

II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 10 December 2003

on State aid implemented by France for France 2 and France 3

(notified under document number C(2003) 4497)

(Only the French text is authentic)

(Text with EEA relevance)

(2004/838/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above⁽¹⁾ and having regard to their comments,

Whereas:

I. PROCEDURE

- (1) On 10 March 1993, Télévision Française 1 SA (hereinafter TF1) submitted a complaint to the Commission concerning the methods used to finance and operate the public broadcasters France 2 and France 3⁽²⁾. The complaint alleged infringements of Article 81, Article 86(1), and Article 87 of the Treaty.
- (2) With regard to Article 81 of the Treaty, TF1 argued that France 2 and France 3 had implemented a number of concerted practices which had as their object and effect the restriction of competition. As far as Article 86 was concerned, TF1 considered that the French State was maintaining in force measures that were contrary to the principle of equal treatment of public and private enterprises and imposed or encouraged anticompetitive agreements. Lastly, as regards Article 87 of the Treaty, TF1 claimed that the licence fee, various grants and capital injections and authorisations to incur deficits which France 2 and France 3 received in the early 1990s constituted State aid. TF1 also regarded as a measure with equivalent effect to State aid the fact that the French Broadcasting Authority could not impose fines on the public broadcasters. TF1 alleged that these State aid measures had enabled the public broadcasters to disregard all commercial profitability constraints by outbidding for the purchase of television rights and offering introductory prices and artificial reductions on their advertising slots or sponsorship activities.

⁽¹⁾ OJ C 340, 27.11.1999, p. 57.

⁽²⁾ For the sake of clarity, this Decision will refer to the broadcasters only as 'France 2' and 'France 3' which in September 1992 replaced the names 'Antenne 2' and 'France Régions 3'.

- (3) On 16 July 1993, the Commission sent a request for information to TF1, which replied by letter dated 30 September 1993. A request for information was addressed on 12 August 1993 to the French authorities, which replied by letter dated 9 December 1993.
- (4) On 17 March 1994, TF1 wrote to the Commission reiterating the main points set out in the complaint.
- (5) By letter of 23 September 1994 and in a document dated 12 December 1994, TF1 provided further information. During the same period, several meetings took place between Commission representatives and representatives of TF1.
- (6) By letter dated 9 June 1995, TF1 expressed concern about the examination of the complaint. The Commission replied by letter of 5 July 1995 that the study it had ordered on the funding of public service broadcasting in all the Member States was not yet available.
- (7) By letter dated 3 October 1995, TF1 called on the Commission to act. By letter of 11 December 1995, the Commission informed TF1 that it had requested further information from the French authorities by letter dated 21 November 1995. By means of a document dated 27 November 1995, TF1 provided additional information.
- (8) On 2 February 1996, TF1 brought an action before the Court of First Instance of the European Communities against the Commission for failure to act.
- (9) By letter of 16 February 1996, the French authorities replied to the request for information addressed to them on 21 November 1995. By letters dated 22 February, 28 June, 4 October and 18 October 1996, the Commission sent further requests for information to the French authorities, which replied by means of a number of letters and fax messages dated 21 March, 28 March, 12 April, 18 July and 20 December 1996.
- (10) By letter dated 10 March 1997, TF1 lodged an additional complaint with the Commission.
- (11) In a letter addressed to TF1 on 15 May 1997, the Commission stated that in its view no measure taken by the French State infringed Article 86 read in conjunction with Articles 81 and 82 of the Treaty.
- (12) By letter dated 21 October 1997, the French authorities provided the Commission with further information.
- (13) On 10 July 1998, a meeting was held between the Commission and TF1.
- (14) By decision adopted on 2 February 1999, the Commission rejected the arguments set out in TF1's complaint and based on Articles 81 and 82 of the Treaty.
- (15) On 26 February 1999, the Commission issued an injunction requiring the French authorities to provide information; the latter replied by letter dated 29 April 1999.
- (16) With the entry into force of the Treaty of Amsterdam on 1 May 1999, the Protocol on the system of public broadcasting in the Member States (hereinafter the Protocol) was annexed to the Treaty.

- (17) On 3 June 1999, the Court of First Instance delivered a judgment declaring that the Commission had failed to fulfil its obligations by failing to adopt a decision concerning the part of the complaint lodged by TF1 concerning State aid ⁽³⁾.
- (18) By letter dated 27 September 1999, the Commission informed France that it had decided to initiate the procedure laid down in Article 88(2) of the Treaty in respect of the investment grants received by France 2 and France 3 and the capital injections received by France 2 between 1988 and 1994.
- (19) The Commission decision to initiate the procedure was published in the *Official Journal of the European Communities* ⁽⁴⁾. The Commission invited interested parties to submit their comments on the measures concerned.
- (20) A meeting was held between the French authorities and the Commission on 19 November 1999. The French authorities submitted their comments by letter dated 10 December 1999. On 1 February 2000, the Association of Commercial Television in Europe (hereinafter the ACT) submitted its comments to the Commission. The French authorities reacted to those comments by letter dated 15 June 2000.
- (21) Meetings took place on 10 February 2000, between the Commission and representatives of TF1, then on 6 April and 2 October 2000, between the Commission and representatives of the French authorities and France Télévisions.
- (22) The communication from the Commission on the application of State aid rules to public service broadcasting ⁽⁵⁾ (hereinafter the communication) was published on 15 November 2001. It sets out the principles which the Commission intends to follow when examining public funding measures granted to public broadcasters.
- (23) By letters dated 29 July, 18 October and 16 December 2002, and 21 January, 20 March and 15 April 2003, the Commission requested further information from the French authorities, which replied by letters dated 19 August 2002 and 2 January, 11 February, 12 February, 19 May, 26 August and 7 November 2003.
- (24) On 20 November 2002 and 11 June 2003, meetings were held between the Commission and representatives of the French authorities and France Télévisions; on 14 April 2003, a meeting was held between the Commission and representatives of TF1.
- (25) This Decision relates only to the financial measures in respect of which the decision was taken to initiate the Article 88(2) procedure, namely the investment grants received by France 2 and France 3 and the capital injections received by France 2 between 1988 and 1994. It does not deal with the television licence fee introduced by Act No 49-1032 of 30 July 1949, which was excluded from the scope of the decision to initiate the procedure.
- (26) Nevertheless, in order to gain a comprehensive view of the financial relations between the French State and the public broadcasters France 2 and France 3 over the period covered by this Decision, the Commission must take account not only of the investment grants and capital injections but also of the licence fee. It will consequently refer in this Decision to the licence fee in so far as is necessary for its analysis of the financial measures referred to in recital 25.

