JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

13 September 2010 *

In Case T-193/06,

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

applicant,

v

European Commission, represented by C. Giolito, T. Scharf and B. Stromsky, acting as Agents,

defendant,

* Language of the case: French.

supported by

French Republic, represented by G. de Bergues and L. Butel, acting as Agents,

intervener,

APPLICATION for annulment of Commission Decision C(2006) 832 Final of 22 March 2006 relating to support measures for the cinema and audiovisual industry in France (State aid NN 84/2004 and N 95/2004 — France, Aid schemes for the film and audiovisual industry),

THE GENERAL COURT (Fifth Chamber),

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

Registrar: T. Weiler, Administrator,

having regard to the written procedure and further to the hearing on 22 April 2010,

gives the following

Judgment

Legal context

1 Article 87(1) EC provides that '[s]ave 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'.

2 Article 87(3)(d) EC provides that aid to promote culture and heritage conservation, where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest, may be considered to be compatible with the common market.

3 The Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on certain legal aspects relating to cinematographic and other audiovisual works (OJ 2002 C 43, p. 6) defines the specific criteria on the basis of which the Commission is to assess

State aid for cinematographic and audiovisual production, in the context of the derogation provided for in Article 87(3)(d) EC. The Commission also points out in that communication that, when it assesses schemes of aid to cinematographic and audiovisual production, it must verify that they respect the 'general legality principle', that is to say, it must verify that they do not contain clauses that would be contrary to provisions of the EC Treaty in fields other than State aid (including fiscal provisions). In 2004 the Commission extended the validity of those specific compatibility criteria for aid to cinematographic and audiovisual production until 30 June 2007 (OJ 2004 C 123, p. 1).

4 French Law No 86-1067 of 30 September 1986 on freedom of communication (*JORF* of 1 October 1986, p. 11755), as amended in particular by Law No 2000-719 of 1 August 2000 (*JORF* of 2 August 2000, p. 11903), sets out the rules applicable to audiovisual communication services.

5 The French legislation features measures to promote cinematographic and audiovisual production. These include, first, support mechanisms for producers, implemented by the Centre national de la cinématographie (National cinematographic centre) ('the CNC'). Those mechanisms are financed by, inter alia, a tax on the turnover of television service providers ('the Tax'). They include, secondly, obligations imposed on television service providers to invest in cinematographic and audiovisual production.

6 The structures for CNC support for cinematographic and audiovisual production are governed by:

— with regard to the cinematographic field, Decree No 99-130 of 24 February 1999 concerning financial support for the cinematographic industry (*JORF* of 25 February 1999, p. 2902), as amended,

— with regard to the audiovisual field, Decree No 95-110 of 2 February 1995 concerning State financial support for the audiovisual programme industry (*JORF* of 3 February 1995, p. 1875), supplemented by Decree No 98-35 of 14 January 1998 concerning State financial support for the audiovisual industry (*JORF* of 17 January 1998, p. 742), as amended.

7 The Tax is governed by Article 302a KB of the General Tax Code, inserted by Article 28.A of Tax Amendment Law for 1997 No 97-1239 of 29 December 1997 (*JORF* of 30 December 1997, p. 19101), and amended by Tax Law for 2006 No 2005-1719 of 30 December 2005 (*JORF* of 31 December 2005, p. 20597) and by Tax Amendment Law for 2005 No 2005-1720 of 30 December 2005 (*JORF* of 31 December 2005, p. 20654).

8 The scheme of investment obligations is governed by:

— Decree No 2001-609 of 9 July 2001, applying point 3 of Article 27 and Article 71 of Law No 86-1067 and concerning the contribution of television services broadcast in unencoded form via a land radio relay channel in analogue mode to the development of the production of cinematographic and audiovisual works (*JORF* of 11 July 2001, p. 11073), as amended,

— Decree No 2001-1332 of 28 December 2001, applying Articles 27, 28 and 71 of Law No 86-1067 and concerning the contribution of television services broadcast via a land radio relay channel in analogue mode, the financing of which calls for a remuneration on the part of the users for the development of the production of cinematographic and audiovisual works (*JORF* of 29 December 2001, p. 21310), as amended,

— Decree No 2001-1333 of 28 December 2001, applying Articles 27, 70 and 71 of Law No 86-1067 and fixing the general principles concerning the broadcast of services other than radio services via a land radio relay channel in digital mode (*JORF* of 29 December 2001, p. 21315), as amended,

— Decree No 2002-140 of 4 February 2002, applying Articles 33, 33-1, 33-2 and 71 of Law No 86-1067 and fixing the scheme applicable to different categories of radio and television services broadcast by cable or by satellite (*JORF* of 6 February 2002, p. 2412), as amended.

