JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

11 March 2009 *

In Case T-354/05,

Télévision française 1 SA (TF1), established in Boulogne-Billancourt (France), represented by J.-P. Hordies and C. Smits, lawyers,

applicant,

v

Commission of the European Communities, represented by C. Giolito, acting as Agent,

defendant,

* Language of the case: French.

supported by

French Republic, represented by G. de Bergues and A.-L. Vendrolini, acting as Agents,

and by

France Télévisions SA, established in Paris (France), represented by J.-P. Gunther and D. Tayar, lawyers,

interveners,

APPLICATION for the annulment of Commission Decision C(2005) 1166 final of 20 April 2005 on aid granted to France Télévisions (aid E 10/2005 (ex C 60/1999) — France, Audiovisual licence fee),

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

composed of M. Vilaras (Rapporteur), President, M. Prek and V.M. Ciucă, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 15 October 2008,

gives the following

Judgment

Legal context

1 Article 86(2) EC provides:

'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, in so far 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.'

2 Article 87(1) EC provides:

'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, in so far as it affects trade between Member States, be incompatible with the common market.'

3 Article 88 EC provides:

‘1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the common market.

2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 87, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

…

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 87, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.’

4 Article 1 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1) provides:

‘For the purpose of this Regulation:

…

(b) "existing aid" shall mean:

(i) ... all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty.

…'

5 Article 17 of Regulation No 659/1999 provides:

'1. The Commission shall obtain from the Member State concerned all necessary information for the review, in cooperation with the Member State, of existing aid schemes pursuant to Article [88(1) EC].

2. Where the Commission considers that an existing aid scheme is not, or is no longer, compatible with the common market, it shall inform the Member State concerned of its preliminary view and give the Member State concerned the opportunity to submit its comments within a period of one month. In duly justified cases, the Commission may extend this period.'

6 Article 18 of Regulation No 659/1999 provides:

'Where the Commission, in the light of the information submitted by the Member State pursuant to Article 17, concludes that the existing aid scheme is not, or is no longer, compatible with the common market, it shall issue a recommendation proposing appropriate measures to the Member State concerned. The recommendation may propose, in particular:

(a) substantive amendment of the aid scheme,

or

(b) introduction of procedural requirements,

or

(c) abolition of the aid scheme.'

7 Article 19 of Regulation No 659/1999 provides:

'1. Where the Member State concerned accepts the proposed measures and informs the Commission thereof, the Commission shall record that finding and inform the Member State thereof. The Member State shall be bound by its acceptance to implement the appropriate measures.

2. Where the Member State concerned does not accept the proposed measures and the Commission, having taken into account the arguments of the Member State concerned,

still considers that those measures are necessary, it shall initiate proceedings pursuant to Article 4(4). Articles 6, 7 and 9 shall apply *mutatis mutandis*.'

8 Article 26(1) of Regulation No 659/1999 provides:

'The Commission shall publish in the *Official Journal of the European Communities* a summary notice of the decisions which it takes pursuant to … Article 18 in conjunction with Article 19(1). The summary notice shall state that a copy of the decision may be obtained in the authentic language version or versions.'

Facts

9 By letter of 10 March 1993, the applicant, Télévision française 1 SA, which owns the private commercial television channel TF1, complained to the Commission regarding the basis of the financing and operation of France 2 and France 3, two French public television channels. That complaint, which was supplemented by another of 10 March 1997, alleged infringements of Article 81 EC, Article 86(1) EC and Article 87 EC. The applicant maintained in its complaint that, among other measures, the onward payment of the audiovisual licence fee by the French Republic to France 2 and France 3 constituted State Aid within the meaning of Article 87(1) EC.

10 By decision of 27 September 1999, published in the *Official Journal of the European Communities* of 27 November 1999 (OJ 1999 C 340, p. 57), the Commission initiated the formal investigation procedure provided for in Article 88(2) EC with regard to the investment subsidies received by France 2 and France 3 and the capital contributions received by France 2 between 1988 and 1994. That procedure did not concern the

licence fee, that measure being considered, on a preliminary basis, an existing aid that should be examined separately under Article 17 et seq. of Regulation No 659/1999.

11 In 2000, France 2 and France 3 were contributed as assets by the French Republic to the public holding company France Télévisions SA, created by French Law 2000-719 of 1 August 2000, amending Law 86-1067 of 30 September 1986, on freedom of communication (JORF No 177 of 2 August 2000, p. 11903), and entrusted with coordination of the activities of French public broadcasters.

12 By Decision 2004/838/EC of 10 December 2003 on State aid implemented by France for France 2 and France 3 (OJ 2004 L 361, p. 21) ('the 10 December 2003 decision'), the Commission decided that the investment grants received by France 2 and France 3 and the capital injections made in favour of France 2 between 1988 and 1994 constituted State aid compatible with the common market under Article 86(2) EC. The 10 December 2003 decision was the subject of an action for annulment brought by the applicant, registered in the Court of First Instance as Case T-144/04 and dismissed by order of the Court of First Instance of 19 May 2008 (Case T-144/04 *TFI* v *Commission* [2008] ECR II-761).

13 By letter of 10 December 2003 addressed to the French Republic on the basis of Article 17 of Regulation No 659/1999 ('the 10 December 2003 letter'), the Commission, as part of the constant review of existing aid, gave details to the French Republic of its analysis of the French audiovisual licence fee system.

14 By letters dated 20 February and 23 July 2004, the French authorities replied to the 10 December 2003 letter. They met Commission representatives on 21 October 2004. By letters dated 18 November 2004 and 4 January, 28 February and 15 April 2005, they gave commitments in response to the Commission's analysis contained in the 10 December 2003 letter.

15 By Decision C(2005) 1166 final of 20 April 2005 on aid granted to France Télévisions [aid E 10/2005 (ex C 60/1999) — France, Audiovisual licence fee] ('the contested decision'), notified on 21 April 2005 to the French Republic, the Commission informed that Member State that, on the basis of the commitments given by the French authorities within the procedure for constant review of the licence fee scheme benefiting France Télévisions, it considered those rules to be compatible with the common market under Article 86(2) EC and therefore decided to close the procedure concerning those rules in relation to an existing aid (paragraphs 1 and 72 of the contested decision).

16 On 29 June 2005, the Commission notified the contested decision to the applicant by fax.

17 On 30 September 2005, the contested decision was published in summary form in the *Official Journal of the European Union* (OJ 2005 C 240, p. 20) and a reference was given to the Commission Internet site allowing access to the full text of that decision.

Procedure and forms of order sought

18 By application lodged at the Registry of the Court of First Instance on 9 September 2005, the applicant brought the present action.

19 By documents lodged at the Registry of the Court of First Instance on 5 and 25 January 2006, the French Republic and France Télévisions sought leave to intervene in support of the Commission. Their applications were granted by orders of the President of the Fifth Chamber of the Court of First Instance of 14 March 2006.

20 In response to a request from the Court of First Instance of 25 January 2006 for the production of documents, the Commission, by letter of 21 February 2006, produced the 10 December 2003 decision but stated that it was unable to produce the correspondence exchanged with the French Republic in relation to constant review of the licence fee. By letters of 2 June 2006, the Court informed the parties that production of those documents might be ordered if the Court considered it necessary to do so.

21 In reply to a question from the Court of 23 May 2008, the Commission, by letter of 29 May 2008, informed the Court of the measures taken by the French Republic to implement the contested decision.

22 By letter of 9 October 2008 to the Registry of the Court of First Instance, which has been placed in the file, the applicant stated that it would, at the hearing, refer to new legal developments, namely the judgment of the Court of First Instance of 26 June 2008 in Case T-442/03 *SIC* v *Commission* [2008] ECR II-1161 and Commission Decision C(2008) 3506 final of 16 July 2008 on the aid granted to France Télévisions (aid N 279/2008 — France, capital endowment for France Télévisions).

23 The applicant claims that the Court of First Instance should:

— declare the action admissible;

— annul the contested decision;

— order the Commission to pay the costs and give a decision on costs, regarding the interveners, in accordance with the Rules of Procedure.

24 The Commission, supported by the French Republic and by France Télévisions, contends that the Court of First Instance should:

— dismiss the action as inadmissible;

— in the alternative, dismiss the action as manifestly without legal foundation;

— order the applicant to pay the costs.

Admissibility

Observance of the time-limit for commencing proceedings

Arguments of the parties

25 The Commission, supported by France Télévisions, raises doubts as to whether, in view of the date on which it was brought, the action is admissible.

26 The contested decision was sent to the applicant by registered letter with a return receipt on 20 June 2005 and received by it on 23 June 2005. The applicant thus had full knowledge of it on that date and, certainly, no later than 29 June 2005, the date on which it asked the Commission to re-fax the contested decision to it on the ground that the registered letter of 20 June 2005 had gone astray.

27 The application is therefore, it is maintained, out of time.

28 The Commission states that it is not unaware of the case-law which provides that in the case of measures which, according to consistent practice and, a fortiori, in compliance with a legal obligation, are published in the *Official Journal of the European Union*, the period for bringing proceedings starts to run from the date of publication, but it notes that the contested decision does not fall precisely within the category of measures referred to by Article 26(1) of Regulation No 659/1999. The contested decision contains both a recommendation for the adoption of appropriate measures, as referred to in Article 18 of that regulation, and an acceptance by the Member State, as referred to in Article 19(1) of that regulation. The Commission therefore queries whether the

contested decision had to be published under Article 26(1) of that regulation and relies on the wisdom of the Court on that point.