⁽³⁾ Judgment of 3 June 1999 in Case T-17/96 *TF1 v Commission* [1999] ECR II-1757.

⁽⁴⁾ See footnote 1.

⁽⁵⁾ OJ C 320, 15.11.2001, p. 5.

II. DETAILED DESCRIPTION OF THE MEASURES

- (27) France 2 and France 3 are financed by a combination of the licence fee and advertising and sponsorship income. The licence fee is the ordinary source of public funding for the French public broadcasters. Nevertheless, over the period 1988 to 1994, France 2 and France 3 also received investment grants and France 2 received capital injections.

A. Investment grants and other grants

- (28) Between 1988 and 1994, France 2 and France 3 received from the French State the investment grants and other grants set out in tables 1 and 2.

TABLE 1

Grants received by France 2

	(FRF million) (*)						
	1988	1989	1990	1991	1992	1993	1994
Investment grants	130	136	—	178,3	195	139	—
Other grants	—	—	0,74	86,52	—	—	21
Total grants	130	136	0,74	264,82	195	139	21

(*) The differences between some of the figures given in these tables and those appearing in the decision to initiate the formal investigation procedure derive from information provided by the French authorities in the course of the procedure.

TABLE 2

Grants received by France 3

	(FRF million) (*)						
	1988	1989	1990	1991	1992	1993	1994
Investment grants	50	100	40	80	145	159	—
Other grants	—	—	—	—	—	4,5	—
Total grants	50	100	40	80	145	163,5	—

(*) The differences between some of the figures given in these tables and those appearing in the decision to initiate the formal investigation procedure derive from information provided by the French authorities in the course of the procedure.

B. Capital injections

- (29) During the period under consideration, France 2 also received three capital injections from the French State, in 1991 (FRF 500 million), 1993 (FRF 55 million) and 1994 (FRF 355 million).
- (30) With the exception of the licence fee, the investigation has shown that France 2 and France 3 did not receive other public funding enabling them to finance their activities.

III. COMMENTS FROM INTERESTED PARTIES

- (31) In the course of the formal investigation procedure, the Commission received, by letter dated 1 February 2000, comments from the ACT, which represents most of the commercial television broadcasters in the Community.

- (32) By way of introduction, the ACT stated that the private broadcasters TF1, M6 and Canal + had been required to fulfil public service obligations without receiving any corresponding financial compensation from the State and that the public service obligations imposed on France 2 and France 3 therefore in no way justified their public funding. It also regretted that certain items of information, such as the additional costs incurred by the public broadcasters on account of their public service remits or the content of their reorganisation plan, did not appear in the decision to initiate the formal investigation procedure. It nevertheless confirmed the Commission's analysis of the effect of the aid measures in question on competition and trade between Member States.
- (33) The ACT claimed, firstly, that the licence fee constituted State aid following the liberalisation of broadcasting and that it was new aid, since the licence fee was paid to France 2 and France 3 each year. It concluded from this that the Commission should have included the licence fee among the measures covered by the formal investigation procedure and took the view that the licence fee could not be declared compatible with the common market under Article 87(3)(c) or Article 86(2) of the Treaty. The public funding of France 2 and France 3 was unjustified in its opinion insofar as the private broadcasters had similar public service obligations to those of the public broadcasters but did not receive the same financial compensation from the State.
- (34) As regards the investment grants and capital injections, the ACT took the view that such aid was not linked to a precise cultural project and consequently could not be justified pursuant to Article 87(3)(d) of the Treaty. It also considered that the measures constituted operating aid and that the exemption for rescue and restructuring aid to firms in difficulty could not be applied to the case in point since the French authorities had not communicated the restructuring plan for the broadcasters to the Commission.
- (35) Lastly, after recalling the methodology that the Commission should follow for assessing State aid in the light of Article 86(2) of the Treaty, the ACT argued that the investment grants and capital injections under examination did not meet the criteria laid down by that provision insofar as they constituted exceptional, temporary aid and were not paid in order to finance additional public service tasks.
- (36) In conclusion, the ACT therefore called on the Commission to adopt a negative final decision on the investment grants paid to France 2 and France 3 and the capital injections granted to France 2, to initiate the formal investigation procedure in respect of the licence fee and to provide it with fuller information on the public service obligations of the two broadcasters and the content of their reorganisation plan.

IV. COMMENTS FROM FRANCE

A. Decision to initiate the formal investigation procedure

- (37) The French authorities commented by letter dated 10 December 1999 on the decision to initiate the formal investigation procedure. They stated that their letters dated 20 December 1996 and 29 April 1999 formed an integral part of those comments. The points developed in those two letters will be summarised here only where they did not appear already in the letter of 10 December 1999.
- (38) The French authorities began by reviewing the consequences of the liberalisation of broadcasting. They considered that the privatisation of TF1 had suddenly and unexpectedly weakened France 2's financial stability since, from 1987 onwards, TF1's advertising income rose steeply while that of France 2 stagnated. The French authorities ascribed that trend to two factors: on the one hand, TF1's programme schedule had been redirected, for commercial reasons, towards housewives under 50 years of age, the audience of most interest to advertisers, whereas the target audience for the public broadcasters was broad and diversified; on the other hand, the rules laid down by law and regulatory action allowed public broadcasters more limited access to advertising resources than private broadcasters.