9 Those investment obligations must, for at least two thirds of those in the audiovisual field and for at least three quarters of those in the cinematographic field, be earmarked for independent production, the concept of independent production meaning, as was confirmed at the hearing, the independence of the producer of the work in relation to the television service providers which finance that work, and it is defined according to relative criteria, in particular, the reciprocal holding of share capital or voting rights by the producer and the television service provider concerned and that service provider's share in that producer's recent work.

10 The CNC support measures for audiovisual production must also benefit independent production undertakings, the concept of independent producer being defined in the same terms as in the area of the investment obligations.

Background to the case

11 On 15 July 1992, by Decision N 7/92 relating to aid (OJ 1992 C 203, p. 14), the Commission of the European Communities approved, for an unlimited period, certain provisions of the French scheme of support for cinematographic and audiovisual production.

12 By Decision N 3/98 of 3 June 1998 relating to aid, as amended on 29 July 2008, (OJ 1998 C 279, p. 4), the Commission approved, for two years, certain modifications made to the scheme of automatic support for cinematographic production. On 7 August 1998, the validity of that approval was extended to 3 June 2004.

13 By letter of 3 October 2001, the applicant, Télévision française 1 SA (TF1), submitted two complaints to the Commission concerning certain operational features of the French system of support for cinema and television.

14 By letter of 16 February 2004, the French authorities notified the selective aid scheme for cinematographic works of interest to overseas departments (N 95/2004). The Commission requested additional information from the French authorities, which acceded to that request. The latter also sent the Commission a notice of implementation of the scheme, which they subsequently withdrew in January 2005.

15 By letters of 13 and 27 April 2004, the CNC sent to the Commission information relating to the applicant's complaints.

16 By letter of 24 May 2004, the French authorities notified all of the aid schemes for cinema and television to the Commission, requesting it to extend temporarily the validity of the schemes covered by the aid decisions N 7/92 and N 3/98, which the Commission refused to do. By letter of 27 July 2004, the Commission requested the French authorities to supplement their notification, which they did by means of several letters in 2004 and 2005. On 14 December 2004, all of the notified aid schemes were registered under the reference NN 84/2004.

17 By letter of 22 December 2004, the Commission informed the French authorities that, as the notified support schemes had already been implemented, it considered them to be unlawful for the purposes of Article 88(3) EC.

18 By letter of 10 January 2006, the applicant submitted a supplement to its complaints of 3 October 2001.

19 By Decision C(2006) 832 final of 22 March 2006 relating to support measures for the cinema and audiovisual industry in France (aid cases NN 84/2004 and N 95/2004 — France, Aid schemes for the cinema and audiovisual industry) ('the Decision'), the Commission decided not to raise any objections to the measures at issue on the conclusion of the preliminary investigation procedure laid down under Article 88(3) EC.

20 On 14 December 2006, a summary of the Decision was published in the *Official Journal of the European Union* (OJ 2006 C 305, p. 12), including a link to the Commission internet site giving access to the full text of that decision.

The Decision

21 It is apparent from the Decision that it related to the support scheme for cinematographic and audiovisual production, in particular to the financial support measures granted through the CNC and the mechanism of investment obligations.

22 With regard, in the first place, to the support measures for cinematographic and audiovisual production granted through the CNC, the Commission describes the latter as a public administration body with legal personality and financial independence, and which is under the authority of the French Ministry of Culture and Communication (point II, paragraph 20, of the Decision). The budget managed by the CNC is divided into two sections: the 'audiovisual industries' section (including the support account for the audiovisual programme industry (COSIP)) and the 'cinematographic industries' section (point II, paragraph 21, of the Decision). The Commission states next that the budget of the CNC is financed by parafiscal charges, including the Tax (point II, paragraph 22, of the Decision). The Commission notes that, according to Article 302a KB of the French General Tax Code, the Tax is payable by operators, established in France, of television services received in metropolitan France and in the overseas departments which programmed, during the course of the previous year, one or more audiovisual or cinematographic works eligible to receive support measures from the CNC and that it is based essentially on the turnover of those television service providers (point II, paragraphs 23 and 24, of the Decision).