29 The Commission nevertheless questions the relevance of that case-law to circumstances in which the measure has been notified to the applicant. To apply that case-law to the present case would render meaningless the communication provided for in Article 20 of Regulation No 659/1999 and unjustifiably extend the period allowed to the principal interested parties, in this case the competitors of the undertakings receiving the aid, for bringing proceedings.

30 The applicant considers that the contested decision was notified to it in full not on 23 June 2005 but only on 29 June 2005. Since the application was lodged on 9 September 2005, the action is admissible. Moreover, if the time-limit were to commence only on publication of the contested decision, the application would certainly be admissible.

Findings of the Court

31 It must be observed at the outset that the contested decision, of which the Member State concerned, in this case the French Republic, is the sole addressee (see, to that effect, the order of the Court of First Instance of 13 May 2008 in Case T-327/04 *SNIV* v *Commission,* not published in the ECR, paragraph 33) was not notified, but merely communicated, to the applicant.

32 Under the fifth paragraph of Article 230 EC, an action for annulment must be instituted within two months of the publication of the measure or of its notification to the applicant or, in the absence thereof of the day on which it came to the knowledge of the latter.

33 It follows from the wording itself of that provision that the criterion of the date on which the applicant became aware of the measure as the start of the period for bringing an action is subsidiary to the criterion of publication or notification of the measure (orders of the Court of First Instance in Case T-426/04 *Tramarin* v *Commission* [2005] ECR II-4765, paragraph 48; *SNIV* v *Commission,* cited in paragraph 31 above, paragraph 21; and *TFI* v *Commission,* cited in paragraph 12 above, paragraph 19).

34 Moreover, as regards measures which, according to the established practice of the institution concerned, are published in the *Official Journal of the European Union* even though that publication is not a condition for their applicability, the Court of Justice and the Court of First Instance have acknowledged that the criterion of the date on which a measure came to the knowledge of the applicant was not applicable and that it was the date of publication which made the period in which to institute proceedings start to run. In such circumstances, the third party concerned may legitimately expect that the measure in question will be published (orders in *Tramarin* v *Commission,* cited in paragraph 33 above, paragraph 49; *SNIV* v *Commission,* cited in paragraph 31 above, paragraph 22; and *TF1* v *Commission,* cited in paragraph 12 above, paragraph 20). That approach, which seeks to ensure legal certainty and applies to all third parties concerned, is valid in particular where, as in this case, the interested third party who instituted the proceedings became aware of the measure before its publication.

35 Finally, the fact that the Commission gives third parties full access to the text of a decision placed on its website, combined with publication of a summary notice in the Official Journal enabling interested parties to identify the decision in question and notifying them of that possibility of access via the Internet, must be considered as publication for the purposes of the fifth paragraph of Article 230 EC (Case T-17/02 *Olsen* v *Commission* [2005] ECR II-2031, paragraph 80; orders of the Court of First Instance in Case T-321/04 *Air Bourbon* v *Commission* [2005] ECR II-3469, paragraph 34; and *Tramarin* v *Commission,* cited in paragraph 33 above, paragraph 53).

36 Article 26(1) of Regulation No 659/1999 provides that the Commission is to publish in the *Official Journal of the European Communities* a summary notice of the 'decisions which it takes pursuant to … Article 18 in conjunction with Article 19(1)'.

37 In order to determine whether the contested decision, which is not based on any stated legal basis, corresponds to what Article 26(1) of Regulation No 659/1999 means by the terms used in the foregoing paragraph, it is first necessary to review the stages of the procedure followed by the Commission in this case and, second, to clarify the meaning of those terms.

38 First, it is clear from paragraph 64 of the contested decision that, by the 10 December 2003 letter, described by the Commission as an 'Article 17 letter' (paragraph 15 of the contested decision), the Commission did not confine itself to informing the French Republic of its preliminary conclusion that the licence fee scheme was not or was no longer compatible with the common market and inviting that Member State to submit its observations.

39 In that letter, the Commission indicated 'that, as a preliminary step, modifications must be made to the existing system in order to guarantee the compatibility of the French licence fee system with the Community rules applicable to State aid' (paragraph 64 of the contested decision). The Commission 'consider[ed] that the French authorities should adopt the measures necessary to ensure compliance with [certain] principles' concerning, essentially, the proportionality of the State compensation in relation to the costs of the public service (paragraph 64, first indent, of the contested decision) and the carrying on by public service broadcasters of their commercial activities under market conditions (paragraph 64, second and third indents, of the contested decision).

40 By so doing, the Commission, as early as the 10 December 2003 letter, decided to make to the Member State concerned a 'recommendation proposing appropriate measures', even though, in principle, such a recommendation is to be made only at the stage envisaged in Article 18 of Regulation No 659/1999, that is to say 'in the light of the information submitted [to it] by the Member State'.

41 In the contested decision, the Commission, after referring to the terms of that recommendation (paragraph 64 of the contested decision) and examining the commitments given by the French Republic in response thereto (paragraph 65 et seq. of the contested decision),'consider[ed] that the commitments given by the French

authorities concerning the principle that there should be no over-compensation [were] satisfactory' (paragraph 68 of the contested decision) and that those commitments 'concerning the commercial conduct of the public channels satisfactorily respond[ed] to the recommendations which it [had] made' (paragraph 70 of the contested decision). It also took note of the French authorities' commitment to proceed 'within two years following the date of this letter' to modify its legislation and rules as necessary for the fulfilment of those commitments and to provide the Commission, within the same period, with a report on that matter (paragraph 71 of the contested decision).

42 On the basis of the various commitments thus given by the French authorities and its finding that they satisfied its recommendation, the Commission decided to close the procedure (paragraphs 1 and 72 of the contested decision), whilst at the same time pointing out that the contested decision did not in any way detract from its power to undertake the constant review of existing aid schemes provided for in Article 88(1) EC (first subparagraph of paragraph 73 of the contested decision).

43 It is apparent from the foregoing that, in this case, the Commission, as early as the procedural stage provided for in Article 17(2) of Regulation No 659/1999, decided to address to the French Republic the 'recommendation proposing appropriate measures' provided for in Article 18 of that regulation. Then, on receiving commitments from the French Republic, the Commission examined them, considered them to be compliant with that recommendation and, consequently, accepted them. Such acceptance, which is based on a prior examination of the commitments and thereby goes beyond merely taking note of them, may nevertheless be assimilated, at least on a first analysis and in order to reflect, as far as possible, the procedural stages provided for in terms by Regulation No 659/1999, to the fact of 'recording [its] finding' within the meaning of Article 19(1) of that regulation.

44 Second, it is necessary to determine the meaning of the expression 'decisions which it takes pursuant to … Article 18 in conjunction with Article 19(1)' contained in Article 26(1) of Regulation No 659/1999.

45 That expression means that the obligation to publish laid down by that provision does not apply at once and solely to 'decisions which it takes pursuant to … Article 18' of Regulation No 659/1999 to address to the Member State a recommendation proposing the adoption of appropriate measures, but that the obligation to publish arises only where the Commission's recommendation is accepted by the Member State, which corresponds to the situation envisaged in Article 19(1) of the same regulation.

46 Thus, Article 26(1) of Regulation No 659/1999 definitively requires the Commission, if and when its recommendation proposing the adoption of appropriate measures is accepted by the Member State, to proceed with publication of the terms of that recommendation which the Commission had decided to address to the Member State and of the fact that the recommendation was accepted by the Member State. Third parties are thus informed not of a merely intermediate stage of the review procedure but of its final stage.

47 In this case, the contested decision, although made following a procedure in which the recommendation provided for in Article 18 of Regulation No 659/1999 was made as soon as the Article 17 letter was sent (see paragraphs 38 to 40 above), corresponds in reality to what that regulation describes, in Article 26(1), by the terms 'decisions which it takes pursuant to … Article 18 in conjunction with Article 19(1)'.

48 Since the contested decision does correspond with one of the measures covered by Article 26(1) of Regulation No 659/1999 and is therefore required to be published, it was, under Article 102(1) of the Rules of Procedure of the Court of First Instance, 'from the end of the fourteenth day after publication thereof in the *Official Journal of the European* Union', that is to say, from 14 October 2005 at midnight, that the period within which proceedings might be brought started to run. Thus, pursuant to the fifth paragraph of Article 230 EC in conjunction with Articles 101 and 102(2) of the Rules of Procedure, the period for bringing proceedings expired on Tuesday 27 December 2005 at midnight.

49 The present action was brought on 9 September 2005 and is therefore admissible.

The nature of the contested decision

Arguments of the parties

50 The Commission, supported by the interveners, submits that the contested decision, containing as it does a recommendation accepted by the French authorities, has no binding effect and is not therefore challengeable.

51 It is a letter addressed to the French Republic during the phase of constant review of an existing aid. According to the wording of Article 88(1) EC, the relevant measures are only proposals. It is only in cases where the Member State decides not to adopt those proposals that the Commission should, if it so considers fit, take a decision under Article 88(2) EC in order to require amendment of the aid scheme in question, and only that decision is of a binding character. The Commission has no coercive powers vis-à-vis the Member State when making a preliminary examination of a State measure. In support of its position, the Commission relies on the judgment of the Court of First Instance in Case T-330/94 *Salt Union* v *Commission* [1996] ECR II-1475, paragraph 35, and the order in *Tramarin* v *Commission,* cited in paragraph 33 above).

52 The so-called 'appropriate measures procedure' thus displays similarities with a quasi-contractual process. If the Member State accepts the Commission's proposals for appropriate measures, it is required to give effect to them. If it refuses, the Commission initiates the formal investigation procedure.