- (39) Programme purchase and production costs had also risen sharply. Since the number of broadcasters had doubled in the space of four years, competition had become keener on the programmes market, while the new operators had injected additional cash into that market. As a result, the costs of programmes of all types had increased. To compensate for such inflation, the two public broadcasters drew from their stock of programmes. Since they received less funding and were less frequently renewed, those programmes became less attractive, causing among other things a slump in France 2's audience and therefore a fall in its advertising revenue. Falling advertising incomes and rising costs thus brought about a deterioration in the financial situation of the two public broadcasters.
- (40) The French authorities claimed that the State was forced to intervene in order to ensure the continued operation of the public channels and performance of their public service tasks, thereby maintaining pluralism. Those public service tasks were reflected in a general obligation to achieve certain quality standards and to broadcast specific types of programme. They derived from the notion that the existence of general-interest public channels reaching a sufficiently wide audience was a necessary condition for pluralism of information, variety of programmes and diversified support for TV and film production. The performance of these tasks resulted in both an additional cost and a loss of advertising income for the public broadcasters. Between 1988 and 1994, the deterioration in their economic situation threatened to jeopardise their survival and thus obstruct the performance of their public service tasks. The State therefore had to intervene through investment grants and capital injections. The spontaneous growth of the licence fee could not absorb the rapid increase in programme costs and halt the broadcasters' economic decline. The French authorities considered that the State intervention in favour of France 2 and France 3 was compatible with the common market pursuant to both Article 86(2) and Article 87(3)(c) of the Treaty and the Community guidelines on State aid for rescuing and restructuring firms in difficulty⁽⁶⁾.
- (41) They argued that the investment grants awarded to France 2 and France 3 were justified by the need to help them cope with the increase in programme costs. Furthermore, following an audit by the consultants Coopers & Lybrand, the two public broadcasters drew up a strategic plan in July 1991, comprising for each channel an internal reorganisation plan and a redundancy programme designed to generate savings, and setting out a strategy for meeting viewers' expectations more effectively while asserting their specific identity as public service broadcasters. The State supported the implementation of this strategic plan with additional finance in the form of the abovementioned investment grants and in the case of France 2, a capital injection in order to consolidate the structure of its balance sheet. The first injection of FRF 500 million having proved insufficient, the State decided to grant France 2 two more capital injections in 1993 and 1994, the latter being implemented following a fresh audit by Coopers & Lybrand and at the same time as a further cost cutting plan. These recapitalisation measures enabled France 2's financial situation to be put onto a sounder footing. The French authorities consider that these financing measures enabled the two public broadcasters to adjust to the new competitive environment.
- (42) The French authorities pointed out that the aid measures for the public broadcasters were granted against a general background of the redefinition of their public service tasks and their relations with the State through the conclusion of target-setting contracts.
- (43) They stated, lastly, that the markets in television audiences, programmes and advertising were national in size and claimed that the Commission had not demonstrated how intra-Community trade had been affected by the public financing measures in question.

⁽⁶⁾ OJ C 368, 23.12.1994, p. 12.

- (44) In their reply dated 29 April 1999, the French authorities commented on the position of France 2 and France 3 on the markets in the acquisition of broadcasting rights and advertising. They stated that the public broadcasters were unable to threaten the positions of the commercial channels on the markets in the acquisition of broadcasting rights, since their financial capacities were smaller and their programming had to meet standards of quality and diversity, whereas the commercial channels offered only programmes that were attractive in terms of audience ratings. The French authorities also denied that France 2 and France 3 had pursued an 'artificially low' pricing policy in the sale of advertising slots: they argued among other things that France 2's advertising rates were on the whole only 5 to 10 % lower than TF1's, although the latter's slots were twice as powerful; the difference between the prices applied by the two public broadcasters and TF1 merely reflected the difference in the power of their advertising slots.

B. Comments from the ATC

- (45) By letter dated 15 June 2000, the French authorities sent the Commission their reactions to the comments from the ATC. They reiterated their view that the licence fee constituted existing aid and denied that the private terrestrial channels were subject to similar obligations to those of the public broadcasters. They maintained that the investment grants and capital injections covered by this Decision were compatible with the common market pursuant to both Article 86(2) and Article 87(3)(c) of the Treaty and pointed out that they had not requested the application of Article 87(3)(d) concerning the promotion of culture. They ended by stating that it was for the Commission to assess whether the information in its possession was sufficient in order to bring the procedure to an end and whether the public documents could be communicated to the ACT.

V. ASSESSMENT OF THE MEASURES

- (46) Article 87(1) of the Treaty provides that 'save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market'.
- (47) Consequently, for a measure to constitute State aid within the meaning of Article 87(1) of the Treaty, all of the following conditions must be met:

- the aid must be granted by a Member State using State resources,
- it must favour certain undertakings or certain sectors and thereby distort or threaten to distort competition,
- it must affect trade between Member States.

A. State resources

- (48) The grants and capital injections covered by this Decision come from the French national budget. They were awarded by virtue of a legislative instrument or a regulatory decision. Consequently, there can be no doubt that they involve State resources and can be imputed to the State.

B. Selective advantage and distortion of competition

- (49) All the grants received by France 2 and France 3 between 1988 and 1994 constituted financial resources which the public broadcasters were able to use in order to finance their activities or make investments and which they obtained without having to draw on their own resources or borrow on the market. The grants therefore constituted an advantage. The advantage was also selective since only the two public broadcasters benefited and not all television operators, whether public or private.

- (50) During the period 1988 to 1994, the French State also made three capital injections into France 2. The Commission normally takes the view that a State capital injection into an enterprise does not constitute a selective advantage for the latter if it is made in circumstances that would be acceptable for a private investor operating under normal market economy conditions. This market economy private investor test can, because of its very nature, be applied only to investments in commercial activities from which a normal return is expected. In the case in point, France 2 is engaged in making and programming television broadcasts in line with the tasks entrusted to it by the State, and a large share of its activity is on that account directly financed by the State via the licence fee. Its programming is not intended to maximise its commercial revenues. By injecting capital into France 2, the French State's prime objective was not therefore to obtain an optimum return; it therefore did not have the same motives as a private investor operating in a market economy. In their comments dated 20 December 1996 and 29 April 1999, the French authorities argued that the French State had acted as a market economy private investor would have done. It is contradictory, however, to claim, in certain comments, that the State acted in the same way as a private investor operating in a market economy and in the comments on the decision to initiate the formal investigation procedure, that the State intervention in favour of France 2 complied with the guidelines on State aid for rescuing and restructuring firms in difficulty. The guidelines apply to rescue and restructuring aid and not to interventions in line with the market economy private investor principle.
- (51) Since the French authorities compared their behaviour towards France 2 with that of a private investor operating in a market economy, that argument must nevertheless be examined. To assess whether the capital injections were granted under normal market conditions, the economic performance of the recipient during the period preceding the grant of the capital injections must be examined, together with its financial prospects based on market forecasts. Table 3 shows France 2's net profits/losses before and after the grant of the three capital injections.

