treaty on the exclusive right to broadcast television advertising in Flanders (OJ 1997 L 244, p. 18),

* Language of the case: Dutch.

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

composed of: B. Vesterdorf, President, C.W. Bellamy, J. Pirrung, A. W. H. Meij and M. Vilaras, Judges,

Registrar: A. Mair, Administrator,

having regard to the written procedure and further to the hearing on 20 November 1998,

gives the following

Judgment

Facts of the dispute

1 Article 127 of the Belgian Constitution confers on the Councils of the French Community and the Flemish Community the power to lay down rules on cultural matters in so far as they relate to them.

2 The Flemish legislation on the media was consolidated by an Order of the Flemish Government of 25 January 1995 consolidating the decrees relating to radio and television (*Moniteur Belge* of 30 May 1995, p. 15058; amendment to the *Moniteur Belge* of 31 October 1995, p. 30555) which was ratified by the Decree of the Council of the Flemish Community of 23 February 1995 (hereinafter 'the Codex').

3 The Codex consolidates, in particular, the provisions contained in the Decree of 28 January 1987 on the transmission of radio and television programmes on the radio and television cable networks and on the approval of non-public television companies (hereinafter 'the 1987 Decree', *Moniteur Belge* of 19 March 1987, p. 4196), the Decree of 12 June 1991 laying down rules on radio and television advertising and sponsorship (*Moniteur Belge* of 14 August 1991, p. 17730) and the Decree of 4 May 1994 on radio and television cable networks and the authorisation required to establish and exploit such networks and on the promotion of the broadcasting and production of television programmes (*Moniteur Belge* of 4 June 1994, p. 15434).

4 Articles 39 to 41 of the Codex provide as follows:

'Article 39. On the advice of the Media Council the Flemish Government may authorise private broadcasters on the conditions laid down in this chapter.

To obtain authorisation such broadcasters must be formed as legal persons governed by private law and their head office must be located in the Dutch-speaking region or the bilingual region of Brussels-Capital.

Article 40. Private broadcasters shall have as their object to produce programmes. They may take any action which contributes directly or indirectly to the attainment of that objective.

Article 41. The following broadcasters may be authorised:

(1) a private broadcaster broadcasting to the Flemish community as a whole;

...'

5 Articles 44 to 50 of the Codex contain provisions on the private broadcaster broadcasting to the Flemish community as a whole. The first paragraph of Article 44, point 1, on the conditions governing authorisation reads as follows:

'The private broadcaster which broadcasts to the Flemish community as a whole shall have the status of a private company. The company's capital shall be made up solely of registered shares. At least 51% of that capital shall be subscribed by publishers of Dutch-language newspapers and magazines.'

6 The first paragraph of Article 46 provides that 'the private broadcaster which broadcasts to the Flemish community as a whole shall be approved for a period of eighteen years.'

7 The first and second paragraphs of Article 80 of the Codex stipulate that:

'The radio and television broadcasters of or approved by the Flemish community may not broadcast advertising unless they are authorised to do so by the Flemish Government...

Only one of the radio and television broadcasters of or approved by the Flemish community and broadcasting to the Flemish community as a whole may be authorised to broadcast advertising. That exclusive right shall also apply to non-commercial advertising.'

8 Pursuant to the applicable provisions, Vlaamse Televisie Maatschappij (hereinafter 'VTM' or 'the applicant'), a private Dutch-language television company established in Flanders, was approved, by a decision of the Flemish Government of 19 November 1987, as the only private television company authorised to broadcast to the Flemish community as a whole for a period of 18 years.

9 By Royal Order of 3 December 1987, confirmed by a decision of the Flemish Government of 11 December 1991, VTM was also granted authorisation to broadcast advertising, as provided for in Article 80 of the Codex, for a period of eighteen years.

10 The other television broadcaster broadcasting to the Flemish community as a whole, the public radio and television corporation Belgische Radio en Televisie Nederlands (hereinafter 'BRTN'), controlled by the Flemish community, is not authorised to broadcast television advertising.

11 VTM was formed in 1987 by nine associates, all having interests in the Flemish press and each holding 11.1% of its capital.

12 At the time the present action was brought, only four shareholders held VTM capital. Three of them are subsidiaries of the Netherlands media group Verenigde Nederlandse Uitgeverijen (hereinafter 'VNU'). The fourth shareholder, Vlaamse Media Holding (hereinafter 'VMH'), holds 55.55% of the applicant's shares. The first- and third-largest Flemish press groups, Vlaamse Uitgevers Maatschappij NV and Concentra Holding NV, do not own shares in VTM.

13 Under the initial version of the 1987 Decree, the majority of the shares in the private broadcaster broadcasting to the Flemish community as a whole had to be reserved for the publishers of Dutch-language newspapers and magazines having their head office in the Flemish region or the Brussels-Capital region. The requirement that the associates' head office be located in Flanders or Brussels was abolished after the Court of Justice declared it incompatible with the Treaty (Case C-211/91 *Commission* v *Belgium* [1992] ECR I-6757).

14 On 16 December 1994, VT4 Ltd (hereinafter 'VT4'), a company incorporated under English law with its head office in London which broadcasts programmes aimed at the Flemish community via satellite, lodged a complaint with the Commission concerning VTM's exclusive right to broadcast television advertising in Flanders.

15 On 13 July 1995 the Commission asked the Belgian Government to set out its views on the compatibility of the Flemish legislation granting VTM the exclusive right to broadcast television advertising in Flanders with the provisions of Article 90 of the EC Treaty (now Article 86 EC) and Article 59 of the EC Treaty (now, after amendment, Article 49 EC). It finally stated that that legislation was

not contrary to the Community rules on freedom to provide services since it did not prohibit television channels established in other Member States from broadcasting advertisements targeted at the Flemish community.

16 On 10 January 1997 the Commission communicated to the Belgian Government its reasons for considering that the exclusive right granted to VTM was incompatible with Article 90(1) of the EC Treaty (now Article 86(1) EC), read in conjunction with Article 52 of the EC Treaty (now, after amendment, Article 43 EC), and asked it to submit its observations in that respect.

17 The Flemish authorities replied to that letter from the Commission on 11 February 1997.

18 At the same time as the procedure referred to at paragraph 16 above, the Commission notified to the Belgian authorities, on 15 May 1997, a reasoned opinion concerning the requirement that 51% of the capital of the private broadcaster broadcasting to the Flemish community as a whole be held by publishers of Dutch-language newspapers and magazines.

19 On 26 June 1997 the Commission adopted Decision 97/606/EC pursuant to Article 90(3) of the EC Treaty on the exclusive right to broadcast television advertising in Flanders (OJ 1997 L 244, p. 18, hereinafter the 'contested decision'), Article 1 of which stipulates:

'The second paragraph of Article 80 and Article 41, point 1, of the Codex of Flemish rules on radio and television broadcasting, sponsoring and cable distribution, which provide that the Flemish Government may authorise only one private broadcaster to broadcast to the Flemish community as a whole and to broadcast commercial and non-commercial advertising to that Community, that

broadcaster being the private television company Vlaamse Televisie Maatschappij NV, and the Decision of the Flemish executive of 19 November 1987 and the Royal Order of 3 December 1987, confirmed by a Decision of the Flemish executive of 11 December 1991, by which VTM was recognised as the sole private television company broadcasting to the Flemish community as a whole and was authorised to include commercial advertising in its programmes, are incompatible with Article 90(1) of the EC Treaty, read in conjunction with Article 52 thereof.'

Procedure and forms of order sought by the parties

20 By application lodged at the Registry of the Court of First Instance on 6 October 1997, the applicant brought the present action.

21 Pursuant to Article 14 of the Rules of Procedure of the Court of First Instance and on the proposal of the First Chamber, the Court decided, after hearing the parties in accordance with Article 51 of the above Rules, to refer the case to a Chamber sitting in extended composition.

22 Upon hearing the report of the Judge-Rapporteur, the Court (First Chamber, Extended Composition) decided to open the oral procedure and adopted measures of organisation of procedure in which it requested the parties to reply to certain written questions and to produce certain documents. The parties complied with those requests.

23 The parties presented oral argument and their replies to the Court's questions at the hearing on 20 November 1998.

24 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

25 The Commission contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

Substance

26 In support of its action the applicant raises five pleas in law: first, a breach of its rights of defence; secondly, breach of the principle of the protection of legitimate expectations, the principle of legal certainty and the duties of prudence and care; thirdly, infringement of Articles 90(1) and 52 of the EC Treaty; fourthly, misuse of powers; and fifthly, infringement of Article 190 of the EC Treaty (now Article 253 EC).