53 However, at that stage of the appropriate measures procedure, which moreover does not have suspensive effect, the French Republic could continue to pay the aid on the basis of the existing scheme for two further years as from notification of the contested decision. The only compulsion would consist in the threat of initiation of the formal investigation procedure in the event of non-fulfilment of the commitments and the fact that, if the two years pass and the commitments have not been fulfilled, the aid in question would no longer be existing aid but new aid. Only a decision to initiate the formal investigation procedure might possibly be binding in nature.

54 Moreover, the only obligation on the Member State is to fulfil its commitments and that obligation derives from its own unilateral acceptance of the Commission's proposals and not from the contested decision, which merely records those commitments.

55 Furthermore, the Commission has no opportunity, merely on the basis of non-fulfilment of the commitments, to initiate Treaty-infringement proceedings under Article 88(2) EC or Article 226 EC.

56 The applicant's argument alleging that the Member States are given an incentive not to cooperate with the Commission in good faith is specious. It is true that a Member State might decide not to cooperate and to reject all proposals of appropriate measures. But that would result in the immediate initiation of the formal investigation procedure, followed by a unilateral Commission decision requiring immediate alteration of the aid scheme. The cooperation procedure followed in this case made it possible to avoid initiating the formal investigation procedure, whilst at the same time allowing the Member State to fulfil its commitments at an agreed rate but not over longer periods. The system thus encourages cooperation between the Commission and the Member States without giving any incentive to the latter to behave in bad faith.

57 As regards the argument alleging that there can be no judicial review of the Commission's action where, on expiry of the period notified to the Member State, no decision has been taken to initiate the formal investigation procedure, it is incorrect. Failure by the French Republic to fulfil its commitments would enable the applicant to

apply to the national courts for suspension of the payment of the new aid, which is what the licence fee would then become. Moreover, the applicant could submit a request that action be taken, and then bring an action for failure to act against the Commission if it did not immediately initiate the formal investigation procedure. Lastly, the formal procedure would culminate in a final Commission decision, which could be challenged by the applicant.

58 Finally, the Commission did not, in the terms of paragraph 73 of the contested decision, create any confusion as to the nature of the contested decision, which depends on the substantive content of that document.

59 The applicant contests the Commission's position.

Findings of the Court

60 According to settled case-law, only measures with binding legal effects capable of affecting the interests of the applicant by bringing about a distinct change in his legal position are capable of being the subject-matter of an application for annulment under the fourth paragraph of Article 230 EC (Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9; Case T-87/96 *Assicurazioni Generali and Unicredito* v *Commission* [1999] ECR II-203, paragraph 37; Joined Cases T-125/97 and T-127/97 *Coca-Cola* v *Commission* [2000] ECR II-1733, paragraph 77; Case T-112/99 *M6 and Others* v *Commission* [2001] ECR II-2459, paragraph 35; and order of the Court of First Instance of 5 November 2003 in Case T-130/02 *Kronoply* v *Commission* [2003] ECR II-4857, paragraph 43).

61 In order to determine whether an act or decision produces such effects, it is necessary to look to its substance (*IBM* v *Commission,* cited in paragraph 60 above, paragraph 9; order of the Court of Justice in Case C-50/90 *Sunzest* v *Commission* [1991] ECR I-2917, paragraph 12; *Coca-Cola* v *Commission,* cited in paragraph 60 above, paragraph 78; and order in *Kronoply* v *Commission,* cited in paragraph 60 above, paragraph 44).

62 In the field of State aid, the procedural rules laid down by the Treaty vary according to whether the measures constitute existing aid or new aid. Whilst the former is subject to Article 88(1) and (2) EC, the latter is governed by Article 88(2) and (3) EC (judgment of 30 June 1992 in Case C-47/91 *Italy* v *Commission* [1992] ECR I-4145, paragraph 22).

63 As far as existing aid is concerned, Article 88(1) EC gives the Commission the power, in cooperation with the Member States, to keep aid under constant review. As part of that review, the Commission is to propose to the Member States any appropriate measures required by the progressive development or by the functioning of the common market. Paragraph 2 of the same article provides that if, after giving notice to the parties concerned to submit their comments, the Commission finds that aid is not compatible with the common market having regard to Article 87 EC, or that such aid is being misused, it is to decide that the State concerned must abolish or alter such aid within a period of time to be determined by the Commission (*Italy* v *Commission,* cited in paragraph 62 above, paragraph 23; Case C-44/93 *Namur-Les assurances du crédit* [1994] ECR I-3829, paragraph 11).

64 According to Article 17(2) of Regulation No 659/1999, if the Commission considers that an existing aid scheme is not, or is no longer, compatible with the common market, it is to inform the Member State concerned of its preliminary view and give the Member State an opportunity to submit its comments within a period of one month.

65 According to Article 18 of Regulation No 659/1999, if, in the light of the information submitted by the Member State under Article 17, the Commission concludes that an existing aid scheme is not, or is no longer, compatible with the common market, it is to issue a recommendation proposing appropriate measures to the Member State

concerned. It is incontestable that such a recommendation, which is no more than a proposal, is not, taken in isolation, a challengeable act (see, to that effect, the judgment in *Salt Union* v *Commission,* cited in paragraph 51 above, paragraph 35, first sentence).

66 According to Article 19(2) of Regulation No 659/1999, where the Member State concerned does not accept the proposed measures and the Commission, having taken into account the arguments of the Member State concerned, still considers that those measures are necessary, it is to initiate proceedings pursuant to Article 4(4) of that regulation.

67 According to Article 19(1) of Regulation No 659/1999, where the Member State concerned accepts the proposed measures and informs the Commission thereof, the Commission is to record that finding and inform the Member State thereof.

68 As regards the latter case, which is relevant here, the Court rejects the approach essentially advocated by the Commission, which consists, on the basis of a literal reading of Article 19(1), taken in isolation, in maintaining that it takes no decision in the case of a procedure for review of an existing aid leading to acceptance by the Member State of the appropriate measures proposed or else limiting the procedure under Articles 17, 18 and 19(1) of Regulation No 659/1999 to a quasi-contractual procedure.

69 That approach disregards the terms and purpose of that procedure which, by its very nature, is a decision-making procedure, as is moreover indicated in Article 26(1) of Regulation No 659/1999 by the words 'decisions [taken] pursuant to … Article 18 in conjunction with Article 19(1)'.

70 It is true that the Commission and the Member State may discuss the proposed appropriate measures. But in fact it is only where the Commission decides, in the exercise of its exclusive power to assess the compatibility of State aid with the common market, to accept the State's commitments as answering its concerns that the investigation procedure is brought to an end by the decision mentioned in the foregoing paragraph.

71 In this case, the Commission examined the French Republic's commitments, considered that they answered its recommendation and thus enabled the compatibility of the licence fee scheme with the common market to be ensured and it therefore decided to close the procedure (paragraphs 1 and 72 of the contested decision), whilst at the same time pointing out that the contested decision did not detract in any way from its power to undertake the constant review of existing aid schemes provided for in Article 88(1) EC (first subparagraph of paragraph 73 of the contested decision).

72 By so doing, the Commission, far from passively recording the French Republic's commitments, adopted a decision regarding them, without which the examination of the licence fee would not have come to an end but would have continued, either through further exchanges with a view to commitments satisfactory to the Commission being obtained or by initiation of the formal investigation procedure under Article 19(2) of Regulation No 659/1999.

73 As regards the binding legal effects of the contested decision, suffice it to observe that, under the last part of Article 19(1) of Regulation No 659/1999, a Member State which, at the time of the publication provided for in Article 26(1) of Regulation No 659/1999, has necessarily accepted the appropriate measures is 'bound … to implement' those measures (see, regarding recognition by the Court of Justice of a legally binding effect of that kind, in cases prior to the entry into force of Regulation No 659/1999, Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraph 36; Case C-311/94 *Ijssel-Vliet* [1996] ECR I-5023, paragraphs 42 and 43; and Case C-288/96 *Germany* v *Commission* [2000] ECR I-8237, final part of paragraph 65).

74 Those considerations are not undermined by the Commission's reference to the order in *Tramarin* v *Commission,* cited in paragraph 33 above, and to *Salt Union* v *Commission,* cited in paragraph 51 above.

75 As regards the case in which the order in *Tramarin* v *Commission,* cited in paragraph 33 above, was made, it concerned preliminary examination of a new aid. Such a preliminary examination must, under Article 4(1) of Regulation No 659/1999, lead to the adoption of a decision under Article 4(2), (3) or (4), and such a decision may, if appropriate, be the subject of an action for annulment. It was in that context that the Court of First Instance considered that the letter in which the Commission had, as part of its preliminary examination, called on the Italian Republic to abandon a proposal on the transition from the aid scheme then in force to the notified aid scheme constituted a measure preparatory to the final decision and could not therefore be the subject of an action for annulment.

76 However, in the context of the constant review of existing aid and where the Member State is fulfilling its commitments, the Commission no longer, after its decision under Article 26(1) of Regulation No 659/1999, has to adopt a further decision. The only measure then available to interested third parties — and, in this case, the applicant — is not, as in *Tramarin* v *Commission,* a measure preparatory to a final decision yet to be adopted but the decision referred to in the abovementioned provision of Regulation No 659/1999, a decision which has the binding legal effect mentioned in paragraph 73 above.