TABLE 3
France 2 financial data 1988 to 1994

(FRF million)

	1988	1989	1990	1991	1992	1993	1994	1995
Turnover	2 835,66	2 878,81	3 047,18	3 414,15	4 393,52	4 367,65	4 935,79	5 073,76
Net profit/loss	- 99,92	- 329,19	- 744,25	- 92,92	75,51	52,01	73,13	60,73

Source: France 2, profit and loss accounts

- (52) As can be seen from table 3, France 2 was not profitable at the time the capital injections were made. The French authorities could not, on the basis of the broadcaster's past performance, expect a reasonable rate of return on their investment. Neither could they expect a normal return on the basis of the enterprise's financial prospects or market forecasts. Although France 2's viability was restored from 1992 onwards, after several years of losses, the meagre profits it registered were possible only thanks to the additional capital injections granted by the French State in 1993 and 1994. Consequently, the French authorities' argument that the capital injections granted to France 2 should be regarded as a normal market investment cannot be accepted.
- (53) The Commission thus takes the view that a private investor operating in a market economy would not have granted France 2 capital injections equivalent to those made by the French State in 1991, 1993 and 1994. Those capital injections therefore conferred an advantage on France 2 that was also selective since France 2 is the only television broadcaster that received such capital injections in order to finance its activities.

- (54) It also has to be examined whether the criterion concerning the advantage conferred is fulfilled in the light of the cumulative conditions laid down by the Court of Justice of the European Communities in *Altmark*⁽⁷⁾. Those conditions are the following:
- the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined,
 - the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner, to avoid it conferring an economic advantage which may favour the recipient undertaking over competing undertakings,
 - the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations,
 - where the undertaking is not chosen pursuant to a public procurement procedure, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.
- (55) In the case in point, the Commission considers that the second condition laid down by the Court in *Altmark* is not met. The investment grants and capital injections are one-off support measures granted by the French State to France 2 and France 3 to enable them to cope with the deterioration in their economic situation. Such finance was granted only a posteriori and in order to address an unforeseen situation, and therefore not on the basis of parameters established in advance in an objective and transparent manner.
- (56) Furthermore, as far as the fourth condition laid down by the Court in *Altmark* is concerned, the Commission notes that the television broadcasters to which the French authorities entrusted public service obligations were not chosen pursuant to a public procurement procedure, and the level of financial compensation granted to the two public broadcasters was not determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided, would have incurred in discharging those public service obligations.
- (57) Since the cumulative conditions laid down by the Court in *Altmark* are not met, the Commission finds that the grants and capital injections covered by this Decision did constitute for France 2 and France 3 selective advantages within the meaning of Article 87(1) of the Treaty.
- (58) The Court of Justice has furthermore consistently held⁽⁸⁾ that any State aid which strengthens the position of an undertaking compared with other undertakings competing in intra Community trade distorts competition. In 1988, when the Commission's examination of this case began, the broadcasting sector in France was open to competition. France 2 and France 3 were in competition with other television broadcasters and the financial advantage they received through the financial measures covered by this Decision necessarily maintained or strengthened their position compared with that of their competitors. The financial measures from which they benefited did therefore result in a distortion of competition within the meaning of Article 87(1) of the Treaty.

⁽⁷⁾ Judgment of 24 July 2003 in Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH*, not yet reported.

⁽⁸⁾ See Cases C-730/79 *Philip Morris Holland BV v Commission* [1980] ECR 2671 and C-259/85 *France v Commission* [1987] ECR 4393.

C. Effect on trade

- (59) A State financial measure constitutes State aid within the meaning of Article 87(1) of the Treaty only where it actually or potentially affects trade between Member States. When State financial aid strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid⁽⁹⁾. The Court of Justice has developed a broad interpretation of the concept of the effect on trade. Accordingly, the fact that an undertaking is not itself engaged in exporting does not mean that trade is not affected. Where a Member State grants aid to an undertaking, domestic production may for that reason be maintained or increased, with the result that undertakings established in other Member States have less chance of exporting their products to the market in that Member State. Such aid thus enables the undertaking to retain a market share that could have been captured by competitors established in other Member States⁽¹⁰⁾.
- (60) In the light of this case-law, the communication states that 'thus, State financing of public service broadcasters can generally be considered to affect trade between Member States. This is clearly the position as regards the acquisition and sale of programme rights, which often takes place at an international level. Advertising, too, in the case of public broadcasters who are allowed to sell advertising space, has a cross-border effect, especially for homogeneous linguistic areas across national boundaries. Moreover, the ownership structure of commercial broadcasters may extend to more than one Member State'⁽¹¹⁾.
- (61) In its information injunction⁽¹²⁾ and in the decision to initiate the formal investigation procedure, the Commission developed at length the issue of the effect on trade. The markets in the acquisition of broadcasting rights and the sale of programmes have an international dimension, even if rights and programmes are usually acquired for a particular geographic market. The financial resources granted to France 2 and France 3 provided them with additional competitive means for acquiring broadcasting rights and investing in programmes that were subsequently put up for sale. The aid measures in question also placed France 2 and France 3 in a more favourable position than their competitors in the Community, with the result that those competitors had less chances of exporting their products to France. It should be noted here that during part of the period examined in this Decision, a broadcasting group operating in several Member States held shares in the French channel La Cinq, which was declared bankrupt in 1992.
- (62) Consequently, the grants and capital injections received by France 2 and France 3 did affect trade within the meaning of Article 87(1) of the Treaty.
- (63) In the light of these considerations, it has to be concluded that the grants paid by the French authorities to France 2 and France 3 and the capital injections granted to France 2 between 1988 and 1994 constitute State aid within the meaning of the Treaty.

VI. ASSIGNMENT TO FRANCE 2 AND FRANCE 3 OF RESPONSIBILITY FOR THE OPERATION OF A SERVICE OF GENERAL ECONOMIC INTEREST

- (64) Article 86(2) of the Treaty provides that 'undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community'.

⁽⁹⁾ See judgment in *Philip Morris*, *ibid.*

⁽¹⁰⁾ See in particular Cases 102/87 *France v Commission* [1988] ECR 4067 and C-303/88 *Italy v Commission* [1991] ECR I-1433.

⁽¹¹⁾ Point 18 of the communication.

⁽¹²⁾ See recital 15 of this Decision.