First plea: breach of the rights of defence

The first limb of the first plea

— Summary of the arguments of the parties

27 In the first limb of the first plea the applicant claims, essentially, that undertakings benefiting from a State measure within the meaning of Article 90(1) of the Treaty are not third parties in the procedure by which a decision is adopted pursuant to Article 90(3) of the Treaty. Consequently, such an undertaking must be accorded the same rights of defence as those accorded to the Member State concerned. Therefore, before a decision on the basis of that provision is adopted, it must receive not only an exact and complete statement of the objections addressed to the Member State concerned but also all the observations submitted by interested third parties (Joined Cases C-48/90 and C-66/90 *Netherlands and Others* v *Commission* [1992] ECR I-565, paragraphs 45 and 46). That was not the case here, since neither a copy of the complaint lodged by VT4 nor the observations of the Flemish Government concerning the objections notified by the Commission were communicated to it. Furthermore, it claims that the Commission relied on those observations (point 13 of the preamble to the decision) to claim that there was no justification for the exclusive right.

28 In its reply the applicant maintains that no distinction should be drawn between the rights of defence of the Member State affected by a decision adopted pursuant to Article 90(3) of the Treaty and those of the undertakings benefiting from the contested State measure. In its judgment in *Netherlands and Others* v *Commission*, cited above, the Court of Justice did not rule out the possibility that an undertaking benefiting from a contested State measure might enjoy the same rights of defence as an undertaking to which a decision adopted pursuant to Article 85 of the EC Treaty (now Article 81 EC) or Article 86 of the EC Treaty (now Article 82 EC) is addressed.

29 Moreover, it claims that the Commission acknowledges that in practical terms the applicant is in a situation comparable to that of the Member State to which the contested decision is addressed. First, the preamble to the decision reveals that the Belgian authorities and the applicant were considered in the same way in terms of their rights of defence. Secondly, the Commission notified the decision to the Belgian authorities and the applicant. Thirdly, the absence of any dispute as to the admissibility of the action means that the Commission acknowledges that, in accordance with the fourth paragraph of Article 173 of the EC Treaty (now, after amendment, the fourth paragraph of Article 230 EC), the applicant is directly and individually affected by the decision which therefore directly affects its legal position as if it were the addressee.

30 The applicant submits that, in a procedure concerning the broadcasting monopoly of the public broadcasting channel in Flanders, the Commission asked the undertakings benefiting from the State measure to submit their observations on the substance of the complaint concerning that monopoly before the formal procedure was initiated.

31 The Commission denies that it has infringed the applicant's rights of defence. It considers that the applicant misconstrues the scope of the judgment in *Netherlands and Others* v *Commission*, cited above, and the particular nature of the procedure based on Article 90(3) of the Treaty. The Court of Justice has drawn a clear distinction between the rights of defence of the Member State concerned by a decision adopted pursuant to that provision and the rights of defence of the undertakings benefiting directly from the contested State measure.

— Findings of the Court

32 Under Article 90(1) of the Treaty, the Member States are under an obligation to refrain, in the case of public undertakings and undertakings to which they grant special or exclusive rights, from enacting or maintaining in force any measure

contrary to the rules contained in the Treaty, in particular to those rules provided for in Article 6 of the EC Treaty (now, after amendment, Article 12 EC) and Articles 85 to 94 of the EC Treaty (now Article 89 EC) inclusive.

33 Article 90(3) of the Treaty requires the Commission to ensure that Member States comply with their obligations as regards the undertakings referred to in Article 90(1) and expressly empowers it to take action for that purpose by way of directives and decisions. The legal measures which the Commission adopts on the basis thereof, whether directives or decisions, are to be addressed to the Member States concerned.

34 As the Court of Justice has held, Article 90(3) empowers the Commission to determine, by a decision, that a given State measure is incompatible with the rules of the Treaty and to indicate what measures the State to which the decision is addressed must adopt in order to comply with its obligations under Community law (*Netherlands and Others* v *Commission*, cited above, paragraph 28). It follows that a procedure leading to the adoption of a decision pursuant to Article 90(3) is a procedure initiated against the Member State concerned and that, consequently, any undertaking to which Article 90(1) of the Treaty relates is a third party to that procedure. Contrary to the contention of the applicant, an undertaking benefiting from the contested State measure is not, in a procedure pursuant to Article 90(3) of the Treaty, by that mere fact placed in a position similar to that of an undertaking which is the subject of a procedure to establish whether or not Article 85 or 86 of the Treaty has been infringed.

35 According to settled case-law, observance of the rights of the defence in all proceedings which are initiated against a person and which are liable to culminate in a measure adversely affecting that person is a fundamental principle of Community law which must be guaranteed even in the absence of any rules on the procedure in question (see, for example, *Netherlands and Others* v *Commission*, cited above, paragraph 44). That principle requires that the

Member State concerned must receive, before the decision which will be notified to it is adopted pursuant to Article 90(3) of the Treaty, an exact and complete statement of the objections which the Commission intends to raise against it and must be placed in a position in which it may effectively make known its views on the observations submitted by interested third parties (judgment in *Netherlands and Others* v *Commission*, cited above, paragraphs 45 and 46).

36 It is clear from the judgment in *Netherlands and Others* v *Commission* (paragraphs 50 and 51) that an undertaking to which Article 90(1) of the Treaty relates, which is the direct beneficiary of the State measure at issue and is expressly named in the applicable law, to which the contested decision relates directly and which is directly affected by the economic consequences of that decision is entitled to be heard by the Commission during that procedure.

37 Observance of the right to be heard requires the Commission to communicate formally to the undertaking benefiting from the contested State measure the specific objections which it raises against that measure as set out in the letter of formal notice addressed to the Member State and, where appropriate, in any subsequent correspondence, and to grant it an opportunity effectively to make known its views on those objections. However, it does not require the Commission to afford the undertaking benefiting from the State measure an opportunity to make known its views on the observations submitted by the Member State against which the procedure has been initiated in response to objections that have been addressed to it or in response to observations submitted by interested third parties, nor formally to transmit to it a copy of any complaint which may have given rise to the procedure.

38 In the present case it is established that VTM is the undertaking which benefits from the exclusive right to broadcast television advertising to the Flemish community, that it is expressly named in the Flemish legislation, that the contested decision relates directly to it and that it is directly affected by the economic consequences of that decision.

39 It is also apparent from the documents before the Court that the Commission gave the Belgian Government, by a letter of 10 January 1997, formal notice to submit its observations on the objections, which were attached to that letter, relating to the incompatibility of the exclusive right granted to VTM with Article 90(1) of the Treaty, read in conjunction with Article 52 thereof. The Flemish Government put forward its observations on those objections in a letter of 11 February 1997.

40 A copy of that letter of formal notice and the statement of objections was sent to the applicant and was received on 20 March 1997 at the latest. By letter of 16 May 1997 it submitted its observations to the Commission within the prescribed two-month time-limit.

41 Inasmuch as the applicant does not dispute that the Commission adopted the contested decision after it had given it notice to submit its comments on the Commission's objections 'to the monopoly on television advertising in Flanders' (preamble to the contested decision) or that those objections correspond to those contained in the contested decision, it must be concluded that it was duly heard. The fact that the Belgian authorities were also able to submit their comments on the Commission's objections does not mean, contrary to the contention of VTM, that the Member State concerned and the undertaking benefiting from the State measure are placed in the same procedural position or that it has the same rights in the procedure pursuant to Article 90(3) of the Treaty.

42 Furthermore, the applicant cannot reasonably claim that the Commission relied, in particular, on the observations of the Flemish Government to claim that there was no justification for the applicant's exclusive right. It is clear from point 13 of the preamble to the contested decision as a whole that the Commission first set out the Belgian authorities' views as to whether arguments of cultural policy justified 'the granting of a monopoly in television advertising to VTM' (first paragraph of point 13), then the applicant's views (second paragraph of point 13)

and lastly its own position on that matter (third to seventh paragraphs of point 13).

43 The applicant's argument that it follows from the fact that its action is admissible that it is placed in a situation analogous to that of the addressee of the contested measure must also be disregarded. Compliance with the conditions governing the admissibility of an action for annulment brought by a legal person which is not an addressee of the decision provides no grounds for inferring that that person enjoys the same rights of defence as the person to which the decision is addressed and against whom the procedure culminating in an measure having an adverse effect has been initiated.