77 The reference to *Salt Union* v *Commission*, cited in paragraph 51 above, is likewise not capable of justifying the Commission's position. The case expressly envisaged by the Court in paragraph 35 of that judgment was one of refusal by a Member State to accept a proposal from the Commission for appropriate measures, a proposal which does not in fact, taken in isolation and as observed in paragraph 65 above, constitute a challengeable act. However, the situation in this case is different since it involves acceptance of appropriate measures by the Member State.

78 It follows from the foregoing considerations that neither the order in *Tramarin* v *Commission,* cited in paragraph 33 above, nor the judgment in *Salt Union* v *Commission*, cited in paragraph 51 above, supports the Commission's position.

79 Finally, as regards the question whether the binding legal effects produced by the contested decision are capable of affecting the applicant's interests, it must be observed that that decision, within a binding legal and temporal framework specific to the procedure of constant review of existing aid, endorsed commitments by the French Republic which might be regarded as inappropriate for ensuring compatibility of the licence fee regime with the common market. The contested decision thus allows the French Republic to continue to implement the aid scheme in question for two years.

80 Moreover, and above all, the contested decision allows that aid scheme to be maintained beyond that period of two years, subject to certain adjustments.

81 It follows from all the foregoing considerations that the contested decision produces binding legal effects capable of affecting the applicant's interests and therefore constitutes a measure which may be the subject of an action for annulment under the fourth paragraph of Article 230 EC.

The applicant's interest in bringing proceedings

Arguments of the parties

82 The Commission, supported by the interveners, does not in any way contest the applicant's standing as such, but contends that the applicant, as a competitor of an undertaking receiving aid which has voluntarily been brought into conformity with Community law, has obtained satisfaction and therefore has no interest in bringing proceedings for annulment of the contested decision. If the decision were annulled, the applicant's situation would be less satisfactory than it would be by virtue of the contested decision, which alters the aid scheme in a manner more conducive to the public interest.

83 The applicant contests the Commission's position

Findings of the Court

84 According to settled case-law, an action for annulment brought by a natural or legal person is not admissible unless the applicant has an interest in seeing the contested measure annulled. That interest must be vested and present and is evaluated as at the date on which the action is brought (Case T-141/03 *Sniace* v *Commission* [2005] ECR II-1197, paragraph 25, and Case T-136/05 *Salvat père & fils and Others* v *Commission* [2007] ECR II-4063, paragraph 34).

85 Such an interest presupposes that the annulment of the measure must of itself be capable of having legal consequences or, to use a different form of words, the action must be liable, if successful, to procure an advantage for the party who has brought it (see Case T-310/00 *MCI* v *Commission* [2004] ECR II-3253, paragraph 44 and the case-

law there cited). A decision which gives full satisfaction to the applicant is not, by definition, capable of adversely affecting it (see to that effect Case C-242/00 *Germany* v *Commission* [2002] ECR I-5603, paragraph 46, and Case T-138/89 *NBV and NVB* v *Commission* [1992] ECR II-2181, paragraph 32) and such an applicant has no interest in seeking its annulment.

86 Conversely, where the applicant claims that the measure in question, even though it may be partially favourable to him, none the less does not adequately protect his legal situation, it must be recognised that he has an interest in bringing proceedings to have the legality of that decision verified by the Community judicature. The assessment as to whether or not the contested measure is favourable goes to the substance and not the admissibility of the application (see, to that effect, the Opinion of Advocate General Tesauro in Case 55/88 *Katsoufros* v *Court of Justice* [1989] ECR 3579, 3585 to 3587).

87 In the contested decision, the Commission, to which the applicant had submitted a complaint concerning in particular the audiovisual licence fee rules, considered that certain commitments by the French Republic were capable of rendering the scheme compatible with the common market. The applicant, for its part, considers those commitments to be inappropriate for that purpose and challenges the contested decision precisely because it endorses those measures and, by so doing, allegedly infringes, to its detriment, the Treaty provisions on State aid.

88 It must be stated that the Commission's argument that the applicant has no interest in seeking annulment of the contested decision on the ground that it is a decision favourable to it is based on the premiss that the applicant's objections regarding the substance, that is to say, in particular, the manifestly unsuitable nature of those commitments, are incorrect.

89 The applicant had, as a television company competing with France 2 and France 3, a clear interest in referring to the Community judicature the question whether it was

lawful for the Commission to consider, in the contested decision, that the commitments given by the French Republic enabled the compatibility of the French licence fee rules with the common market to be ensured.

90 Moreover, and contrary to the Commission's contention, annulment of the contested decision, either because of a manifest error by that institution in determining appropriate measures to be implemented or because of an inadequate statement of reasons concerning the appropriateness of those measures to the problems identified, would not place the applicant in a less favourable situation than that resulting from the contested decision.

91 Annulment on either of those grounds would mean that the contested decision was either characterised, or liable to be characterised, by inadequate commitments and was therefore unfavourable to the applicant. Following that annulment, it would be incumbent on the Commission, in the light of the present conditions for the financing of France 2 and France 3, to assess, as part of its constant review of existing aid, whether it was appropriate to propose other appropriate measures for the future.

92 It follows that, contrary to the Commission's contention, the applicant does have an interest in bringing proceedings for annulment of the contested decision.

93 It follows from all the foregoing considerations that the action is admissible.

Substance

94 The present action comprises five pleas. The first plea alleges breach of the obligation to state reasons. The second alleges breach of the rights of the defence. The third alleges that the commitments given by the French Republic are inadequate. The fourth alleges abuse of procedure. The fifth alleges misinterpretation of the judgment of the Court of Justice of 24 July 2003 in Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747 ('the *Altmark* judgment').

95 It is appropriate to examine first the pleas alleging breach of the rights of the defence and abuse of procedure. Next, the plea alleging misinterpretation of the *Altmark* judgment, cited in Paragraph 94 above will be examined and then the two pleas alleging breach of the obligation to state reasons and the inadequacy of the commitments.

The second plea: breach of the rights of the defence

Arguments of the parties

96 The applicant, whilst recognising that administrative proceedings on State aid are brought only against Member States, claims that, during the review procedure provided for in Article 88(2) EC, the Commission must formally give notice to interested parties that they may submit their observations. The applicant expresses surprise at not having been able to discuss with the Commission the appropriateness and scope of the French Republic's commitments, since it was on the basis of them that the Commission approved the maintenance of a scheme constituting State aid contrary to Article 87 EC. Such discussion is particularly necessary since the dialogue between the applicant and the Commission, which would have led to the conclusion that the licence fee scheme was a State aid within the meaning of Article 87 EC, was suddenly interrupted at the stage of assessing the compatibility of that scheme with the common market.

97 The applicant considers that the role assigned to it in the procedure in this case is hardly compatible with the case-law according to which, even in the absence of a written provision, the Community is not entitled to affect a person's situation adversely if that person has not been given an opportunity to put forward his views. Having regard to the Commission's discretion when adopting a decision under Article 88(1) EC, it is particularly important for the right to be heard to be upheld. Interruption of the dialogue between the Commission and the applicant constitutes a breach of the latter's rights of defence.

98 The Commission, supported by the interveners, rejects the applicant's position.

Findings of the Court

99 It should be borne in mind that the procedure for reviewing State aid is, in view of its general scheme, a procedure initiated in respect of the Member State responsible, in the light of its Community obligations, for granting the aid (Case T-198/01 *Technische Glaswerke Ilmenau* v *Commission* [2004] ECR II-2717, paragraph 61, and Joined Cases T-111/01 and T-133/01 *Saxonia Edelmetalle* v *Commission* [2005] ECR II-1579, paragraph 47).

100 That consideration, developed in the case-law in the context of the Commission's examination of new aid, also applies to the constant review of existing aid.

101 It follows that, whilst there is nothing to prohibit a party from forwarding to the Commission information alleging the incompatibility of a State aid with the common market, whether it be a new aid or an existing aid, that entitlement does not confer on that party any right of defence. The Commission is under no obligation whatsoever to engage in discussions with that party.

102 It is true that, in the context of the formal investigation procedure provided for in the first subparagraph of Article 88(2) EC and Article 6 of Regulation No 659/1999, a procedure that may be initiated, with regard to the examination of new aid, by a decision taken under Article 4(4) of Regulation No 659/1999 and, in the case of the constant review of existing aid, by a decision taken under Article 19(2) of the same regulation, the Commission 'shall call upon … the … interested parties to submit comments' (second sentence of Article 6(1) of Regulation No 659/1999). However, it must be stated that, in this case, the contested decision was not adopted on completion of a formal investigation procedure of that kind, but was the outcome of a proposal for appropriate measures accepted by the Member State concerned, that is to say in the context of Article 19(1) of Regulation No 659/1999.

103 At that stage of the procedure for constant review of existing aid, the Commission was not required to invite the applicant to submit its comments to it. The applicant is therefore wrong to claim the benefit of rights of defence and to allege that the Commission acted in breach of them.

104 Accordingly, the present plea must be rejected.

The fourth plea: abuse of procedure

Arguments of the parties

105 According to the applicant, the Commission appears to pass on to the national authorities the task — even though it is a matter of exclusive Commission competence — of detecting the existence of State aid. The applicant does not see how the Commission could delegate its competence in that way and, therefore, endow

Article 87 EC with direct effect by means of a mere decision accepting the commitments, whereas a regulation would be required in order to give direct effect to Article 88(3) EC.

106 The Commission rejects the applicant's position

Findings of the Court

107 First, it must be stated that, contrary to what appears to be alleged in the present plea, the purpose of the contested decision is certainly not to pass on to the national authorities the task, allegedly attributable exclusively to the Commission, of detecting the existence of possible State aid, it being clear, moreover, that, as the Court of Justice has held, the national court is in any event competent to make a finding, where appropriate, as to the existence of State aid (see, to that effect, Case 78/76 *Steinike & Weinlig* [1977] ECR 595, paragraph 14).