- (65) It is settled case-law that Article 86 of the Treaty constitutes, for undertakings entrusted with the operation of services of general economic interest, a derogation from the ban on State aid⁽¹³⁾. The Court's judgment in *Altmark* implicitly confirms that State aid which compensates for the costs incurred by an undertaking in providing a service of general economic interest may be declared compatible with the common market if the conditions laid down in Article 86(2) of the Treaty are met.
- (66) The Court has consistently held⁽¹⁴⁾ that Article 86 provides for a derogation and must therefore be interpreted restrictively. The Court has clarified that in order for a measure to benefit from such a derogation, it is necessary that all the following conditions be fulfilled:
- the service in question must be a service of general economic interest and clearly defined as such by the Member State,
 - the undertaking in question must be explicitly entrusted by the Member State with the provision of that service,
 - the application of the competition rules of the Treaty must obstruct the performance of the particular tasks assigned to the undertaking and the derogation must not affect the development of trade to an extent that would be contrary to the interests of the Community.
- (67) The communication sets out the principles and methods which the Commission intends to follow to ensure that the above conditions are fulfilled in the broadcasting sector. In the case in point, the Commission must accordingly establish that:
- the activity of France 2 and France 3 constitutes a public service activity and the public service tasks of the two broadcasters are clearly defined (definition),
 - France 2 and France 3 have been entrusted with these public service tasks by an official decision (entrustment and supervision),
 - the financial compensation granted to them is proportional to the net cost of their public service activity (proportionality test).
- (68) In its analysis, the Commission must also have due regard for the Protocol. The Protocol stresses that the system of public broadcasting is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism. It states more precisely that the Member States are competent 'to provide for the funding of public service broadcasting insofar as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and insofar as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account'.

⁽¹³⁾ Case T-106/95 *FFSA and Others v Commission* [1997] ECR II-229.

⁽¹⁴⁾ See judgment in *FFSA*, *ibid.*

A. Definition of the public service remits of France 2 and France 3

- (69) In accordance with the Protocol and the communication, the definition of the public service remit is a matter for the Member States. The communication states that 'given the specific nature of the broadcasting sector, a "wide" definition, entrusting a given broadcaster with the task of providing balanced and varied programming in accordance with the remit, while preserving a certain level of audience, may be considered, in view of the interpretative provisions of the Protocol, legitimate under Article 86(2). Such a definition would be consistent with the objective of fulfilling the democratic, social and cultural needs of a particular society and guaranteeing pluralism, including cultural and linguistic diversity' ⁽¹⁵⁾. As regards the definition of the public service in the broadcasting sector, the role of the Commission is limited to checking for manifest error ⁽¹⁶⁾.
- (70) Article 48 of French Act No 86-1067 of 30 September 1986 on freedom of communication refers to the 'educational, cultural and social role' of the television channels France 2 and France 3. Articles 54, 55 and 56 of the Act determine precisely certain tasks to be performed by France 2 or France 3 with regard to the transmission of government communiqués, parliamentary debates and broadcasts reserved for political parties, trade unions and professional associations and the main religious denominations represented in France.
- (71) The public service remits of France 2 and France 3 are then specified for each channel in a schedule of obligations. Article 3 of the schedule of tasks and obligations of France 2 dated 28 August 1987 provides that 'the company shall make and programme its broadcasts with the aim of providing all sections of the public with information, cultural enrichment and entertainment, in accordance with the cultural, educational and social role assigned to it by law' and that 'through its programmes in particular, it shall promote the cultural heritage and contribute to its enrichment via the productions it broadcasts'. Article 3 of the schedule of tasks and obligations of France 3, also dated 28 August 1987, reproduces the aforementioned two paragraphs and adds a third one, whereby 'the company shall make and programme broadcasts on regional life, facilitating in particular the expression of and provision of information to the different cultural, social and professional communities and spiritual and philosophical groupings'.
- (72) Some 20 articles then spell out more precisely the content of these public service tasks: pluralistic expression of different trends of thought and opinion; fairness, independence and pluralism of information; adjustment to technological change; adaptation of programmes to cater for the needs of the deaf and hard of hearing; transmission of government communiqués, the main parliamentary debates and broadcasts reserved for political parties, trade unions and professional associations and the main religious denominations represented in France; broadcasting of messages devoted to major national causes, road safety and consumer information; transmission of educational and social welfare broadcasts; obligations relating to the transmission and nature of documentaries, news and current affairs programmes, drama, music, dance, variety shows, sporting events, programmes for children and young people and fictional works.
- (73) The schedules of tasks and obligations of France 2 and France 3 dated 16 September 1994, which replaced those dating from 1987, reaffirm these public service tasks. The preamble to both documents states that 'the national television broadcasting companies (France 2 and France 3) provide a television service for all citizens. As such, they shall endeavour to reach the widest possible audience while affirming their personality by offering a specific range of programmes based on four major characteristics:
- in performing the cultural, educational and social role assigned to them by law, these channels shall provide the public with information, cultural enrichment and entertainment, showing respect for human dignity at all times,
 - they shall ensure pluralism in their programming by including all types of programme and catering for all audiences,

⁽¹⁵⁾ Point 33 of the communication.

⁽¹⁶⁾ Point 36 of the communication.

- the programmes they offer shall be particularly rich and diversified in the area of cultural broadcasts and programmes for the young,
- they shall make a significant effort in terms of programme output by pursuing innovation, being systematically attentive to the script and encouraging the creation of original productions aimed, among other things, at promoting the French cultural heritage.

In doing so, the national broadcasting companies shall endeavour to act as the benchmark in standards of ethics, quality and imaginativeness. They shall be guided by concern to avoid any kind of bad taste. The attention they pay to their audience shall reflect a desire to achieve high standards rather than commercial performance'. The preamble to the schedule of tasks and obligations of France 2 then describes the latter as 'the only exclusively general-interest channel in public ownership' with a duty to reach 'a wide audience, to which it shall offer a diversified and balanced range of programmes', while the preamble to the schedule of tasks and obligations of France 3 states that the latter 'shall assert its specific role as a regional and local channel' and give priority to 'decentralised news coverage and regional events'. As in the case of the schedules of tasks and obligations dated 28 August 1987, some 20 articles then spell out more precisely the content of these public service tasks.