44 Lastly, the fact that, in a procedure concerning the broadcasting monopoly of the public broadcasting channel in Flanders, the Commission asked the undertakings benefiting from the State measure to submit their observations on the substance of the complaint against that monopoly before the formal procedure was initiated cannot affect the legality of the contested decision. Therefore, that argument must be rejected as irrelevant.

45 In view of the foregoing the first limb of this plea must be rejected.

Second limb of the first plea

— Summary of the arguments of the parties

46 The applicant claims that the Commission decided in advance to take no account of its observations on the statement of objections, as demonstrated by the two statements on the compatibility of the State measures at issue with Community

law made by the Commissioner responsible for competition matters on 2 May 1996 and 5 February 1997 respectively.

47 The Commission disputes that allegation and maintains that no objection liable to affect the legality of the contested decision may be inferred from the public statements cited. Moreover, any decision adopted pursuant to Article 90(3) of the Treaty would be adopted by the College of Commissioners.

— Findings of the Court

48 The Court considers that the applicant's arguments cannot be upheld.

49 Subject to the obligation of professional secrecy to which each Commissioner is bound under Article 214 of the EC Treaty (now Article 287 EC), the expression of an opinion by the Commissioner responsible for competition matters on a procedure in progress pursuant to Article 90(3) of the EC Treaty, is, in so far as it is strictly personal and without prejudice, attributable to that Commissioner alone and does not predetermine the position that the College of Members of the Commission will adopt at the end of the procedure. Under Article 163 of the EC Treaty (now, after amendment, Article 219 EC), the operation of the Commission is governed by the principle of collegiality. That principle is based on the equal participation of the Commissioners in the adoption of decisions, from which it follows in particular that decisions should be the subject of collective deliberation (Case 5/85 *AKZO Chemie* v *Commission* [1986] ECR 2585, paragraph 30; and Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555, paragraph 63).

50 In the present case the first document cited by the applicant is a report drawn up by Mr Van Rompaey on behalf of the Media Council of the Flemish Parliament on the hearing of the Commissioner responsible for competition matters which took place on 2 May 1996. That document states, primarily:

'As regards VTM's monopoly, the European Commissioner stands by his view that the monopoly does not comply with European rules. A procedure is now under way before the European Commission in that regard following the complaint lodged by VT4 pursuant to Article 90 of the EC Treaty.'

51 It is apparent from that document, even when read in the light of the remarks made by the speaker who addressed the Flemish Parliament before the above-mentioned Commissioner spoke, that the Commissioner confined himself to expressing 'his view' and to indicating that a procedure concerning the compatibility of the exclusive right granted to VTM with Community law was currently being prepared by the Commission.

52 The second document, a press article dated 14 May 1997, reports the comments made on 5 February 1997 by Mr Van Rompuy, the Flemish Media Minister as follows: 'In February the European Commissioner responsible for competition policy, Karel Van Miert, promised to send us the letter of formal notice at the beginning of May.'

53 Leaving aside the fact that that article only indirectly reports the remarks made by the Commissioner and the fact that the formal letter of notice to which he refers can be construed only as being, in reality, the Commission decision adopted at the end of the procedure which it had initiated, the remarks in question cannot be regarded as attributable to the Commission and the 'promise' made to the Flemish Media Minister by the Commissioner could consequently be interpreted only as meaning that there was a possibility that a decision declaring certain provisions of the Flemish rules on radio and television broadcasting incompatible with Article 90(1), read in conjunction with Article 52, of the Treaty, would finally be adopted in May 1997.

54 First, it is not disputed that the letter of formal notice addressed to the Belgian Government pursuant to Article 90(3) of the Treaty and the final decision based on that provision are decisions that were in fact the subject of joint discussion.

55 Secondly, it should be noted that the second paragraph of point 13 of the preamble to the contested decision sets out certain arguments put forward by VTM, whereas the corresponding paragraph in the annex to the letter of formal notice, that is to say paragraph 12, makes no mention thereof. It follows, contrary to the contention of the applicant, that the Commission did in fact take account of the observations that it had submitted.

56 In view of the foregoing the first plea must be rejected in its entirety.

Second plea: breach of the principle of the protection of legitimate expectations, the principle of legal certainty and the duties of prudence and care

Arguments of the parties

57 The applicant first points out that the Commission has initiated, against the Kingdom of Belgium, several procedures directed against the legislation on radio and television broadcasting applicable in the Flemish community.

58 Thus, a procedure initiated on the basis of Article 169 of the EC Treaty (now Article 226 EC) in March 1990 culminated in the *Commission* v *Belgium* judgment cited above. By that judgment the Court of Justice held that the Kingdom of Belgium had failed to fulfil its obligations under Articles 52 and 221 of the EC Treaty (now, after amendment, Article 294 EC) by reserving 51% of the capital of the non-public television broadcasting company which serves the entire Flemish community to publishers of Dutch-language daily and weekly newspapers whose registered office is situated in the Dutch-speaking region or in the bilingual Brussels region. Therefore, no other provision of the 1987 Decree was regarded as being contrary to Article 52 of the Treaty.

59 Furthermore, in July 1995, the Commission gave the Belgian authorities formal notice, in a procedure based on Article 90(3) of the Treaty, to submit their observations on the compatibility of the exclusive right granted to the applicant with the provisions of Article 90(1) of the Treaty, read in conjunction with Article 59 thereof. That procedure has finally been concluded.

60 Since those procedures enabled the Commission to examine the legality of the 1987 Decree as a whole in the light of Community law, the applicant claims that the provisions of that Decree to which those procedures did not relate may be regarded as consistent with the Treaty.

61 That situation is said to have led the applicant to entertain the justified expectation that the Commission no longer disputed the legality of the Flemish rules on radio and television broadcasting in the light of Community law.

62 It follows that in declaring the exclusive right granted to VTM illegal in the light of Article 90(1) of the Treaty, read in conjunction with Article 52 thereof, the Commission failed to observe the Community principle of the protection of legitimate expectations (Case 112/77 *Töpfer* v *Commission* [1978] ECR 1019, paragraph 19; and Case C-90/95 P *de Compte* v *Parliament* [1997] ECR I-1999, paragraphs 39 and 40), in accordance with which any individual who is in a situation in which it is apparent that the Community administration, by giving him precise assurances, has led him to entertain justified expectations is entitled to rely on that principle (Case T-336/94 *Efisol* v *Commission* [1996] ECR II-1343, paragraph 31).

63 The Commission's attitude also led to its failing to fulfil duties of prudence and care and to observe the principle of legal certainty. The applicant points out that that principle precluded the Commission from initiating a fresh procedure against the legislation at issue because the compatibility of that legislation with Community law had already been subject to thorough examination. That situation is comparable with that of a national court which is precluded, by virtue of the principle of legal certainty, from submitting for a preliminary ruling a question regarding the validity of a Community act where that act has not been challenged within the period laid down by the Treaty (Case C-188/92 *TWD Textilwerke Deggendorf* [1994] ECR I-833, paragraphs 24 to 26).

64 In its reply the applicant rebuts the Commission's contention that it is disputing the direct effect of Articles 90(1) and 52 of the Treaty and, consequently, the possibility open to a national court of reviewing the legality of provisions contained in national legislation that have already been analysed by the Commission and, if appropriate, of declaring them incompatible with the abovementioned provisions. However, the duty of diligence and the principle of legal certainty preclude the Commission — and it alone — from calling into question the compatibility of the exclusive right granted to VTM with Community law. In the absence of any substantive amendment to the

arrangements contained in the decree governing the exclusive right which would justify a fresh Commission inquiry, the abovementioned exclusive right became final as far as the Commission is concerned following the investigation which was concluded by the *Commission* v *Belgium* judgment cited above.

65 The Commission's alternative argument that it can hardly be expected immediately to have at its disposal all the necessary information to carry out a complete factual and legal analysis and to initiate all the possible procedures without delay every time a Member State adopts a measure that might infringe one or more provisions of Community law, is based on an erroneous interpretation of the duty of diligence. The duty of diligence contained in Article 155 of the EC Treaty (now Article 211 EC) requires that the Commission should not, following a complaint, limit its inquiry merely to the details of the national measure referred to in the complaint or merely to the provisions of Community law invoked in that complaint, but that it should also examine the national measure in its entirety in the light of Community law as a whole.