108 Second, in so far as, by the present plea, the applicant complains of an alleged transfer by the Commission to the national authorities of its exclusive competence to assess the compatibility of a State aid with the common market, it must be pointed out that the contested decision plainly does not bring about any such transfer of competence.

109 On the contrary, it was in the exercise of its exclusive competence to assess the compatibility of State aid with the common market that the Commission, by the contested decision, obtained from the French Republic certain commitments designed to ensure the compatibility of the licence fee scheme with the common market. Moreover, the contested decision, as mentioned in paragraph 73 thereof, in no way detracts from the Commission's power, under Article 88(1) EC, to undertake the constant review of existing aid schemes and to propose appropriate measures required by the progressive development or by the functioning of the common market.

110 Accordingly, the present plea must be rejected.

The fifth plea: misinterpretation of the Altmark judgment

Arguments of the parties

111 The applicant considers that the Commission erred in law regarding the applicability of Article 86(2) EC to aid resulting from over-compensation for the cost of public service obligations.

112 In the *Altmark* judgment, cited in paragraph 94 above, the Court of Justice opted for the so-called 'compensatory' approach. The choice of that compensatory approach has been further confirmed in the subsequent case-law of both the Court of Justice and the Court of First Instance.

113 The applicant submits that, contrary to the Commission's contention, the Court of Justice does not, in the *Altmark* judgment, cited in paragraph 94 above, implicitly confirm that an aid which compensates, or rather over-compensates, for the costs incurred by an undertaking in providing a service of general economic interest ('SGEI') may be declared compatible with the common market if the conditions laid down by Article 86(2) EC are fulfilled.

114 It is not incumbent on the Court of Justice, in preliminary ruling proceedings, to answer, even implicitly, a question which has not been referred to it.

115 Moreover, the Court of Justice referred to its judgment in Case C-53/00 *Ferring* [2001] ECR I-9067 ('the *Ferring* judgment'). In that judgment, the Court expressly excluded the application of Article 86(2) EC, stating that an advantage exceeding the additional costs of tasks undertaken in the general interest 'cannot, in any event, be regarded as necessary to enable [those operators] to carry out the particular tasks assigned to them'.

116 Next, the application of Article 86(2) EC presupposes the fulfilment of conditions linked to the definition of, mandate for and monitoring of public service tasks and the proportionality of the financial compensation granted in return for that service. However, in the *Altmark* judgment, cited in paragraph 94 above, the Court treated those conditions as cumulative criteria for assessment not of the compatibility, but rather of the very existence, of the aid, on the basis of the first, second and third of the four conditions referred to in paragraph 95 and in the operative part of that judgment (together,'the *Altmark* conditions'). In other words, the examination of proportionality takes place, according to the Court of Justice, at the stage of classification of the aid, that is to say at an earlier stage than the one to which the Commission seeks to apply it.

117 Finally, as a matter of practice, the Commission has applied Article 86(2) EC to situations in which the second and fourth *Altmark* conditions were not fulfilled, with the implicit consequence that, where the first and third *Altmark* conditions are not fulfilled, the measure cannot be saved through investigation of it under Article 86(2) EC. In this case, in so far as the Commission itself found that the third *Altmark* condition was not fulfilled, it should necessarily have been prompted to conclude that aid within the meaning of Article 87(1) EC was indeed involved, without the need to raise any question of its possible compatibility.

118 The Commission therefore erred in law by seeking to establish whether a State measure granting compensation for public service costs could be justified under Article 86(2) EC, even though it had itself found that the measure in question did not fulfil the *Altmark* conditions for it to avoid being classified as State aid.

119 In its reply, the applicant denies calling in question the Commission's exclusive competence to decide as to the compatibility of an aid with the common market, as was moreover confirmed by the complaint which it lodged. It seeks rather to challenge the conditions under which the Commission undertook that examination.

120 The applicant notes that the Court of Justice, in the *Ferring* judgment, cited in paragraph 115 above, does not refer to Article 86(2) EC as justification for the course followed. Indeed, after laying down the principle that compensation fulfilling the condition of equivalence is not aid, the Court adds that 'if it is the case that the advantage for wholesale distributors in not being assessed to the tax on direct sales of medicines exceeds the additional costs that they bear in discharging the public service obligations imposed on them by national law, that advantage, to the extent that it exceeds the additional costs mentioned, cannot, in any event, be regarded as necessary to enable them to carry out the particular tasks assigned to them'. Consequently, according to the Court,'the answer must be that Article [86(2) EC] is to be interpreted as meaning that it does not cover a tax advantage enjoyed by undertakings entrusted with the operation of a public service such as those concerned in the main proceedings in so far as that advantage exceeds the additional costs of performing the public service'.

121 It is therefore clear, according to the applicant, that the Court of Justice excludes any application of the derogation laid down by Article 86(2) EC in cases of compensation exceeding the additional costs linked to performance of public service obligations, with the result that such aid should be assessed solely on the basis of Article 87 EC. In this case, examination of the compatibility of the aid with the common market continues to be a matter for the Commission but, since the Article 86(2) EC derogation cannot be applied, that examination can in practice lead only to a negative outcome.

122 Furthermore, the Court, in the *Altmark* judgment, cited in paragraph 94 above, does not undermine that analysis. The Court does not expressly exclude the application of Article 86(2) EC, but does not confirm it either.

123 The Commission, supported by the French Republic and by France Télévisions, rejects the applicant's arguments. It contends, essentially, that, by this plea, the applicant is confusing two issues which are in fact distinct and which the *Altmark* judgment helped to clarify. The first is whether a State aid exists, within the meaning of the Treaty, and the second is when such an aid can be declared compatible with the common market.

Findings of the Court

124 By the present plea, the applicant maintains, essentially, that the Commission erred in law by concluding that the audiovisual licence fee system was compatible with the common market, despite considering that certain *Altmark* conditions were not satisfied.

125 That argument cannot be upheld, deriving as it does from a misinterpretation of the *Altmark* judgment.

126 In the *Altmark* judgment, cited in paragraph 94 above, the Court of Justice pointed out that, according to settled case-law, classification as aid requires that all the conditions set out in Article 87(1) EC are fulfilled (paragraph 74 of the judgment) and that that provision lays down the following conditions. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer an advantage on the recipient. Fourth, it must distort or threaten to distort competition (paragraph 75 of the judgment).

127 As regards the condition concerning the existence of an advantage granted to the recipient, the Court of Justice observed that it is clear from the case-law, and in particular the *Ferring* judgment, cited in paragraph 115 above, that, where a State intervention must be regarded as compensation for the services provided by the

recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such intervention is not caught by Article 87(1) EC (*Altmark* judgment, cited in paragraph 94 above, paragraph 87).

128 However, the Court added that, for such compensation to escape classification as State aid, a number of conditions must be satisfied (*Altmark* judgment, cited in paragraph 94 above; paragraph 88):

— first, the recipient undertaking must actually have public service obligations to discharge and the obligations must be clearly defined (first *Altmark* condition);

— second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner (second *Altmark* condition);

— third, 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 (third *Altmark* condition);

— fourth, where the undertaking which is to discharge public service obligations 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 with means of transport so as to be

able to meet the public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations (fourth *Altmark* condition).

129 The Court concluded that State intervention which does not meet one or more of those conditions must be regarded as State aid within the meaning of Article 87(1) EC.

130 It is clear from the entirely unequivocal terms of the *Altmark* judgment, cited in paragraph 94 above, that the sole purpose of the four conditions mentioned above is the classification of the measure in question as State aid, and more specifically the determination of the existence of an advantage.

131 The Court of Justice thereby adopted and clarified the approach taken in the *Ferring* judgment, cited in paragraph 115 above, to which the applicant refers several times in its pleadings, in order to enable the Member States better to assess whether their intervention in favour of an entity entrusted with the performance of public service obligations constitutes State aid, giving rise to an obligation to notify the measure to the Commission in the case of a new aid or to cooperate with the Commission in the case of an existing aid.

132 It must be emphasised that the applicant's argument is also contradicted by paragraphs 104 and 105 of the *Altmark* judgment, cited in paragraph 94 above, in which the Court answers the second part of the question in which the national court asks in particular whether Article 73 EC may be applied to public subsidies that compensate for additional costs incurred in discharging public service obligations.

133 In the abovementioned paragraphs, the Court of Justice indicated that, in so far as the subsidies at issue in the main proceedings were to be regarded as compensation for the transport services provided in order to discharge public service obligations and as satisfying the four *Altmark* conditions, those subsidies would not come under Article 87 EC, so that there would be no need to rely on the exception to that provision under Article 73 EC. It follows, according to the Court of Justice, that the provisions of primary law concerning State aid, namely those of Article 73 EC, would be applicable to the subsidies at issue only in so far as all the abovementioned conditions were not fulfilled and the subsidies in question did not come under the provisions of Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ, English Special Edition 1969 (I), p. 276), as amended by Council Regulation (EEC) No 1893/91 of 20 June 1991 (OJ 1991 L 169, p. 1).

134 It is thus clear that the Court of Justice draws a distinction between the question of classifying a measure as State aid, allegedly resulting in this case from non-satisfaction of the four *Altmark* conditions, and that of its compatibility with the common market. The Court's reasoning, relating to the application of Article 73 EC, can be fully transposed to the present case, concerning the applicability of Article 86(2) EC.