23 With regard to the support measures of the CNC for cinematographic and audiovisual production which are being challenged in the present action, the Commission describes in the Decision the measures of 'support for feature-length film production' (point II, paragraphs 29 to 95), 'support for the promotion of cinematographic works

abroad' (point II, paragraphs 121 to 126), 'support for short cinematographic works' (point II, paragraphs 127 to 149) and 'support for audiovisual production' (point II, paragraphs 186 to 219), and their method of financing (point II, paragraphs 19 to 24).

24 After analysing those measures in the Decision, the Commission concludes that a number of them constitute State aid, within the meaning of Article 87(1) EC, and are compatible with the common market under Article 87(3)(d) EC, until the end of 2011, while other measures were not classified as State aid, within the meaning of Article 87(1) EC, pursuant to Commission Regulation (EC) No 69/2001 of 12 January 2001 on the application of Articles 87 [EC] and 88 [EC] to *de minimis* aid (OJ 2001 L 10, p. 30) (point III, paragraphs 38 to 124, of the Decision for 'support for cinema — support for feature-length film production'; point III, paragraphs 158 to 193, of the Decision for 'support for the promotion of cinematographic works abroad'; point III, paragraphs 194 to 223, of the Decision for 'support for short cinematographic works'; point III, paragraphs 257 to 331, of the Decision for 'support for audiovisual production'). With regard to the measures declared to be compatible with the common market pursuant to Article 87(3)(d) EC, the Commission reached that conclusion either by applying the criteria established in the communication of 2001 referred to in paragraph 3 of the present judgment, or by applying those criteria by analogy or as a relevant reference. Consequently, the Commission decided not to raise any objections to them.

25 With regard, in the second place, to the investment obligations (point II, paragraphs 246 to 255, of the Decision), the Commission states that these are imposed, with certain differences in their detailed rules, on providers of television services broadcast in unencoded form via a land radio relay channel in analogue or digital mode, by cable or satellite, on pay television services broadcast via a land radio relay channel in analogue mode and on so-called 'pay-per-view' services broadcast via a land radio relay channel in digital mode.

26 The Commission points out that the amount of the investment obligations is determined by applying a percentage to the turnover of the television service providers concerned for the previous year (point II, paragraph 250, of the Decision). That amount varies according to the manner in which the television services are broadcast and the characteristics of the service provider (point II, paragraphs 251 to 254, of the Decision). In general terms, the Commission maintains that the percentage of turnover which must be invested in cinematographic production is higher if the television service programming is centred around the cinema and that it is lower if that programming is not centred principally around the cinema (point II, paragraph 251, of the Decision).

27 The Commission takes the view that those investment obligations do not involve State resources and do not therefore constitute State aid within the meaning of Article 87 EC (point III, paragraphs 390 to 398, of the Decision).

28 In point IV of the Decision, the Commission 'regrets that France has implemented the majority of the measures examined in this decision, contrary to Article 88(3) [EC]'. The Commission states next that the State aid measures, challenged in the present action, which were notified to it and form the subject-matter of the Decision, are compatible with the common market, until the end of 2011, on the basis of Article 87(3)(d) EC. Finally, the following is also stated in that point:

'The Commission emphasises the fact that that period is granted in consideration of the commitment made by the French authorities "to carry out any amendments which may be necessary in order to comply with changes in the State aid rules for the cinema and audiovisual industry after 30 June 2007". The Commission points out to the French authorities that they must submit an annual report on the implementation of the notified measures. That report must provide sufficient details to allow the Commission to verify whether those measures distort competition to an extent contrary to the common interest.'

Procedure and forms of order sought by the parties

29 By application lodged at the Registry of the Court on 12 July 2006, the applicant brought the present action.

30 By document lodged at the Registry of the Court on 4 October 2006, the French Republic applied for leave to intervene in the present proceedings in support of the Commission. By order of 14 November 2006, the President of the First Chamber of the Court granted that leave to intervene. The intervener lodged its statement in intervention and the other parties lodged their observations on that statement within the prescribed period.