66 The applicant considers that the Commission should have been able, from reading the Flemish rules on radio and television broadcasting with ordinary care, to establish, in the procedure pursuant to Article 169 of the Treaty concluded by the *Commission* v *Belgium* judgment, cited above, that the 1987 Decree granted VTM an exclusive right; otherwise it failed in its duty of diligence, so that the adoption of the contested decision constitutes a breach of the principle of the protection of legitimate expectations in respect of the applicant. In the alternative, the applicant does not rule out the possibility that the Commission did, during that procedure, establish the existence of an exclusive right and examine its compatibility with the Treaty. In that case, the Commission's assessment of the compatibility of that exclusive right with the Treaty in the procedure initiated in the present case constitutes a breach of the principle of the protection of legitimate expectations in respect of the applicant and therefore the applicant may legitimately invoke the principle of legal certainty in order to have the contested decision annulled.

67 In support of the second part of that alternative, the applicant cites the reasoned opinion which the Commission sent to the Belgian Government on 13 February

1991 concerning the requirement regarding establishment imposed for the purpose of approving the private broadcaster, which states:

'The means chosen by the Flemish community to attain that objective is not, however, compatible with Community law. It is true that Article 90 of the Treaty authorises the Member States to grant specific rights to broadcasters, as follows from the judgment of the Court of Justice in Case 155/73 *Sacchi* [1974] ECR 409. However, that article provides that Member States may not maintain in force any measure contrary to the rules contained in the Treaty. If a Member State chooses to grant special rights to a private company it may not intervene in the capital structure of that undertaking by a measure contrary to Articles [52 and 221 of the Treaty] which, furthermore, may not be justified on the ground of public policy by invoking Article 56 of the Treaty.'

68 The Commission disputes the applicant's argument that it should not have initiated the procedure which led to the adoption of the contested decision; that would have meant acknowledging the existence of an acquired right to infringe Treaty provisions having direct effect.

69 Since the provisions of Article 90(1) of the Treaty, read in conjunction with Article 52 thereof, have direct effect, their applicability in no way depends on steps being taken by the Commission pursuant to Article 90(3) of the Treaty. Therefore, the incompatibility of the applicant's exclusive right with Community law could have been established at any juncture by the national court. Consequently, there can be no legitimate expectation implying that incompatibility may never be established.

70 In the alternative, the Commission notes that it can hardly be expected immediately to have at its disposal all the necessary information to carry out a complete factual and legal analysis and to initiate all possible procedures without delay every time a Member State adopts a measure that might infringe one or more provisions of Community law.

Findings of the Court

71 According to consistent case-law, the principle of the protection of legitimate expectations forms part of the Community legal order (*Töpfer* v *Commission*, cited above, paragraph 19). The right to rely on the principle of the protection of legitimate expectations extends to any individual who is in a situation in which it is apparent that the Community administration has led him to entertain reasonable expectations in particular by giving him precise assurances (Case T-571/93 *Lefebvre and Others* v *Commission* [1995] ECR II-2379, paragraph 72).

72 In the present case although the Commission has, for the purpose of examining the compatibility of the Flemish rules on radio and television broadcasting with the rules contained in the Treaty, over a period of several years, first initiated and then conducted procedures against the same rules, which nevertheless remain unamended, it should be noted firstly that no precise assurance was given to the applicant, as it acknowledged at the hearing, as to the legality, in the light of Article 90(1) and Article 52 of the Treaty, of the provisions of the Flemish rules granting VTM the exclusive right to broadcast television advertising to the Flemish community as a whole; secondly the manner in which the Commission conducted its examination of the compatibility of those rules with the rules contained in the Treaty was not such as to have led the applicant to entertain reasonable expectations.

73 The extract from the reasoned opinion notified by the Commission to the Belgian Government on 13 February 1991, on which the applicant relies (paragraph 67 above), contains nothing to suggest that the Commission had already examined, by then, whether the rules laying down that exclusive right were in conformity with all the rules contained in the Treaty. That extract simply confirms the general rule whereby the grant of special or exclusive rights is not prohibited provided that no provision of the Treaty is infringed and the fact that a Member State 'may not intervene in the capital structure' of an undertaking which has been granted such rights 'by a measure contrary to Articles 52 and 221 of the Treaty'. However, the position set out in the reasoned opinion does not constitute an assurance given by the Commission and therefore could not have led the

applicant to entertain a reasonable expectation that the compatibility of the exclusive right provided for by the Flemish rules would not be called into question in the light of the rules contained in the Treaty.

74 Similarly, the failure, in the procedures which it had initiated prior to that culminating in the contested decision, to call into question the compatibility of the exclusive right in the light of Article 90(1) of the Treaty, read in conjunction with Article 52 thereof, cannot be equated with a precise assurance. It should be noted that that situation is not comparable with that of a person who entertains reasonable expectations of the legality of an administrative act that is favourable to him (*de Compte* v *Parliament*, cited above). Therefore, the finding that national rules are incompatible with Community law cannot be compared with the revocation of a favourable administrative act on the validity of which a person had relied.

75 As regards the applicant's argument that the Commission failed to fulfil its duty of prudence and care, it should be noted that under Article 90(3) of the Treaty, 'The Commission shall ensure the application of the provisions of this Article and shall, where necessary, address appropriate directives or decisions to Member States'. Furthermore, under Articles 155 and 169 of the Treaty, the Commission is the custodian of Community legality. In that capacity, in the general interest of the Community, its function is to ensure that the provisions of the Treaty are applied properly by the Member States and to note the existence of any failure to fulfil the obligations deriving therefrom, with a view to bringing it to an end (Case 167/73 *Commission* v *France* [1974] ECR 359, paragraph 15). It is therefore for the Commission to determine whether it is expedient to take action against a Member State under Article 169 or Article 90(3) of the Treaty and what provisions, in its view, the Member State has infringed, and to judge at what time it will bring an action for failure to fulfil obligations (see, with regard to Article 169 of the Treaty only, Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 27). In that regard it is apparent from the wording of Article 90(3) of the Treaty and from the scheme of Article 90 as a whole that the Commission enjoys a wide discretion in the field covered by paragraphs 1 and 3, both in relation to the action which it considers necessary to be taken and in relation to the means appropriate for that purpose (Case C-107/95 P *Bundesverband der Bilanzbuchhalter* v *Commission* [1997] ECR I-947, paragraph 27).

76 It follows that when the Commission considers that national provisions are contrary to rules of Community law other than those whose infringement had justified the initiation of previous procedures, it may initiate a fresh procedure for a declaration of further failure to fulfil obligations in order fully to discharge the duties assigned to it under Articles 155 and 169 of the Treaty (see, to that effect, *Commission* v *Italy*, cited above, paragraph 28). Similarly, if it finds that a Member State has infringed Article 90 of the Treaty, even though the presumed incompatibility of the national rules with Community law has already justified the initiation of several procedures, it is open to the Commission to address an appropriate decision to that Member State in order to ensure application of that article.

77 Since the Commission is not required to examine the legality of a national regulation in the light of all the rules contained in the Treaty once and for all, the argument that the applicant derives from the duty of diligence and care which Article 155 of the Treaty imposes on the Commission when it conducts a procedure must be rejected.

78 Lastly, since the applicant has failed to show that the Commission gave it an assurance that the provisions of the Flemish rules governing the grant of the exclusive right were compatible with Article 90(1) of the Treaty, read in conjunction with Article 52 thereof, and there are no specific factors on which it could have based its expectation that those rules would be tolerated by the Commission, it cannot reasonably claim that the Commission failed to observe the principle of legal certainty by initiating the procedure which led to the adoption of the contested decision.

79 In view of all the foregoing the second plea must be rejected.

Third plea: breach of Article 90(1) in conjunction with Article 52 of the Treaty

Arguments of the parties

80 The applicant disputes that either the provisions of the Codex or their implementing measures constitute infringements of Article 90(1) of the Treaty, in conjunction with Article 52 thereof, for the reason that their 'object and... effect are incontestably protectionist' (point 12 of the preamble to the contested decision).

81 In the first limb of the plea the applicant calls into question the Commission's assessment of the justification for the exclusive right which is granted temporarily.

82 It considers that the question of the need and, therefore, justification for the exclusive right must be dealt with first. Since it has been shown that there are acceptable reasons for a Member State to grant an exclusive right, any objection based on freedom of establishment and which relates, in point of fact, solely to the effect of exclusion inherent in the exclusive right would appear irrelevant.

83 It claims that the Court has also acknowledged that cultural policy objectives are objectives of general interest which a Member State may lawfully pursue by formulating the statutes of its own broadcasting bodies in an appropriate manner (Case C-23/93 *TV10* [1994] ECR I-4795, paragraph 19, and Case C-368/95 *Familiapress* [1997] ECR I-3689, paragraph 18).