- (74) The Commission considers that the public service tasks entrusted to France 2 and France 3 correspond to a service of general economic interest within the meaning of Article 86(2) of the Treaty. They are clearly defined and legitimate, in that they are aimed both at satisfying the democratic, social and cultural needs of French society and at ensuring pluralism, including cultural and linguistic diversity, within the meaning of the Protocol. The Commission also notes that these public service tasks cover the making and transmission of all the programmes broadcast by France 2 and France 3; the public service activity of the two broadcasters therefore consists in making and transmitting all their programmes. Although some of the public service tasks are of a general and predominantly qualitative nature, the Commission, having due regard to the interpretative provisions set out in the Protocol, deems such a 'wide' definition to be legitimate. It considers, finally, that the definition of public service tasks does not contain any manifest error.
- (75) The schedules of tasks and obligations of the two public broadcasters also contain provisions on programming quotas for films and audiovisual works 'in original French language' and on funding for the co-production of films. These are regulatory measures that apply to all free-to-air terrestrial broadcasters. Since the scope of this Decision does not include those measures, it is without prejudice to any examination of the advantages thus granted to the television and film production industry.

B. Entrustment and supervision

- (76) The public service tasks in question were entrusted to France 2 and France 3 by official decisions, since they derive from Act No 86-1067 and the schedules of tasks and obligations dated 28 August 1987, then 16 September 1994, adopted by decree by the Prime Minister. The schedules of tasks and obligations provide that certain obligations are to be spelled out by annual measures. The schedules of tasks and obligations dated 16 September 1994 also indicate that the obligations and principles set out therein are to be spelled out, where necessary, in the target-setting contracts concluded between the State and the broadcasters.
- (77) The French authorities have established various means of checking that France 2 and France 3 are discharging their public service tasks. The two public broadcasters have to report each year to the minister responsible for communication and to the Broadcasting Authority on compliance with their schedules of tasks and obligations. The Broadcasting Authority publishes annually a report in which it assesses, article by article, compliance by each channel with the schedules of tasks and obligations. In the event of a serious failure by one of the channels to fulfil its public service obligations, the Broadcasting Authority addresses comments to its board of directors. Such comments are made public.

- (78) Furthermore, pursuant to Article 53 of Act No 86-1067, Parliament passes the budget for the public broadcasters on the basis of a report drafted in each House by a member of the Finance Committee. The draftsman may, if he deems necessary, comment on the fulfilment by the broadcasters of their public service obligations.
- (79) It should lastly be noted that the 12 members of the board of directors of each channel include two Members of Parliament, four representatives of the State and four experts. These 10 figures are from outside the channels and are therefore able unreservedly to express their views on fulfilment of the public service obligations.

C. Proportionality of the funding of the public service activity

- (a) *Assessment of the State compensation for the cost of the public service activity*
- (80) The Commission must assess whether the State aid paid to France 2 and France 3 is proportionate to the cost of their public service activity. As stated in the communication, 'in order to satisfy the proportionality test, it is necessary that the State aid does not exceed the net costs of the public service mission, taking also into account other direct or indirect revenues derived from the public service mission. For this reason, the net benefit that non-public service activities derive from the public service activity will be taken into account in assessing the proportionality of the aid' ⁽¹⁷⁾.
- (81) Although the communication refers in this context to Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings ⁽¹⁸⁾ and the obligation to keep separate accounts introduced by that Directive, that obligation did not apply to television broadcasting during the period covered by this Decision.
- (82) The communication is neutral as regards the methods chosen by the Member State for funding television broadcasters entrusted with public service tasks. The French authorities have opted for a dual-funding system involving both public resources and commercial revenues. Advertising and sponsorship income accounts for nearly all the commercial revenues, since distribution activities generate very little income. As far as the public resources are concerned, the licence fee constitutes the ordinary public funding of France 2 and France 3. However, between 1988 and 1994, in addition to the licence fee, the French authorities awarded France 2 and France 3 the grants set out in tables 1 and 2.
- (83) The French authorities also granted three capital injections to France 2. Between 1988 and 1991, France 2 accumulated losses such that in 1991 it was required by Article 241 of Act No 66-537 of 24 July 1966 to increase and then reduce its registered capital in order to offset most of its losses and restore the level of its shareholders' equity to half its registered capital. During that operation, the French State injected FRF 500 million into France 2. This was sufficient to enable the broadcaster to continue operating in the short term, but was not enough to restore a lasting balance between its net assets and bank debt. The French State therefore had to grant two more capital injections, in 1993 and 1994, totalling FRF 410 million.
- (84) As part of the proportionality test, the Commission has to check that all the public funding received by France 2 and France 3 between 1988 and 1994, i.e. the State aid covered by this Decision plus the licence fee and the equipment grants, does not exceed the net cost of their public service activity.

⁽¹⁷⁾ Point 57 of the communication.

⁽¹⁸⁾ OJ L 195, 27.7.1980, p. 35. Directive as last amended by Directive 2000/52/EC (OJ L 193, 29.7.2000, p. 75).

- (85) It should first be noted that, over the period 1988 to 1994, France 2 and France 3 received types of public funding that are dealt with differently in the accounts. The licence fee is intended to compensate for the annual expenses incurred by the two public broadcasters in carrying out their public service activity and as such, it is entered annually in the profit and loss account. On the other hand, the capital injections and grants are recorded on the balance sheet. This is because the capital injections are exceptional contributions that served to make good previous deficits that had accumulated over several years. Likewise, the investment and equipment grants finance investments that are then used, and therefore depreciated, over several years. The grants are therefore entered in the profit and loss account at the same rate as the investments are depreciated. Since, for the calculation of the compensation for public service costs, balance-sheet items (grants) are mixed with items in the profit and loss account (depreciations, included in the total costs for the year), it is essential to adopt a cumulative approach over a medium or long-term period, since that makes it possible to consider that the entries made for grants in the profit and loss account and the grants entered on the balance sheet converge towards the same amounts. Since the formal investigation procedure relates to the period between 1988 and 1994, that period will be taken for the cumulative calculation.
- (86) France 2 and France 3 carry on both a public service activity and commercial activities, either in-house or via subsidiaries. Only the cost of the channels' public service activity, which includes all the costs necessary for making and transmitting their programmes, is eligible for financial compensation from the State. However, each channel's total costs for the year include not only the costs linked to the public service activity but also those linked to commercial activities. The net cost of each channel's public service activity is therefore obtained by deducting from its total costs for the year all the costs linked to commercial activities, whether carried on in-house or via subsidiaries, and the net profits from those activities (chiefly advertising and sponsorship income), as specified in the communication. As shown in table 4, over the period under consideration, 1988 to 1994, the cumulative net cost of the public service activity was FRF 15,69 billion for France 2 and FRF 20,89 billion for France 3⁽¹⁹⁾.