31 Owing to a change in the composition of the Chambers of the Court, the Judge-Rapporteur was assigned to the Fifth Chamber, to which, in consequence, the present case was assigned.

32 Upon hearing the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure. The parties presented oral argument and replied to the questions put by the Court at the hearing on 22 April 2010.

33 The applicant claims that the Court should:

— declare the action admissible;

— annul the Decision;

— make an appropriate order as to costs.

34 The Commission contends that the Court should:

— dismiss the action as inadmissible;

— in the alternative, dismiss the action as manifestly devoid of any legal basis;

— order the applicant to pay the costs.

35 The French Republic contends that the Court should:

— dismiss the action as inadmissible;

— in the alternative, dismiss the action as unfounded;

— order the applicant to pay the costs.

Law

36 Without formally raising an objection of inadmissibility within the meaning of Article 114 of the Rules of Procedure of the Court, the Commission disputes the admissibility of the action, alleging that the applicant lacks standing to bring proceedings.

Arguments of the parties

37 The Commission disputes the admissibility of the action, contending that the applicant is not individually concerned by the Decision. First, since the applicant calls into question the soundness of the Decision, it should establish, according to the case-law, its particular status, by showing that its position on the market is substantially affected, and not merely its position as a competitor in relation to a company which is a beneficiary of the aid.

38 The applicant, it argues, ought to have carried out a market analysis to establish in which specific product or geographical markets it would be competing with the beneficiaries of the aid (Advocate General Jacob's Opinion in Case C-78/03 P *Commission* v *Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737, at I-10741, points 117 and 118). Thus, it ought to have shown that it cannot benefit from any of the aid measures referred to in the Decision and that that disadvantage substantially affects its competitive position.

39 In its rejoinder, the Commission notes that the applicant does not seek to establish its direct and individual interest in bringing proceedings with regard to the production support measures of the CNC. From this the Commission infers that the applicant implicitly acknowledges that its action is admissible only in so far as it relates to the investment obligations. That is easily explained by the fact that the applicant can

benefit from the production support measures of the CNC. For cinematographic production, the applicant benefits in particular from automatic support for production and distribution and from aid for videographic editing services. For audiovisual production, the applicant benefits directly from the support of the COSIP, by means of its production subsidiaries, and it benefits indirectly therefrom for the programmes in respect of which the channel provides advance financing via appointed producers. In the view of the Commission, according to settled case-law, an action for annulment is admissible only in so far as the applicant has an interest, vested and present, in the annulment of the contested measure. However, such is not so in the present case in so far as, on the assumption that the Court will grant the applicant's application and annul the Decision, to the extent to which it relates to the support measures declared compatible, the applicant would be prevented from benefiting from the aid at issue and would find itself in a less favourable situation than that resulting from the Decision.

40 Secondly, with regard to the investment obligations, if the Commission made a mistake by finding that there were no State resources, the applicant should also have shown that its competitive position was significantly affected by reason of the fact that it would not benefit, even potentially, from the measures referred to.

41 First, the Commission notes that the investment obligations require, with differences in their detailed rules, that television service providers should spend annually certain amounts on the financing of cinematographic and audiovisual production. Since those obligations are imposed on all television service providers, the action brought by the applicant is not, therefore, admissible in so far as it refers to the classification of that measure as not being aid. In that regard, the reference by the applicant to the legal situation in force when it lodged its complaints in 2001 is not relevant for the examination of the admissibility of the action, since the lawfulness of a measure is assessed, according to settled case-law, on the basis of the elements of fact and

law existing at the time when it was adopted. Furthermore, with regard to the difference in treatment alleged by the applicant, based on the fact that only certain providers of television services broadcast via a land radio relay channel in digital mode are concerned by the investment obligations, which would imply discrimination and implicitly that its competitive position is affected, the Commission contends that that difference is justified by objective circumstances relating to turnover. Moreover, the television service providers which benefit from different treatment are those which broadcast no, or which broadcast few, audiovisual works and which are therefore not in competition with television service providers such as the applicant, a large part of the programmes of which consist of audiovisual works.