84 However, in the present case the public authorities made provision, when Flemish broadcasting was being liberalised, for the grant of a temporary exclusive right to a single private broadcaster for reasons of cultural policy and, in particular, to preserve the pluralism and independence of the press.

85 It was inevitable that the launch of a commercial channel in Flanders would lead to a switch of advertising investment from the press sector to that of commercial television.

86 The effect of replacing some of the traditional vehicles of brand advertising with commercial television, which was greater than expected, led to a loss of revenue for the press. Between 1988 and 1990 the share of the commercial advertising market held by newspapers went from 25% to 17% and that of magazines from 43% to 24%. That shift benefited commercial television whose share of the market was around 34% in 1990. That loss of revenue could be only very partially offset by the dividends paid by the applicant to the press groups which hold its capital. Consequently, the Flemish press adapted to the new conditions of competition on the advertising market. Flemish media policy thus enabled that reorganisation, which was made inevitable by the liberalisation of the Flemish broadcasting market, to be carried out by maintaining the existence of an independent and pluralist press in Flanders without the public authorities having to pay any subsidy liable to distort competition.

87 The applicant also contests the Commission's reasons for considering that there is no necessary relationship between the cultural policy of preserving pluralism in the Flemish press and the grant to the applicant of a temporary exclusive right to operate a commercial station in Flanders.

88 First, it is apparent from the contested decision that 'the Codex does not guarantee every Flemish newspaper publisher, without distinction, the right to become a shareholder in VTM or to receive a return from its profits' (fourth paragraph of point 13 of the preamble). In that respect the applicant notes first of all that all the publishers of Dutch-language newspapers and magazines had an opportunity to acquire a holding in its capital when it was set up. The competitive disadvantage which some of them are now suffering is not, therefore, the direct consequence of the exclusive right granted to the applicant but that of their own attitude. The Commission also omitted to state which publishers did not exist when the applicant was set up but have entered the Flemish press market since 1987. In any event, any such new publishers were not subject to the same adverse effects which the launch of a commercial television station created on the advertising market as the publishers which existed when it was set up because they were able, from the outset of their activities, to establish a cost structure which took account of the reduction in the share of the advertising market held by the press.

89 Secondly, the applicant disputes the argument that 'there is no guarantee that VTM's advertising revenue, which is divided among the shareholders in proportion to their holdings in the capital, will be used by them to help their newspapers to overcome possible financial difficulties' (fourth paragraph of point 13 of the preamble to the contested decision). In that respect it notes that it pays dividends and not advertising revenue to its shareholders and that the Commission did not indicate the other purposes for which those revenues may be used. In addition, the publishers' finances must be sound if the pluralism of the press is to be guaranteed. Therefore, the question which arises is not whether the financial revenue received by the publishers by virtue of their holdings goes directly to their publications, but whether that revenue helps to strengthen, or possibly even restore, the financial health of those publishers. The applicant cites the development of the financial position of the newspaper *De Morgen* to demonstrate the effectiveness of Flemish media policy.

90 Thirdly, the applicant does not accept the argument that 'the conditions laid down in the Codex regarding the structure of the only private television corporation in Flanders to have received the authorisation of the Flemish

executive, that is to say the provisions reserving 51% of VTM's capital for Flemish press publishers, are ill-suited to the attainment of the stated cultural aim, since it is not impossible that VTM's capital, and more particularly the reserved 51% portion, might come to be concentrated in the hands of a single shareholder, at the expense of any preservation of pluralism in the media' (fifth paragraph of point 13 of the preamble to the contested decision). The Flemish legislature left it to the publishers to decide whether or not they should subscribe to the applicant's capital. Moreover, the reservation of 51% of the applicant's capital offered publishers wishing to have a holding therein sufficient certainty that the switch of advertising revenue away from the press to television would not have an undue effect on their financial situation.

91 The possibility of a publisher acquiring a majority holding in the applicant's capital does not break the necessary link between the exclusive right which is granted and the preservation of pluralism in the Flemish press. On the one hand, the exclusive right granted to the applicant is only temporary and, on the other, the dividends due to a publisher which becomes the majority shareholder are nothing other than the exchange value of its investment in an additional holding which it pays to the publishers selling theirs, thus enabling them to invest to secure the future of their newspapers.

92 Fourthly, the applicant disputes the Commission's claim that 'there is no reason to suppose that a private television station cannot survive in the Flemish community without a monopoly on television advertising' which is said to be demonstrated by the applicant's launching of a second television channel (sixth paragraph of point 13 of the preamble to the contested decision). Such an assertion reveals a misunderstanding of the economic reality of Flemish broadcasting which is characterised by the narrowness of the market. The consequences of the VT4 channel entering the Flemish television market by means of the freedom to provide services show that a commercial television channel which is established in Flanders and satisfies all the conditions laid down by the legislature can be profitable only if it has an exclusive right to broadcast. After the arrival of VT4 the applicant's turnover in the field of advertising in 1996 fell by 21.6% in comparison with 1994 and its liquidity has been considerably damaged.

93 Furthermore, the applicant does not enjoy a monopoly, in particular because the market in television advertising does not exist as such. Two important factors have a strong bearing on the viability of commercial television on the Flemish market. First, the applicant has been faced, since it was set up, with severe competition for television audiences from the public television channel. That channel enjoys a monopoly on public subsidies and a monopoly on the use of national radio frequencies, coupled with an exclusive right in the sphere of advertising which is not limited in time. Secondly, the applicant is subject to strict programming requirements and commercial restrictions imposed by the Flemish authorities. In such circumstances the temporary exclusive right is essential to the applicant's profitability without which the publishers would have no prospect of any financial revenue capable of offsetting the reduction in their advertising revenue.

94 The fact that the applicant is itself launching a second television channel, Kanaal 2, has no bearing on the justification for the temporary exclusive right. That is because the VTM channel is making losses which can be explained by the fact that the applicant has geared its programme output entirely to the qualitative requirements of the Flemish authorities in return for the exclusive right granted to it for 18 years.

95 Fifthly, the applicant disputes the claim that the exclusive right is not justified as a guarantee of pluralism in the Flemish press because 'the Flemish Government could have recourse to [other] appropriate measures which do not impede economic integration to so great an extent' (seventh paragraph of point 13 of the preamble to the contested decision). Leaving aside the fact that the Commission does not state what those other appropriate measures might be, the exclusive right granted to the applicant creates considerably fewer distortions of competition than the payment of direct and indirect aid to the press. It cites several examples in support of its claim.

96 In the second limb of the plea the applicant disputes the claim that both the provisions of the Codex and the enabling provisions are, as follows from the operative part of the contested decision, contrary to Article 90(1) of the Treaty,

read in conjunction with Article 52 thereof, on the ground that they constitute a 'disguised form of discrimination' and their 'effects are protectionist'.

97 Article 41, point 1, of the Codex (see paragraph 4 above) does not constitute disguised discrimination by the mere fact that only one private television channel broadcasting to the Flemish community may be authorised. Nor can it be inferred from the requirements relating to authorisation of that private broadcaster, as laid down in Article 44 of the Codex (see paragraph 5 above), that disguised discrimination exists to the advantage of 'Flemish' or 'Belgian' undertakings. The fact that two foreign media groups subscribed, through their subsidiaries, 22.22% of the applicant's capital when it was set up and that a Netherlands media group, VNU, now controls 45% of its capital demonstrates that the requirements for authorisation do not pose an obstacle to foreign undertakings having a holding in the capital of a non-public television channel. In addition, the requirement that 51% of the applicant's capital be held by publishers of Dutch-language newspapers and magazines does not preclude foreign publishers of that type of publication from having a holding in that capital.

98 The second paragraph of Article 80 of the Codex (see paragraph 7 above) likewise does not constitute disguised discrimination. That provision in no way precludes the Flemish authorities from authorising a private television channel, whose capital is entirely in the hands of foreign shareholders at least 51% of which are publishers of Dutch-language newspapers and magazines, to broadcast advertisements intended for the Flemish community as a whole. Furthermore, the decree does not contain a single provision which provides for the lapsing of that exclusive right in the event that the holder thereof comes under the control, in whole or in part, of a foreign undertaking.