135 The decisions of the Court of Justice and of the Court of First Instance which, since the *Altmark* judgment, cited in paragraph 94 above, refer to the conditions laid down in that judgment do not detract from the fact that those conditions relate to the classification of State aid within the meaning of Article 87(1) EC and they do not indicate that the Court of Justice wished, by enunciating those conditions, to cease applying Article 86(2) EC when assessing the compatibility with the common market of State measures for the financing of SGEIs (see, to that effect, Joined Cases C-34/01 to C-38/01 *Enirisorse* [2003] ECR I-14243, paragraphs 31 to 40; Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraphs 61 to 72; Case C-526/04 *Laboratoires Boiron* [2006] ECR I-7529, paragraphs 50 to 57; and Case C-206/06 *Essent Netwerk Noord and Others* [2008] ECR I-5497, paragraphs 79 to 88; Case T-157/01 *Danske Busvognmaend* v *Commission* [2004] ECR II-917, paragraphs 97 and 98; Case T-274/01 *Valmont* v *Commission* [2004] ECR II-3145, paragraphs 130 and 131; Case T-349/03 *Corsica Ferries France* v *Commission* [2005] ECR II-2197, paragraph 310; and Case T-289/03 *BUPA and Others* v *Commission* [2008] ECR II-81, paragraph 258).

136 In particular, in the judgment in *Servizi Ausiliari Dottori Commercialisti,* cited in the foregoing paragraph, the Court of Justice gave a preliminary ruling on a question from the national court as to whether the remuneration received by tax advice centres for preparing and forwarding tax returns, in accordance with national legislation, constituted State aid within the meaning of Article 87(1) EC.

137 In its judgment, the Court referred to the four *Altmark* conditions, emphasising that fulfilment of them allowed State intervention, regarded as compensation for the services provided by the recipients for discharging public service obligations, to escape classification as State aid.

138 After observing that examination of the last two conditions concerning the level of the remuneration in question called for an assessment of the facts of the main proceedings and indicating that it had no jurisdiction in that regard, the Court stated that it was therefore for the national court to assess, in the light of those facts, whether the remuneration in question constituted State aid within the meaning of Article 87(1) EC.

139 It must be emphasised that the Court of Justice took care to add, in that context, that the national court had no jurisdiction to determine the compatibility of State aid measures or of a State aid scheme with the common market, that assessment falling within the exclusive competence of the Commission, subject to review by the Community judicature (*Servizi Ausiliari Dottori Commercialisti,* cited in paragraph 135 above, paragraph 71).

140 That statement by the Court of Justice clearly shows that in the present plea the applicant is confusing the *Altmark* test, which seeks to determine the existence of State aid within the meaning of Article 87(1) EC, with the Article 86(2) EC test, which is used to determine whether a measure constituting State aid may be regarded as compatible with the common market.

141 In those circumstances, it must be held that, in the present case, the Commission has not erred in law.

142 In the contested decision, the Commission first considered whether the licence fee system constituted State aid. After finding that the condition for the existence of State aid regarding the use of State resources was fulfilled (paragraph 21 of the contested decision), the Commission examined the condition regarding the existence of a selective advantage (paragraphs 22 to 25 of the contested decision) and concluded, in that context, that the second and fourth *Altmark* conditions were not fulfilled (paragraphs 24 and 25 of the contested decision), without giving any views on the other *Altmark* conditions. Finally, the Commission found that the audiovisual licence fee scheme affected trade between Member States (paragraph 26 of the contested decision).

143 Consequently, the Commission concluded that the system constituted State aid (paragraph 27 of the contested decision).

144 The Commission then considered, as it had done on a preliminary basis in the decision of 27 September 1999 initiating the formal investigation procedure (see paragraph 10 above), whether the audiovisual licence fee system was in fact an existing State aid. After finding that the system had been introduced before the entry into force of the Treaty and had not undergone substantial changes (paragraphs 28 to 35 of the contested decision), the Commission concluded that it constituted an existing State aid, under Article 1(b)(i) of Regulation No 659/1999 (paragraph 36 of the contested decision).

145 Finally, the Commission quite properly examined the measure in question in the light of Article 86(2) EC, ultimately concluding that it should close the procedure having regard to the commitments given by the French authorities to amend the legislation so as to provide sufficient safeguards against possible over-compensation for costs incurred by the public service.

146 By so doing, the Commission did not, contrary to the applicant's contention, go against the terms of the *Altmark* judgment, cited in paragraph 94 above.

147 It follows from all the foregoing considerations that the applicant's fifth plea must be rejected as unfounded.

The first plea: breach of the obligation to state reasons

Arguments of the parties

148 The applicant claims that the contested decision gives no information to clarify the Commission's decision to make compatibility of the measure complained of conditional upon the commitments proposed by the French Republic. Contrary to the Commission's contention, the applicant is not confusing criticism of the statement of reasons with criticism of the merits of the contested decision but is merely claiming that the contested decision is, regarding the specific aspect of the commitments, not supported by an adequate statement of reasons. At most, the applicant then emphasises the fact that the defective statement of reasons is particularly regrettable since it is the culmination of a procedure commenced more than 10 years earlier. The applicant indicates that, without going into their merits, it is merely noting the scant nature of the explanations given in the contested decision, which, after 65 paragraphs devoted to the finding that the licence fee system does not provide sufficient guarantees to ensure its compatibility with the common market, accepts without further explanation, in seven paragraphs, the commitments given by the French Republic.

149 In view of the fact that the requirement to state reasons must be appraised, in particular, in relation to the interest of the addressees or other persons concerned in receiving explanations, it was wrong for the Commission to try to confine its assessment of the adequacy of the statement of reasons of the contested decision solely to the relations

between it and the French Republic. That amounts to negating the rights of third parties with a stake in the procedure for annulment of State aid decisions.

150 The inadequacy of the statement of reasons is particularly serious in the light of the interest expressed by the applicant in this case, as reflected by the numerous contacts and exchanges of correspondence.

151 A statement of reasons in which the Commission merely refers formally to the criteria for assessing the existence of State aid, going on to find, in paragraph 24 of the contested decision, that 'the second condition laid down in the *Altmark* judgment is not fulfilled' on the ground that 'the 1986 Law does not identify objective and transparent parameters on the basis of which compensation for public service costs is calculated', cannot be regarded as sufficient, since that defective statement of reasons affects the possibility of appraising the relevance of the commitments given by the French Republic.

152 For the same reasons, an analysis which goes no further than to find that the French legislation is not capable of preventing over-compensation of public service obligations or anticompetitive cross subsidies, without at the same time determining the amount thereof, likewise cannot be described as sufficient.

153 The fact that the Commission sent a letter proposing appropriate measures to the French Republic and followed the approach announced in the Communication from the Commission on the application of State aid rules to public service broadcasting (OJ 2001 C 320, p. 5) ('the Communication on Broadcasting') does not affect the applicant's analysis. The inadequacy of the statement of reasons for the contested decision cannot be mitigated by the statement of reasons contained in the 10 December 2003 letter, of which the applicant was not an addressee. Moreover, the applicant is not challenging the Commission's analysis culminating in its finding that the licence fee scheme constitutes a State aid which does not embody sufficient safeguards to ensure its compatibility with the common market. The applicant is nevertheless denied any

opportunity to assess the merits of the commitments accepted by the Commission, because the latter did not explain why it chose to accept them.

154 The Commission, supported by the interveners, contests the applicant's position.

Findings of the Court

155 It is settled case-law that the statement of reasons required by Article 253 EC must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure or other parties to whom it is of direct and individual concern may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, paragraph 19; Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraphs 15 and 16; Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 86; and Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63).

156 In the contested decision, the Commission, after first referring to the procedure giving rise to the decision (paragraphs 2 to 16 of the contested decision), second, describing the licence fee scheme and concluding that it was existing State aid (paragraphs 17 to 36 of the contested decision), third, finding that the condition for the application of Article 86(2) EC regarding the existence of an SGEI (paragraphs 41 to 50 of the contested decision) and the condition concerning mandate and control (paragraphs 51 to 55 of the contested decision) were fulfilled and, fourth, examining the condition of

the proportionality of the compensation in relation to the public service requirements (paragraph 56 et seq. of the contested decision), concluded, in the context of the latter examination, that 'the French legislation [did] not embody sufficient safeguards against possible over-compensation of costs incurred by the public service' (paragraph 60 of the contested decision).

157 In paragraphs 61 to 63 of the contested decision, the Commission explained why, in its view, the French legislation did not incorporate such safeguards.

158 In paragraph 64 of the contested decision, the Commission described the recommendation proposing the adoption of appropriate measures which it had, consequently, sent to the French Republic by the 10 December 2003 letter.

159 The Commission then referred to its contacts with the French authorities and described and examined the commitments given by those authorities in response to its recommendation proposing the adoption of appropriate measures. Finding that those commitments conformed with the recommendation, the Commission decided to bring the procedure examining the licence fee to an end (paragraphs 65 to 72 of the contested decision).

160 It must be stated, first, that the statement of reasons for the contested decision, as referred to above, clearly and comprehensively shows the reasoning on which the Commission based its decision to bring the procedure examining the licence fee to an end.

161 Moreover, where, in its application, the applicant claims that the contested decision gives it no information enabling it to understand the Commission's choice finally to make compatibility of the measure complained of conditional upon the commitments proposed by the French Republic, the applicant provides no precise evidence to support that assertion. Thus, although it several times mentions in its pleadings the existence of its complaint and its contacts with the Commission, the applicant does not give any

indication as to how, in the light of certain precise elements of that complaint, those contacts or indeed other information which might have been in the Commission's possession, the Commission was required to give more reasons for the contested decision than it actually gave.