42 Secondly, in reply to the applicant, the Commission and the French Republic point out that the French authorities chose, in compliance with Article 3(1) of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23), as amended, to adopt stricter provisions than those of that directive and to calculate the amount of the investment obligations on the basis of the turnover of the television service provider. In any event, in accordance with the French rules, all French television service providers are subject to the investment obligations to the same extent. Therefore, according to the Commission, the fact that the applicant's expenses in that regard exceed those of its competitors, as a result of its position on the French television broadcasting market and the level of its turnover, does not suffice to single it out, a fact which the applicant appears to acknowledge in its reply. Since the applicant acknowledges that the measure would adversely affect a wide group of operators, the Commission contends that, if there are numerous other operators in the same situation as the applicant, that shows that the applicant is not in a special situation, contrary to the requirements of the judgment of the Court of Justice in Case 25/62 *Plaumann* v *Commission* [1963] ECR p. 95.

43 Thirdly, the Commission and the French Republic dispute the applicant's claim that the support measures of the CNC and the investment obligations benefit large communications groups, instead of favouring independent production. Under the French rules, all television service providers must earmark two-thirds of their investment obligations for independent audiovisual production, in accordance with the same criteria. In practice, the majority of those investments, in the form of purchases and advance purchases, are made with producers independent of any audiovisual communications group. In any event, even on the assumption that the French scheme favours those communications groups, the applicant would be disadvantaged in the same way as other television service providers subject to the same obligations. The effects of the French scheme on the applicant are connected solely with its competitive position, to the extent to which, since it is the television service provider with the largest turnover, it finances, via the obligations to invest in independent production, other producers of audiovisual works to a greater extent than its competitors, but always on the basis of an objective element, namely turnover.

44 In the third place, with regard to the right to judicial protection, the Commission notes that it is required to proceed on the basis of positive law and the consolidated case-law, as results in particular from the judgment in Case T-210/02 *British Aggregates* v *Commission* [2006] ECR II-2789 (see, also, Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 40). Thus, in theory, the applicant could refuse to comply with the binding scheme of investment obligations and claim before the national court that that scheme is incompatible with Community law, the onus being on the national court, if necessary, to refer the question of the validity of the Decision to the Court of Justice for a preliminary ruling.

45 The French Republic shares the Commission's finding that the action brought by the applicant is inadmissible inasmuch as the latter is not individually concerned by the Decision.

46 In the first place, like the Commission, the French Republic contends that, in accordance with settled case-law, since the applicant disputes the soundness of the Decision, its action will be admissible only if it shows that its competitive position is substantially affected by the measure at issue. The French Republic also contends, with regard to the applicant's reference to the Opinion of Advocate General Jacobs in *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, cited in paragraph 38 above, that it need only be borne in mind that the Court of Justice confirmed, in that judgment, the requirement that the applicant's competitive position must be significantly affected. In that regard, like the Commission, the French Republic submits that the applicant may not invoke merely the status of a party concerned within the meaning of Article 88(2) EC and the existence of a competitive relationship, but must show the magnitude of the prejudice to its market position. Finally, in contrast to the applicant's claims, the Commission adopted the Decision in response to the notification by the French authorities, on 24 May 2004, of all of the aid schemes for the cinema and audiovisual industry, and not as a result of the applicant's complaint of 3 October 2001.

47 In the second place, it is claimed, the applicant has not shown that its competitive position was significantly affected by the Decision. First, in reply to the applicant, the French Republic states, as does the Commission, that the French authorities chose to calculate the amount of the investment obligations on the basis of the turnover of the television service provider and that the fact that the applicant's expenses exceeded those of its competitors, as a result of its position on the French television broadcasting market and the level of its turnover, cannot suffice to single it out, a fact which the applicant appears to acknowledge in its reply (see paragraph 42 above).

48 Secondly, concerning the applicant's assertion that the measures of support of the CNC and the investment obligations benefit large communications groups, instead of favouring independent production, the French Republic adds that, with regard to one third of its investment obligations, the applicant remains free, like the other television

service providers, to invest in the producer of its choice, in particular in its own subsidiaries. By way of example, the French Republic cites figures for 2005 concerning the applicant's investments in audiovisual and cinematographic productions.