99 As regards the enabling measures, that is to say the decision of the Flemish Government of 19 November 1987 approving the applicant as the only commercial channel broadcasting to the Flemish community as a whole and the Royal Order of 3 December 1987 (confirmed by a decision of the Flemish Government of 11 December 1991) authorising it to broadcast advertising, it asserts that the impediment to establishment which resulted, necessarily, from the

grant of the exclusive right, affects Belgian and foreign undertakings in equal measure with the result that in principle the decision to authorise the applicant as the only commercial channel broadcasting to the Flemish community as a whole does not undermine freedom of establishment.

100 In response to the first limb of the plea, the Commission acknowledges that cultural policy and the preservation of pluralism in the press may constitute overriding reasons relating to the public interest capable of justifying a restriction on freedom of establishment. However, there is no necessary relationship between the cultural policy of preserving pluralism in the Flemish press and the exclusive right granted to the applicant. It finds fault with the applicant's arguments on each of the grounds set out in the decision.

101 In response to the second limb of the plea the Commission submits that the applicant bases its criticism on the fact that two separate cases of discrimination have been found in the decision. However, it found only one breach of Article 90(1) of the Treaty, read in conjunction with Article 52 thereof, that is to say that constituted by the provisions, read together, which established the exclusive right.

Findings of the Court

102 Pursuant to Article 48(2) of the Rules of Procedure of the Court of First Instance, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

103 Therefore, it must first be examined whether or not the applicant's argument at the hearing that the application of Article 90(1) of the Treaty, read in conjunction

with Article 52 thereof, was 'contradictory' constitutes, as the Commission claims, a plea which was relied on for the first time in the course of proceedings.

104 In that respect it should be noted that this ground of challenge expounded by the applicant at the hearing is merely an extension of the arguments which it put forward in the context of this plea in law in its originating application (see paragraph 82 above). Since it cannot be regarded as a new plea relied on for the first time at the hearing, that ground of challenge is admissible.

105 By the contested decision, the Commission declared that the provisions of the Flemish rules which grant VTM the exclusive right to broadcast television advertising to the Flemish community as a whole are incompatible with Article 90(1) of the Treaty, read in conjunction with Article 52 thereof. It maintains that the State measures which form the legal basis of that right are incompatible with Article 52 of the Treaty (second to fifth paragraphs of point 12 of the preamble) and are not justified 'on imperative grounds in the public interest' (seventh paragraph of point 13 of the preamble). In that respect it states that although a cultural policy and the preservation of pluralism in the press, which is an aspect of the freedom of expression, may constitute imperative requirements in the public interest such as to justify the restriction of the freedom of establishment (third paragraph of point 13 of the preamble), the Flemish rules are not appropriate for ensuring attainment of the objectives they pursue and go beyond what is necessary for that purpose (third to seventh paragraphs of point 13 of the preamble). That is because the Commission concludes that '[it] does not believe that VTM's monopolisation of advertising revenue is justified on imperative grounds in the public interest' (seventh paragraph of point 13 of the preamble).

106 Under Article 90(1) of the Treaty: 'In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 6 and Articles 85 to 94'. Even though that provision presupposes the existence of undertakings which have certain special or exclusive rights, it does not follow

that all the special or exclusive rights are necessarily compatible with the Treaty. That depends on different rules, to which Article 90(1) refers (Case C-202/88 *France* v *Commission* [1991] ECR I-1223, paragraph 22, and Case C-353/89 *Commission* v *Netherlands* [1991] ECR I-4069, paragraph 34).

107 It follows that measures taken by Member States in respect of undertakings referred to in Article 90(1) of the Treaty must, without prejudice to the application of Article 90(2), be consistent with the rules contained in the Treaty, and in particular the first paragraph of Article 52 thereof which provides that 'restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished by progressive stages in the course of the transitional period...'.

108 Article 90(1) of the Treaty, read in conjunction with Article 52 thereof, must be applied where a measure adopted by a Member State constitutes a restriction on the freedom of establishment of nationals of another Member State in its territory and, at the same time, gives an undertaking advantages by granting it an exclusive right unless that State measure is pursuing a legitimate objective compatible with the Treaty and is permanently justified by overriding reasons relating to the public interest, such as cultural policy and the maintenance of pluralism in the press (Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007, paragraph 23; and Case C-368/95 *Familiapress*, cited above, paragraph 18). In such a case it is still necessary for the State measure in question to be appropriate for ensuring attainment of the objective it pursues and not to go beyond what is necessary for that purpose (Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32).

109 In the light of those considerations, the applicant's argument that it is sufficient for acceptable reasons to have led to the grant of an exclusive right for it always to be justified (paragraph 82 above) is based on an erroneous premiss and must therefore be dismissed. Furthermore, if the applicant's argument were accepted, it would make it impossible to contest any State measure granting an exclusive right to an undertaking if the grant of that right was initially justified, to use its expression, by 'acceptable reasons'. It would also become impossible to apply the rules on the fundamental freedoms contained in the Treaty to a State measure

granting an exclusive right to an undertaking even though the impediments created by that right were no longer justified by overriding interests relating to the public interest.

110 The rejection of that argument put forward by the applicant also renders irrelevant its argument relating to the reasons why the exclusive right was granted in 1987 (see paragraphs 84 to 86 above). The question raised is whether the overriding reason relating to the public interest which might have justified the restriction on freedom of establishment caused by the entry into force of the national measure granting the exclusive right in 1987 still justifies that restriction.

111 Moreover, in accordance with Article 1 of the contested decision, read in the light of its grounds, the State measures to which it refers, that is to say the second paragraph of Article 80 and Article 41, point 1, of the Codex, together with the implementing measures, are declared incompatible as a whole with Article 90(1) of the Treaty, read in conjunction with Article 52 thereof. Therefore, the applicant's approach, which consists in examining each of the provisions at issue in isolation, cannot be accepted.

112 Furthermore, the Commission has committed no error of assessment in stating that 'VTM's monopoly on the broadcasting of television advertising aimed at the Flemish public prevents any operator from another Member State from establishing itself in Flanders, or setting up a secondary establishment there, with a view to broadcasting television advertisements aimed at the Flemish public via the Belgian cable distribution network' (second paragraph of point 12 of the preamble to the contested decision) or in considering, as a result, that the Flemish rules infringed Article 52 of the Treaty.

113 The right of establishment, provided for in Article 52 of the Treaty, allows, subject to the exceptions and conditions laid down, all types of self-employed activity to be taken up and pursued in the territory of any other Member State, undertakings to be formed and operated, and agencies, branches or subsidiaries to be set up (Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 23). The

concept of establishment within the meaning of the Treaty is therefore a very broad one, allowing a Community national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the Community in the sphere of activities as self-employed persons (same judgment, paragraph 25). Lastly, it is apparent from the *Kraus* judgment, cited above, that Article 52 precludes any national measure which, although applicable without discrimination on grounds of nationality, is liable to hamper or to render less attractive the exercise by Community nationals of fundamental freedoms guaranteed by the Treaty (see, to that effect, paragraph 32 of the judgment).

114 In the present case the Flemish rules granting the exclusive right to VTM make it impossible for a competing company from another Member State which wishes to broadcast, from Belgium, television advertising intended for the Flemish community as a whole to establish itself in Belgium. Since that finding alone is a sufficient indication of an impediment to freedom of establishment, it is unnecessary to examine whether those rules constitute a 'disguised form of discrimination whose effects are protectionist' (sixth paragraph of point 12 of the preamble to the contested decision), a claim which the applicant disputes in the second limb of the plea. On the other hand, it must be ascertained whether the Commission has established that that impediment to freedom of establishment could not be justified by an overriding reason relating to the public interest. The applicant contests the reasons which the Commission cites in the contested decision to demonstrate that there is no necessary relationship between the cultural policy of preserving pluralism in the Flemish press and the grant to the applicant of a temporary exclusive right to operate a commercial channel in Flanders.

115 However, the arguments put forward by the applicant (paragraphs 88 to 95 above) do not suggest that the Commission's assessment, as set out in the second to fourth paragraphs of point 13 of the preamble to the contested decision, is erroneous.

116 First, as the Commission rightly observes in the fourth paragraph of point 13 of the preamble to the contested decision, even though all the publishers had an opportunity to acquire a holding in the applicant when it was set up, some of

them failed to seize that opportunity and therefore cannot benefit from profits reserved for the publishers who did take part in that process. New entrants to the newspaper publishing market are likewise unable to enjoy the advantages conferred by the subscription to VTM's capital. Consequently, publishers that do not have a holding in VTM's capital cannot receive dividends which VTM pays and which stem, at least partially, from the revenue generated by television advertising. As the Commission states in the contested decision '[t]he exclusive right conferred on VTM merely favours one group of publishers at the expense of others' (fourth paragraph of point 13 of the preamble).