162 The applicant merely refers in general terms to the fact that the procedure before the Commission lasted more than 10 years, that the Commission received an additional complaint and that it had numerous contacts with the applicant, that the Commission resorted to an external study, that it published the Communication on Broadcasting to which the contested decision merely referred, and, finally, that only 7 out of 72 paragraphs of the contested decision were devoted to the reasons for bringing the procedure to an end. In the light of those general observations, the applicant, in its own words,'confines itself … to pointing out the scant nature of the explanations given by the Commission' in relation to the specific aspect of the commitments.

163 It must be held that the applicant, in setting out those considerations, has provided no information of such a kind as to establish that the statement of reasons for the contested decision was inadequate with regard to that aspect.

164 As regards, next, the complaint concerning the statement of reasons in paragraph 24 of the contested decision regarding the second *Altmark* condition, it must be borne in mind that the Commission, in that paragraph, found that that condition was not fulfilled, which the applicant does not contest. The Commission explained that finding by the fact that 'the 1986 Law does not identify objective and transparent parameters on the basis of which compensation for the public service costs is calculated'. It must be concluded that that statement of reasons, given for the purpose of classifying the licence fee as a State aid, is sufficient.

165 In so far as the present complaint concerning the statement of reasons concerns the compatibility of the licence fee scheme with the common market, it must be rejected as irrelevant since, as has already been pointed out, the *Altmark* test and the statement of

reasons contained in paragraph 24 of the contested decision concern the classification of the measure as State aid and not the compatibility of that aid with the common market.

166 As regards, finally, the complaint alleging, in essence, that the Commission should have sought, in the contested decision, to determine the existence and the amount of the alleged over-compensation, a complaint which, in the light of the applicant's claim that the licence fee system led to over-compensation, constitutes less of a complaint regarding reasoning than a substantive complaint alleging breach of the obligation to undertake an investigation, it must be pointed out that, according to settled case-law, an examination of existing aids can only lead to measures which produce effects in the future (see, to that effect, Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta and Others* v *Commission* [2000] ECR II-2319, paragraphs 147 and 148; Case T-288/97 *Regione autonoma Friuli-Venezia Giulia* v *Commission* [2001] ECR II-1169, paragraph 91; and Joined Cases T-127/99, T-129/99 and T-148/99 *Diputación Foral de Álava* v *Commission* [2002] ECR II-1275, paragraph 172). Therefore, only if the Commission considers that the financing system in question presents a risk of over-compensation for the future may it be prompted to propose appropriate measures.

167 In those circumstances, whilst it is possible that, as part of the constant review of an existing aid, examining whether there has been any over-compensation in the past may possibly, depending on the particular circumstances of the case, be relevant to an assessment of the compatibility of that existing aid with the common market, the fact nevertheless remains that an examination of that kind is not, in itself, absolutely necessary for a proper assessment of the need to propose appropriate measures for the future and determination of what those measures should be. The risk or otherwise of over-compensation for the future ultimately depends essentially on the specific detailed arrangements of the financing scheme itself, and not on the fact that the scheme has, in practice, led to over-compensation in the past.

168 It is not apparent from the file and it has certainly not been established by the applicant that, in the circumstances of this case, the Commission should, for the purposes of examining the licence fee system under Article 88(1) EC, have, in addition to examining the specific characteristics of that system, compared all the sources of financing for the

public service with the costs of that service with a view to determining whether, in the past, the French Republic might have over-compensated those costs.

169 In that regard, it is common ground that the Commission had, moreover, already carried out, in the 10 December 2003 decision and following the applicant's complaint, an examination of that kind for the period from 1988 to 1994 and that it had concluded that there was no over-compensation of public service costs for that period.

170 Furthermore, the applicant does not anywhere claim that it lodged any complaint alleging over-compensation for the period after 1994.

171 At most, the applicant lodged, in March 1997, a supplement to its complaint of 10 March 1993. Regardless of the fact that that additional complaint could, in any event, be relevant only to the period before the date on which it was lodged, it must be pointed out that the applicant, beyond a brief reference of no particular importance to that document in the application, makes absolutely no other mention of or reference to it, even in general terms, in its submissions to the Court and does not therefore derive from it any particular argument supporting its complaint that the Commission should, in the contested decision, have considered whether there had been over-compensation in the past.

172 It follows that the applicant has plainly not established that, in the present circumstances, the Commission should, for the purposes of examining the licence fee as existing aid and possibly proposing appropriate measures, have examined whether that financing mechanism, together with the other sources of financing of France 2 and France 3, had led to over-compensation for public service costs during the period prior to the adoption of the contested decision. As the Commission observes, the applicant does not put forward in its application any evidence that the Commission failed in its obligation to undertake a diligent and impartial examination.

173 Moreover, and to the extent to which the applicant's complaint must be construed as criticising the Commission for not seeking, in the contested decision, to determine the amount of over-compensation which might occur in the future in the absence of a proposal for appropriate measures, it must be held that such an approach, quite apart from its purely speculative character, is not in any event necessary in order to establish the existence of a risk of over-compensation and in order to formulate a proposal for appropriate measures.

174 It follows from the foregoing considerations that the Court must reject the present plea as to inadequacy of the statement of reasons and also the substantive complaint, made in connection with that plea, to the effect, in essence, that the Commission infringed its obligation to undertake an examination in relation to the existence and the amount of over-compensation as regards the past or the future.

The third plea: the inadequacy of the French Republic's commitments

Arguments of the parties

175 According to the applicant, the French Republic's commitments are not conducive to guaranteeing compatibility of the French licence fee system with the Community State aid rules. The absence of any over-compensation for public service obligations, the carrying on of commercial activities by France Télévisions in accordance with market practices, the sale of advertising time at market price and the establishment of an independent authority to ensure compliance with those rules are all objectives which could already have been attained by other means or using other legal bases.

176 Those commitments are, according to the applicant, purely formal and, essentially, are no more than legislative housekeeping which does not lead to any notable improvement by comparison with the existing instruments, which have proved insufficient to avoid over-compensation and engagement in commercial activities under conditions which do not reflect those prevailing in the market. The express reference, in the French law, to principles of Community law that are in any event already applicable cannot have any greater effect than those principles themselves.

177 The applicant expresses surprise, in particular, that the Commission, after finding, in paragraph 24 of the contested decision, that there were no objective and transparent parameters on the basis of which the compensation for public service costs should be calculated, omitted to state what those parameters ought to be or, at least, to obtain specific commitments from the French Republic in that regard.

178 The Commission should, rather, have proposed the abolition of the licence fee, in that it over-compensated for the cost of public service obligations and constituted an anticompetitive subsidy.

179 That course of action was even more necessary since the French Republic's commitments were still far from being implemented for 2006, giving rise to a breach of that Member State's obligation of cooperation in good faith. In fact, for 2006, France Télévisions Publicité committed itself to setting one of its GRP (Gross Rating Point) costs at 25% of the applicant's GRP cost and that of the commercial broadcaster M6, which is hardly compatible with the French Republic's commitment to ensure, by introducing a legal provision to that effect, that France Télévisions respected the market conditions in its commercial activities.

180 The Commission, supported by the interveners, infers from the applicant's assertion that compliance with State aid rules is an objective that could already have been attained by recourse to other means or other legal bases, that the introduction of new safeguards

through relevant measures was indeed necessary and observes that the applicant's assertion does not in any way show that the French Republic's commitments did not go far enough.

181 According to the Commission, it is incorrect to state that the French Republic's commitments are not effective because they are allegedly not necessary.

182 In the Commission's view, the applicant is merely asserting, without producing even prima facie evidence, that those commitments are not capable of satisfying the requirements of Community law.

183 Those commitments do not merely amount to legislative housekeeping, but involve the inclusion in French law, in such a way as to render them binding in accordance with French legal rules, of provisions guaranteeing that the financing of French public service channels complies with the principles laid down in the Communication on Broadcasting.

184 As regards the argument that numerous Community acts are already applicable within the national legal order, the Commission observes that, if that reasoning were to be followed through, the procedures for reviewing existing aid and new aid by means of individual decisions would become irrelevant, horizontal rules being sufficient.

185 Contrary to the applicant's contention regarding the lack of objective and transparent parameters in the contested decision for checking that there is no over-compensation, the French authorities gave the necessary commitments. The Commission refers in that regard to paragraph 67 of the contested decision.

186 The argument concerning the tariff-setting practices of the public channels in 2006, raised in the applicant's reply, is new and therefore inadmissible. In any event, the alleged practices appear in all cases to fall within the scope of the procedure for examining existing aid in so far as the period of two years had not elapsed. Accordingly, they cannot be relied on to demonstrate the alleged ineffectiveness of the commitments. Above all, with regard to the substance, the applicant has not produced any evidence that the alleged practices involve price dumping.

Findings of the Court

187 According to Article 18 of Regulation No 659/1999, the Commission, if it comes to the conclusion that an existing aid scheme is not, or is no longer, compatible with the common market, is to 'issue a recommendation proposing appropriate measures to the Member State concerned'. According to the same provision, 'the recommendation may propose, in particular … substantive amendment of the aid scheme, or … introduction of procedural requirements, or … abolition of the aid scheme'. According to Article 19(1) of the same regulation, 'where the Member State concerned accepts the proposed measures and informs the Commission thereof, the Commission shall record that finding'.