TABLE 4

Determination of the net cost of the public service activity, calculated on a cumulative basis over the period 1988 to 1994

	<i>(FRF billion)</i>	
	France 2	France 3
Total costs	41,982	37,011
Costs related to commercial activities	<15,2>	<11,74>
Net profits from commercial activities	<11,091>	<4,379>
Net cost of the public service activity	15,691	20,892

- (87) These net public service costs must then be compared with all the public funding received by the broadcasters in order to assess whether or not the financial compensation from the State exceeded those costs. Since the licence fee, on the one hand, and the grants and capital injections, on the other, are dealt with differently in the accounts, the balances of the compensation for the cost of the public service activity need to be calculated successively for each type of public funding examined. Over the period 1988 to 1994, France 2 and France 3 received by way of the licence fee FRF 12,12 billion and FRF 20,17 billion respectively⁽²⁰⁾. An analysis based on the profit and loss account thus reveals that France 2 and France 3 were cumulatively undercompensated to the tune of FRF 3,57 billion and FRF 718,6 million respectively.

⁽¹⁹⁾ These figures and the ensuing ones have been rounded off.

⁽²⁰⁾ These figures include both the licence fee and the reimbursement by the State of part of the revenue lost to the public broadcasters as a result of licence fee exemptions on social welfare grounds.

- (88) These amounts of undercompensation must now be correlated with the additional public resources entered on the balance sheet. These additional resources consist, on the one hand, in equipment grants and on the other, in the investment grants, other grants and capital injections covered by this Decision. Cumulatively, they amount to FRF 1,91 billion in the case of France 2 and FRF 633,5 million in the case of France 3. The net cost of the public service activity should, moreover, not include the capital injections and non-refunded advances on current account granted to the public broadcasters' subsidiaries engaged in commercial activities (FRF 115,2 million for France 2 and FRF 25,9 million for France 3).
- (89) Taking these additional resources into account, it transpires that France 2 and France 3 were under-compensated over the period 1988 to 1994, to the tune of FRF 1,54 billion and FRF 59,2 million respectively.
- (b) *Assessment of the behaviour of France 2 and France 3 on the market in the sale of advertising slots*
- (90) In accordance with the communication, the Commission must also check that no distortion of competition which is not necessary for the fulfilment of the public service tasks has been caused by the commercial activities intrinsically related to the public service activity. Such a distortion would exist if France 2 and France 3, secure in the assurance that their lower commercial revenues would be compensated for by the State, were to drive advertising rates down, thereby reducing the revenues of their competitors.
- (91) In its complaint, TF1 raised this issue, claiming that thanks to the State aid they receive, France 2 and France 3, acting 'outside the profitability constraints of their competitors, are able to offer introductory prices and artificial reductions on their advertising slots or sponsorship activities in order to retain the custom of advertisers'.
- (92) On the basis of the information in its possession, the Commission has not found any evidence in support of TF1's claim. The difference between the advertising rates charged by TF1 and by France 2 and France 3 is accounted for, not by the commercial behaviour of the two public broadcasters, but by the difference in the power of advertising slots as between TF1 and the public channels.
- (93) In the television advertising industry, advertisers are interested above all in the audience reached by advertising slots among housewives under 50 years of age. Audiences are measured using the concept of the gross rating point, or GRP, which is defined as the average number of contacts achieved by an advertising campaign out of 100 people in the target population. A contact is considered to have been established where a person is exposed once, at a given time, to the broadcast message.
- (94) For their adverts, advertisers look for the most powerful slots which achieve, at a given time, the best coverage of the target population. The result is that, the greater the audience for a slot, the more advertisers are prepared to pay a higher unit price per contact (GRP price). There is therefore a premium for the power of advertising slots.
- (95) Table 6 shows for each channel the average GRP and the average GRP price over the whole day for the target population of housewives aged between 15 and 49:

TABLE 6 (*)

	TF1		France 2		France 3		M6	
	Average GRP	GRP price (EUR)						
1990	5,8	2 732	3	2 738	2,3	2 533	1,9	2 440
1991	5,3	2 649	2,6	2 488	2,1	2 463	1,9	2 239
1992	4,8	2 963	2,5	2 652	2	2 707	1,9	2 297
1993	4,7	2 829	2,4	2 595	1,7	2 785	1,9	2 481
1994	4,7	2 983	2,6	2 847	1,6	2 777	2	2 475

(*) Data taken from a table supplied by the French authorities in their letter dated 2 January 2003.

Source: Médiamétrie/Médiamat Traitement Popcorn

The change in methodology in 1989 does not allow comparisons to be made with earlier data.

- (96) Table 7 shows for each channel the average GRP and the average GRP price during peak viewing times (19.00 to 22.00 hours) for the target population of housewives aged between 15 and 49:

TABLE 7

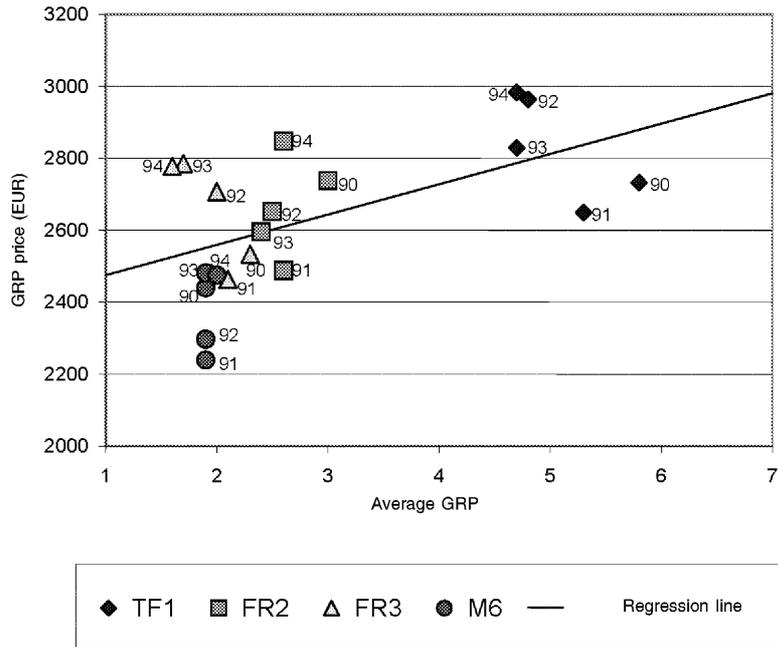
	TF1		France 2		France 3		M6	
	Average GRP	GRP price (EUR)						
1990	12,8	3 465	5,9	3 079	3,9	2 620	3,4	2 815
1991	12,1	3 536	6,1	3 103	4,1	2 607	3,8	2 454
1992	10,4	3 741	5,7	3 613	3,9	3 032	4,4	2 587
1993	10,7	3 512	5,9	3 378	3,4	3 150	3,9	3 084
1994	10,3	3 735	6	3 519	3,4	3 078	4,2	3 920