117 Secondly, the applicant's shareholders operating in the Flemish press are able to use the proceeds from dividends paid by VTM as they see fit. Therefore, they are not prevented from redistributing those dividend revenues to their own shareholders or using them for activities quite unconnected with the Flemish press. It follows that the Commission was right to state in the fourth paragraph of point 13 of the preamble to the contested decision that the State measures against which the action has been brought did not necessarily contribute to the attainment of the objectives pursued.

118 Thirdly, the applicant does not dispute the fact that the Flemish rules do not preclude 51% of the shares in VTM's capital from being held by a single Dutch-language publisher. Therefore, the requirement that the majority of the applicant's capital be reserved does not ensure that the proceeds from television advertising will be divided, through the payment of dividends, between at least two Dutch-language publishers so that that requirement does not, in itself, ensure pluralism in the Flemish press.

119 Fourthly, the applicant disputes the claim that there is no reason to suppose that a private television channel cannot survive in Flanders without a monopoly on television advertising, as demonstrated by the applicant's launch of a second television channel (sixth paragraph of point 13 of the preamble to the contested decision). In that respect the applicant states that the profits generated by

television advertising have fallen in the course of recent financial years, in particular on account of competition from VT4. However, a decline in financial performance does not, in itself and without further proof in that regard, demonstrate that the Commission's assertion is erroneous in fact.

120 Furthermore, the argument which the applicant derives from the public subsidy granted to the public television channel BRTN, which it claims justifies its exclusive right, cannot be accepted. As the Commission states, BRTN is placed in a particular situation where it is entrusted with the operation of services of general economic interest within the meaning of Article 90(2) of the EC Treaty (now Article 86(2) EC) (second paragraph of point 14 of the preamble to the contested decision). Furthermore, it is not the necessary corollary of the fact that a public television channel receives public subsidies that a private station must be granted the exclusive right to broadcast advertising in the whole of the territory concerned.

121 Similarly, since the applicant has failed to furnish any evidence to show that the programming requirements under the rules, on which it relies, could not be satisfied by several competing television stations, its argument based on those requirements must be rejected.

122 Fifthly, the applicant observes that according to the Commission the exclusive right is not justified as a measure to ensure pluralism in the Flemish press because 'the Flemish Government could have recourse to appropriate measures which do not impede economic integration to so great an extent' (seventh paragraph of point 13 of the preamble to the contested decision). However, it should be noted that the Commission did not cite that consideration in its decision as an additional ground intended to show the absence of the necessary relationship between the objective pursued and the State measure granting VTM the exclusive right. That consideration was expressed as a necessary inference which the Flemish Government must draw if it wishes to continue to ensure pluralism after the adoption of the contested decision without infringing Articles 90(1) and 52 of the Treaty. Moreover, the Commission stated in its submissions that the cultural policy objectives and support for pluralism in the press could be attained by granting subsidies to the press. In that connection it stated that if that were done

all publishers could receive subsidies on the basis of criteria linked to the objective pursued and that subsidies for the press would not lead to restrictions on the right of establishment on another market, that is to say that of commercial television.

123 It follows from all the foregoing that the third plea must be rejected as unfounded.

Fourth plea: misuse of powers

Arguments of the parties

124 The applicant claims that there is serious corroborative evidence that the contested decision stems from a misuse of powers. It notes that the provisions of the 1987 Decree formed the subject-matter of procedures which were initiated first in 1990 pursuant to Article 169 of the Treaty, then in 1995 pursuant to Article 90(1) of the Treaty, read in conjunction with Article 59 thereof, and again in 1996 pursuant to Article 90(1) of the Treaty, read in conjunction with Article 52 thereof. In addition, a reasoned opinion concerning the requirement that the majority of the applicant's capital be held by publishers of Dutch-language newspapers and magazines was notified to the Belgian authorities on 15 May 1997.

125 The present procedure forms part of that series of procedures which the Commission has initiated against the 1987 Decree. In that context it observes that Article 90(3) imposes no obligation on the Commission to 'take action against'

exclusive rights but, on the contrary, leaves it a large measure of discretion (see, *inter alia*, Case T-575/93 *Koelman* v *Commission* [1996] ECR II-1).

126 The fact that a Community act reveals serious lack of prudence or care on the part of the institution which adopted it amounts to a failure to observe the legal purpose for which the power to adopt that act was conferred on it (Case 13/57 *Wirtschaftsvereinigung Eisen- und Stahlindustrie and Others* v *High Authority* [1958] ECR 265, 282). However, all the abovementioned procedures demonstrate the manifest and serious lack of prudence and care which the Commission has shown and that is sufficient to establish the existence of a misuse of powers.

127 The initiation by the Commission of fresh procedures pursuant to Article 90(3) of the EC Treaty following the delivery of the *Commission* v *Belgium* judgment, cited above, shows that they are the result of preoccupations other than its concern to accomplish its task as custodian of the Treaty. The same assessment applies to those procedures considered separately. In that respect the applicant notes that the Commission changed tack when it suddenly declared the Codex incompatible with Articles 90(1) and 52 of the Treaty although it had previously declared it compatible with Articles 90(1) and 59 of the Treaty. Therefore, the Commission's sole objective is to attack the exclusive right granted to the applicant.

128 In support of those allegations, the applicant submits that the Flemish Socialist Party, which was in opposition at the time when the preparatory documents which culminated in the 1987 Decree were drawn up, was fiercely opposed to liberalisation of broadcasting in Flanders by the setting up of a commercial television station temporarily enjoying an exclusive right. It assumes that the Flemish Socialist Party lodged a complaint and was therefore behind the procedure which was concluded by the *Commission* v *Belgium* judgment, cited above. The Flemish Socialist Party was presided over from 1978 to 1988 by the present Commissioner responsible for competition matters.

129 The applicant's impression is reinforced by the fact that the decision recently taken in this sphere is based on a perfect partnership between the Flemish minister responsible for radio and television broadcasting and the Commissioner responsible for competition matters. Their public statements are completely in keeping with one another. The Minister wants to put an end to the applicant's exclusive right but, in order to avoid any possible action for compensation on the part of the applicant, wishes to obtain a Commission decision declaring that right incompatible with Community law.

130 The Commission considers that the conditions required for an act to amount to a misuse of powers are clearly not satisfied in the present case.

Findings of the Court

131 A measure may amount to a misuse of powers only if it appears, on the basis of objective, relevant and consistent factors, to have been taken with the exclusive purpose, or at any rate the main purpose, of achieving an end other than that stated or evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case (Case C-48/96 P *Windpark Groothusen* v *Commission* [1998] ECR I-2873, paragraph 52; and Case T-143/89 *Ferrierre Nord* v *Commission* [1995] ECR II-917, paragraph 68).

132 In so far as the Commission enjoys a measure of discretion in exercising the power which it enjoys by virtue of Article 90(3) of the Treaty (see paragraph 75 above), no objection can be made to its having exercised that power at the time it deemed appropriate. Therefore, it may not be inferred from the mere fact that the Commission instituted the procedure which led to the adoption of the contested decision after two other procedures against the Belgian authorities had already been instituted that that procedure was instituted for a purpose other than to put an end to a genuine breach of Community law.

133 In addition, the alleged misuse of powers calls in question the Commission's exercise of its powers. Responsibility for sending a letter of formal notice to a Member State and adopting a decision pursuant to Article 90(3) of the Treaty lies with the College of Members of the Commission and not with a sole Commissioner. Consequently, the applicant's claims calling in question the attitude of the Commissioner responsible for competition matters in respect of the Flemish rules on radio and television broadcasting by reference to his past political attitude, even supposing that was established, are irrelevant.

134 Moreover, the applicant cannot reasonably rely on the judgment in *Wirtschaftsvereinigung Eisen- und Stahlindustrie and Others* v *High Authority*, cited above. In that case one of the applicants complained, in a plea relating to a misuse of powers, that the High Authority had seriously disregarded certain objectives referred to in the ECSC Treaty 'by hampering, through the contested provisions, the development of certain methods of production.' It was in that context that the Court of Justice held that it had to be considered 'whether the provisions indicate, in this respect, an unlawful motive or a serious lack of care amounting to failure to observe the purpose of the law and whether in this respect priority was perhaps accorded to certain lawful aims at the expense of certain others to an extent which is unjustified by the circumstances'. In the present case, however, the applicant merely relies on that case-law without stating which objective referred to in the Treaty, other than that of Community legality, was disregarded by the Commission when it adopted the contested decision.