188 It is clear from the wording of Article 18 of Regulation No 659/1999 that the Commission enjoys a broad discretion in exercising its power to adopt, under Article 26(1) of that regulation, a decision 'pursuant to … Article 18 in conjunction with Article 19(1)' of that regulation and, in that context, to determine the appropriate measures to respond to its conclusion that the existing aid scheme in question is not, or is no longer, compatible with the common market.

189 In those circumstances, it is not for the Court of First Instance to substitute its own assessment for that of the Commission: its review must be limited to checking that the institution has not committed a manifest error of assessment by considering that the commitments given were capable of resolving the competition problems raised by the

aid scheme in question (see, to that effect, Case T-149/95 *Ducros* v *Commission* [1997] ECR II-2031, paragraph 63; Case T-35/99 *Keller and Keller Meccanica* v *Commission* [2002] ECR II-261, paragraph 77; see also, by analogy, Case T-119/02 *Royal Philips Electronics* v *Commission* [2003] ECR II-1433, paragraph 78; Case T-158/00 *ARD* v *Commission* [2003] ECR II-3825, paragraph 329; and Case T-177/04 e*asyJet* v *Commission* [2006] ECR II-1931, paragraph 128).

190 By the present plea, the applicant asserts, in essence, that the commitments given by the French Republic in response to the Commission's proposals for appropriate measures, accepted by that institution, do not involve any notable improvement over existing instruments which have proved to be incapable of avoiding over-compensation.

191 It must be pointed out that, apart from the fact that the applicant's assertion that the licence fee system led to over-compensation is not in any way supported, that assertion is in any event entirely irrelevant.

192 For the purposes of the Court's review of the legality of the contested decision, the relevant question is not whether or not the licence fee system leads to over-compensation for the period prior to the adoption of that decision but only whether, in the particular circumstances of this case, the Commission should, in examining the system of financing and the proposal for appropriate measures, have investigated whether such over-compensation existed.

193 As has already been held (see paragraphs 172 and 173 above), the Commission did not infringe its obligation to investigate by omitting, in the circumstances of this case, to examine that matter in the contested decision.

194 In so far as the applicant relies, in its submissions (see paragraph 179 above) and also in its letter of 9 October 2008, on developments subsequent to the contested decision, these submissions must be rejected. According to settled case-law, the legality of a Community measure must be assessed on the basis of the elements of fact and of law existing at the time when the measure was adopted (Joined Cases 15/76 and 16/76 *France* v *Commission* [1979] ECR 321, paragraph 7; Joined Cases T-177/94 and T-377/94 *Altmann and Others* v *Commission* [1996] ECR II-2041, paragraph 119; and Case T-322/01 *Roquette Frères* v *Commission* [2006] ECR II-3137, paragraph 325). Consequently, elements post-dating the adoption of the measure cannot be taken into account in assessing its legality (*Roquette Frères* v *Commission,* paragraph 325; see also, to that effect, Case T-229/94 *Deutsche Bahn* v *Commission* [1997] ECR II-1689, paragraph 102, and Case T-165/04 *Vounakis* v *Commission* [2006] ECR I-A-2-155 and II-A-2-735, paragraph 114).

195 Moreover, with regard more particularly to the documents produced by the applicant with its letter of 9 October 2008 and submitted by it as raising new points of law, it must be noted that, at the hearing, the applicant did not, on the basis of those documents, establish the existence of facts pre-dating the contested decision which were known to the Commission but unknown to the applicant and which would have been disclosed by those documents. Moreover, as regards, more particularly, the judgment in *SIC* v *Commission,* cited in paragraph 22 above, the applicant did not establish — and it does not appear to be the case — that that judgment clarified or specified the meaning of a Community law provision as it should have been construed since its entry into force, with the result that the contested decision would be seen, in the light of that provision and of its clarified meaning, to be unlawful.

196 It follows from the foregoing considerations that, contrary to the applicant's contention, the question that arises is not whether the proposed measures constituted a notable improvement over existing instruments which allegedly proved incapable of avoiding over-compensation but whether those measures and the commitments given by the French Republic were an adequate response to the problems identified by the Commission in its examination of the compatibility of the licence fee with the common market, it being borne in mind that, in the absence of any indication that the Commission failed in its obligation to undertake a diligent and impartial examination (see paragraph 172 above), the quality of the Commission's identification of the problems is not in issue.

197 For that examination, it is necessary to go back to the terms of the contested decision.

198 In paragraph 56 of the contested decision, the Commission commences its examination of proportionality by stating that it 'must make certain that the [financing] mechanism incorporates guarantees against possible over-compensation for the costs incurred by the public service'.

199 In paragraph 60 of the contested decision, the Commission announces that it 'considers that the French legislation does not embody sufficient safeguards against possible over-compensation', and then, in paragraphs 61 to 63 of the decision, it gives details of its concerns.

200 Essentially, the Commission criticises the French legislation, first, because it 'does not contain any provision explicitly providing that the State compensation for the cost of public service activities of a channel entrusted with public service tasks must not exceed what is necessary to cover that cost, taking account of the net profit of the commercial activities of that channel' (paragraph 61 of the contested decision), second, that it 'does not ever explicitly indicate that [those] commercial activities … must be carried on in accordance with market practices' (paragraph 62 of the contested decision), third, that it does not 'explicitly provide that all commercial exploitation of a television programme falling within the scope of public service tasks and the sale of advertising time by a television channel entrusted with public service tasks must be carried out at market prices' (paragraph 63 of the contested decision).

201 It follows from the foregoing that the difficulties identified by the Commission, prompting its view that the French legislation did not display sufficient safeguards and therefore giving rise to its proposal for appropriate measures, relate to the fact that that legislation did not explicitly include, in its enacting terms, certain requirements laid down in Community law.

202 It must be held that the proposals for appropriate measures set out by the Commission following the contested decision fully meet those concerns.

203 Thus, where, in paragraph 64 of the contested decision, the Commission indicated that the French authorities should adopt the measures necessary to ensure the observance of certain principles, the Commission described those principles, of which there are three, in terms which exactly meet the three concerns expressed by it in paragraphs 61 to 63 of the contested decision.

204 Moreover, in addition to that call for observance of certain principles and the adoption of the measures necessary to do so, the Commission indicated, in its proposal for appropriate measures, that an independent authority should periodically monitor compliance by the public service channels with their obligation to carry on their commercial activities in accordance with market practices and, in particular, not to engage in price dumping when selling advertising time (paragraph 64, second and third indents, final part, of the contested decision).

205 As regards the commitments proposed by the French authorities and described by the Commission in paragraphs 67, 69 and 71 of the contested decision, they are designed to meet the Commission's concerns and the proposals for appropriate measures.

206 The first commitment is designed to meet the concern (see paragraph 61 of the contested decision) and the proposal (see paragraph 64, first indent, of the contested decision) relating to over-compensation for the net costs of the public service. Thus, the French authorities 'undertook to ensure that, when drafting the Finance Law, the amount of financial resources that it is proposed … to grant to the France Télévisions Group covers only the cost of performing its public service obligations' (paragraph 67 of the contested decision). The French authorities 'also indicated that "any profits which may be identified at the end of the financial year are to be … fully reinvested in [the] activities [of the public channels], and more specifically for the purposes of renewal or modernisation of their production facilities"' and that any such profit would be taken into account in drawing up the budget for the following year (paragraph 67 of the

contested decision). In the same paragraph, the French authorities gave a commitment to include in the French rules the principle that there should be no over-compensation of public service costs.

207 The second commitment is designed to meet the concerns (see paragraphs 62 and 63 of the contested decision) and the proposals (see paragraph 64, second and third indents, of the contested decision) relating to the business conduct of the public channels and is intended, to that end, to amend the wording of the French legislation (paragraph 69 of the contested decision).

208 The French Republic also, in response to the proposal from the Commission for appropriate measures regarding periodical monitoring, gave a commitment to arrange for an annual verification by an independent auditing body whose report would be forwarded to the Parliament, of compliance by the public channels with their obligation to carry on their commercial activities under market conditions (see paragraph 69, last sentence, of the contested decision).

209 In the light of the foregoing, there is thus a perfect match between the Commission's concerns expressed in paragraphs 61 to 63 of the contested decision and its proposals for appropriate measures, and also between those proposals and the commitments given by the French Republic.

210 As regards the applicant's complaint relating to paragraph 24 of the contested decision, raised for the first time at the stage of the applicant's reply, although not based on matters of fact or law which came to light during the procedure or constituting a development of any plea set out in the application, it must be rejected as inadmissible pursuant to Article 48(2) of the Rules of Procedure. In any event, that complaint is unfounded, in so far as it relies on a paragraph of the contested decision which relates solely to the classification of the licence fee scheme as State aid.

211 Therefore, the Commission did not commit any manifest error of assessment, either when formulating its proposals for appropriate measures or when accepting the French Republic's commitments.

212 In those circumstances, the present plea must be rejected.

213 Since the applicant has failed in all its pleas, the action must be dismissed as unfounded.

Costs

214 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, it must be ordered to pay the Commission's costs and those of France Télévisions, in accordance with the forms of order sought by the latter.

215 Under the first subparagraph of Article 87(4) of the Rules of Procedure, Member States intervening in proceedings are to bear their own costs. The French Republic should therefore be ordered to pay its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Télévision française 1 SA (TF1) to bear its own costs and to pay those incurred by the Commission and by France Télévisions SA;**

3. **Orders the French Republic to bear its own costs.**

Vilaras Prek Ciucă

Delivered in open court in Luxembourg on 11 March 2009.

[Signatures]

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