Source: Médiamétrie/Médiamat Traitement Popcorn

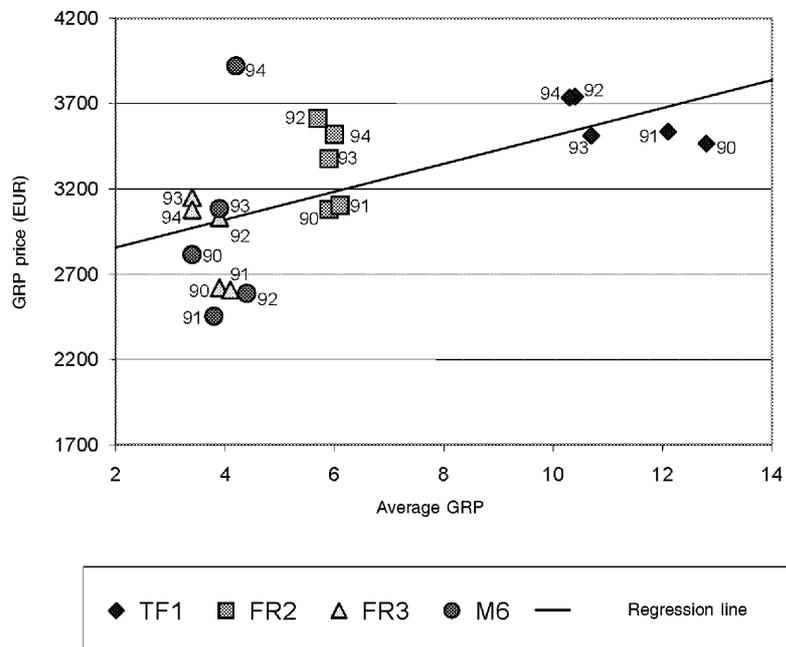
The change in methodology in 1989 does not allow comparisons to be made with earlier data.

- (97) The public broadcasters would be found to have engaged in anticompetitive behaviour on the market in the sale of advertising slots if, given that a higher average GRP results in a higher GRP price (the premium for power), the GRP prices charged by the public broadcasters were appreciably lower than those charged by TF1 and M6. That is not the case on the basis of the data set out in tables 6 and 7. Admittedly, the tables show that, as stressed by TF1, its GRP price is in the main higher than those of France 2 or France 3, which are themselves higher than that of M6. It is also clear that TF1's average GRP is always very distinctly higher than France 2 or France 3. Between 1990 and 1994, over the whole day, TF1's average GRP varied between 4,7 and 5,8 points, whereas that of France 2 varied between 2,4 and 3 points, that of France 3 between 1,6 and 2,3 points and that of M6 between 1,9 and 2 points. During peak viewing times, TF1's average GRP varied between 10,3 and 12,8 points, whereas that of France 2 varied between 5,7 and 6,1 points, that of France 3 between 3,4 and 4,1 points and that of M6 between 3,4 and 4,4 points. However, the difference between TF1's GRP prices and those of the two public broadcasters is not disproportionate if it is compared with the difference between the GRP prices of TF1 and M6. On average, the GRP prices of France 2, France 3 and M6 are around EUR 83 per unit of GRP lower than those charged by TF1 during the two periods examined (over the whole day and at peak viewing times). Consequently, France 2 and France 3 did not sell their advertising slots at artificially low prices.
- (98) By way of illustration, the charts below show the data on the different channels' GRP prices and average GRP, as set out in tables 6 and 7, distinguishing between the average for the whole day and the peak viewing times. The limited number of points (five) available for each channel and their low dispersion allow all five years and four channels to be plotted on the same chart.

Relationship between GRP price and average GRP over the whole day (1990-1994)



Relationship between GRP price and average GRP at peak viewing times (1990-1994)



- (99) The two charts show that there is a positive correlation between average GRP and GRP price, which corroborates the fact that there is a premium for power: a channel with a higher GRP has a higher GRP price. The correlation is represented on the charts by the linear regression line of GRP price against average GRP, which reflects the 'average' relationship between GRP price and GRP for all the channels over the period examined. It can also be seen from the charts that the prices charged by France 2 and France 3 were not significantly lower than those charged by TF1 and M6 when the premium for power is taken into account: for France 2 and France 3, the few points located below the regression line are nevertheless very close to it. Some of France 3's prices were furthermore higher than those of M6 for more or less the same GRP.
- (100) To sum up, the prices charged by France 2 and France 3 between 1990 and 1994 were not significantly lower than those charged by TF1 and M6. The higher prices of TF1's advertising slots can thus be accounted for by the power of its slots and not by the commercial behaviour of the public broadcasters. The French Competition Council furthermore arrived at the same conclusion in a decision it took in 2001 concerning the sale of television advertising slots⁽²¹⁾.
- (101) In conclusion, the Commission finds, firstly, that over the period 1988 to 1994 the public funds paid by the French authorities to France 2 and France 3 were lower than the cost of their public service activity and secondly that there is no conclusive evidence of anticompetitive behaviour by the public broadcasters on the market in the sale of advertising slots. The Commission accordingly finds that the State funding of the public service activity of France 2 and France 3 satisfies the proportionality test.
- (102) The Commission considers that, in the case under examination, the three conditions for the application of the derogation provided for in Article 86(2) of the Treaty are met.

VII. CONCLUSION

- (103) In the light of its analysis, the Commission finds that the State aid measures covered by this formal investigation procedure are compatible with the common market pursuant to Article 86(2) of the Treaty,

HAS ADOPTED THIS DECISION:

Article 1

The investment grants paid by France to France 2 and France 3 and the capital injections granted by France to France 2 between 1988 and 1994 constitute State aid that is compatible with the common market within the meaning of Article 86(2) of the Treaty.

Article 2

This Decision is addressed to the French Republic.

Done at Brussels, 10 December 2003.

For the Commission
Mario MONTI
Member of the Commission

⁽²¹⁾ Decision No 00-D-67 of 13 February 2001 on practices observed on the market in the sale of television advertising slots.