135 It follows that the applicant's claims do not constitute factors which demonstrate that the procedure which led to the adoption of the contested decision was instituted for a purpose other than to put an end to a genuine breach of Community law.

136 Consequently, the fourth plea is unfounded and must be rejected.

Fifth plea: breach of Article 190 of the Treaty

Arguments of the parties

137 The applicant observes, first, that where the Commission takes a new line and adopts a decision which goes further than previous decisions, its obligation to provide a statement of reasons is broader and it must give an account of its reasoning (Case 73/74 *Papiers Peints* v *Commission* [1975] ECR 1491, paragraph 31).

138 Therefore, specific reasons should have been given for the contested decision because it was the first case where an exclusive right had been declared unlawful pursuant to Articles 90(1) and 52 of the Treaty. Commission Decision 85/276/EEC of 24 April 1985 concerning the insurance in Greece of public property and loans granted by Greek State-owned banks (OJ 1985 L 152, p. 25), which the defendant cites, did not simply concern the application of Articles 90(1) and 52 of the Treaty, but was also based on Articles 3f, 85 and 86 of the EEC Treaty.

139 Secondly, it was all the more necessary to give full reasons for the contested decision because the combined application of Articles 90(1) and 52 of the Treaty appears to be contradictory. On the one hand, Article 90(1) of the Treaty permits, as a matter of principle, the grant and existence of an exclusive right which has the effect of excluding individuals or undertakings which do not have that right. On the other, Article 52 of the Treaty prohibits any measure of a Member State liable to hamper the establishment in its territory of a national of another Member State or to render it less attractive, even though it is applicable without discrimination on grounds of nationality (*Kraus*, cited above, paragraph 32). The incompatibility of those two provisions therefore stems from the fact that the existence of an exclusive right authorised by Article 90(1) of the Treaty hampers, in the exercise of their right of establishment, foreign undertakings which do not have that right but wish to carry on activities in the sphere covered by that exclusive right. Because of that apparent contradiction, the Commission should

have explained why that exclusive right, whose existence is deemed compatible with Article 90(1) of the Treaty, suddenly poses a prohibited impediment to the right of establishment.

140 In the light of these considerations the applicant considers that the effect of exclusion (point 12 of the preamble to the contested decision) is inherent in the exclusive right and cannot, therefore, constitute a sufficient reason for declaring the exclusive right to broadcast advertising by and for the Flemish community as a whole incompatible with Article 52 of the Treaty.

141 The statement of reasons for the contested decision is also inadequate in that it fails clearly to show which aspect of the operative part is intended to be substantiated by the consideration 'all of the market in television advertising, or at least most of it, benefits the home economy' (fourth paragraph of point 12 of the preamble to the contested decision). In that context it appears from the operative part of the contested decision that both the provisions of the Codex regarding the exclusive right to broadcast commercial advertising and the implementing measures granting the exclusive right constitute a breach of Article 90(1) of the Treaty, read in conjunction with Article 52 thereof.

142 The Commission states that the contested decision is not the first case where Article 90(1) of the Treaty has been applied in conjunction with Article 52 and essentially maintains that sufficient reasons were given for the contested decision.

Findings of the Court

143 It should be recalled that the statement of reasons required by Article 190 of the Treaty must clearly and unequivocally show the reasoning of the institution

which adopted the measure, so as to enable the Community judicature to exercise its power of review and the persons concerned to know the grounds on which the measure was adopted (see, for example, Case T-84/96 *Cipeke* v *Commission* [1997] ECR II-2081, paragraph 46).

144 It follows that the absence or inadequacy of a statement of reasons constitutes a plea going to infringement of essential procedural requirements and, as such, is distinct from a plea going to the incorrectness of the grounds of the decision, which, by contrast, is reviewed in the context of the question whether a decision is well founded (*Cipeke* v *Commission*, cited above, paragraph 47; Case T-295/94 *Buchmann* v *Commission* [1998] ECR II-813, paragraph 45; and Case T-310/94 *Gruber + Weber* v *Commission* [1998] ECR II-1043, paragraph 41). Therefore, in so far as the applicant's argument that it was incorrectly classified as 'national undertaking' seeks to dispute the correctness of the grounds of the contested decision it is, in the present context, irrelevant.

145 The applicant maintains that insufficient reasons are given for the contested decision as regards its censure of the exclusive right granted by the Flemish authorities, by virtue of the combined application of Articles 90(1) and 52 of the Treaty.

146 However, that is not the case. Points 11 to 14 of the preamble to the contested decision set out the Commission's legal assessment. In particular, points 11 and 12 contain indications which make it possible to understand the reasoning which the Commission followed when deciding to apply Article 90(1) of the Treaty in conjunction with Article 52 thereof.

147 Thus, it is stated in the first paragraph of point 11 of the preamble that 'while Article 90 implies that undertakings may enjoy certain special or exclusive rights, it does not follow that all special or exclusive rights are necessarily compatible

with the Treaty' and '[t]heir compatibility has to be assessed in the light of the various rules in the Treaty to which Article 90(1) refers.' The Commission explains, in that respect, that VTM is a private undertaking to which the Flemish community has granted the exclusive right to broadcast advertising aimed at the Flemish public as a whole and points out that '[t]he exclusive right derives from a State measure' (second paragraph of point 11 of the preamble).

148 Next, after citing Article 52 of the Treaty, the Commission states: 'VTM's monopoly on the broadcasting of television advertising aimed at the Flemish public prevents any operator from another Member State from establishing itself in Flanders, or setting up a secondary establishment there, with a view to broadcasting television advertisements aimed at the Flemish public via the Belgian cable distribution network' (second paragraph of point 12 of the preamble). In that respect it points out that: 'The provisions at issue apply without distinction to undertakings established in Belgium, other than VTM, and to undertakings from other Member States; but this does not serve to take the preferential treatment of VTM outside the scope of Article 52 of the Treaty' (third paragraph of point 12 of the preamble).

149 It follows that the Commission has stated, in clear terms, that the combination of Articles 90(1) and 52 of the Treaty applies in this case because the State measures at issue, first, grant an exclusive right to the applicant and, secondly, are incompatible with Article 52 of the Treaty.

150 Since the Commission has given a detailed account of its reasoning in the contested decision, the applicant is not justified in relying on case-law according to which, while a decision which fits into a well-established line of decisions may be reasoned in a summary manner, for example by a reference to those decisions, the Commission must give an account of its reasoning if a decision goes appreciably further than the previous decisions (*Papier Peints and Others* v *Commission*, cited above, paragraph 31; and Case T-34/92 *Fiatagri and New*

Holland Ford v *Commission* [1994] ECR II-905, paragraph 35). In any event, the Commission did not deviate from its previous decision to such an extent that it should have provided a clearer statement of reasons for its assessment that Articles 90(1) and 52 of the Treaty had been infringed. That is because the Commission, as it states, had already applied the combination of Articles 90 and 52 of the Treaty in Decision 85/276 of 24 April 1985, cited above. The fact that the Commission referred in that decision not only to the combined application of Articles 90 and 52, but also to other provisions of the Treaty in order to conclude that the national rules against which the action was brought were incompatible with Community law does not detract in any way from the fact that it considered that the combined application of Articles 90(1) and 52 of the Treaty was possible.

151 Lastly, it should be recalled that the operative part of the contested decision must be construed in the light of the statement of the reasons upon which it is based (see, for example, Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73 *Suiker Unie and Others* v *Commission* [1975] ECR 1663, paragraphs 122 to 124). Article 1 of the contested decision declares the State measures which it sets out 'incompatible with Article 90(1) of the EC Treaty, read in conjunction with Article 52 thereof.' In that respect it is apparent from the statement of reasons for the contested decision that the incompatibility found does not relate to the provisions of the Flemish rules considered in isolation but to those provisions 'read together' (first paragraph of point 2) or 'in conjunction' (second paragraph of point 11 of the preamble). It follows that the question as to which paragraph of the operative part is intended to be substantiated by the claim that 'all of the market in television advertising, or at least most of it, benefits the home economy' (fourth paragraph of point 12 of the preamble) is irrelevant.

152 It is clear from the foregoing that the fifth plea must be rejected.

153 It follows that the action must be dismissed in its entirety.

Costs

154 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful in its submissions, it must be ordered to pay the costs, as sought by the Commission.

On those grounds,

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

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Vesterdorf Bellamy Pirrung

Meij Vilaras

Delivered in open court in Luxembourg on 8 July 1999.

H. Jung

Registrar

B. Vesterdorf

President