49 Thirdly, in the context of its investment obligations in respect of independent production, the applicant can hold exclusive rights over a relatively long period, of 42 months, and not 18 months as it claims. Outside of those obligations, the television service providers retain economic control over the works which they finance, having a broad scope for manœuvre both at the production stage, through the choice of the forms of financial assistance, and at the stage of exploitation, with regard to the duration of the rights, repurchase and exploitation via multiple media.

50 In the third place, it is argued, the applicant is unable, in any event, to show that its competitive position is significantly affected. First, with regard to the obligations to invest in audiovisual and cinematographic production, the applicant is subject to these in the same way as all French television service providers, on the basis of its turnover. Secondly, the French Republic, like the Commission, questions the applicant's interest, since it benefits from measures of support for the cinema and audiovisual industry, in securing the annulment of the Decision declaring those measures compatible (see paragraph 39 above).

51 The applicant claims that it is directly and individually concerned by the Decision. With regard to its direct interest in bringing an action against the Decision, it claims that any undertaking competing with the beneficiary of aid has an interest in securing

annulment of the Commission decision declaring that aid to be compatible with the common market, since such an annulment will lead to the examination of the compatibility of the aid being reopened. Furthermore, the aid at issue has already been granted, with the result that the Decision allows aid to be maintained which the applicant has sought to have revoked since 2001. The applicant notes, in the reply, that that direct interest is not disputed by the Commission.

52 Furthermore, according to the case-law, the applicant's individual interest is established where its market position is affected by the aid measures covered by the Decision. First, the applicant considers that the two conditions set by the Commission, in its statement in defence, go beyond those established by the case-law. First of all, with regard to the condition relating to the fact that it must not have benefited from the aid measures referred to in the Decision, the applicant claims that it has standing to bring proceedings, being a concerned party within the meaning of Article 88(2) EC and Article 1(h) 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). Next, where the application is based on pleas connected with the merits of the Decision, an applicant should establish its special situation, which can be inferred from the effect on its competitive position and, where appropriate, from its intervention in the preliminary procedure. Any other approach would fail to have regard for the fact that an apparently general aid measure may in reality favour only certain defined operators or activities, even though it may in theory benefit all of them.

53 In the second place, the applicant claims that, in the present case, its competitive position is affected on the free-to-air television broadcasting market and on the market for the purchase of audiovisual rights and content. The Decision, it argues, maintains a system of compulsory contributions in favour of audiovisual production, by declaring either that the investment obligations do not constitute State aid, or that the support measures of the CNC constitute aid compatible with the common market. Those difficulties are at the root of the applicant's complaints.

54 First, the support measures complained of, which are endorsed in the Decision, create a competitive disadvantage by limiting the applicant's opportunity to develop its production activity, with regard to the two-thirds of the expenses connected with the investment obligations, and contribute to favouring the communications groups which are in competition with the applicant. With regard to its alleged economic control over the works which it finances, the applicant claims, in reply to the French Republic, that the level of its investment obligations is such that it in fact structures the use of all of its investment capacity.

55 Secondly, as the applicant has explained in detail in its complaints, the French system of support for the cinematographic and audiovisual industry results in it contributing, through the payment of the Tax financing the COSIP and the subsidy granted by the latter to independent producers, to the financing of the applicant's own competitors. As a result of the definition of 'independent producer' in French law, several of those producers are controlled by the applicant's competitors and a significant number of them are owned by large communications groups operating either in the broadcasting industry (cable, satellite, land radio relay channel in digital mode, internet television), or active in audiovisual production, or combining both those types of activity.

56 In that regard, the applicant disputes the figures, relating to 2005, which have been put forward by the French Republic. Among the 26 producers classified as independent under French law, and with which the applicant concluded contracts in 2005, only nine are producers which are truly independent of any television service provider. Among the 17 other producers, eight are subsidiaries of audiovisual groups and nine are undertakings which form part of industrial groups giving them a significant economic weight and combining, in the case of the majority, the roles of producer and distributor. The applicant notes that those 17 commercial partners are, for the most part, large and economically powerful undertakings which do not correspond to the definition of 'independent producer', established in the 23rd recital in the preamble

to Directive 89/552. The applicant points out that, in the classification of producers of early evening fiction for 2005, the primary beneficiary of the French law relating to support measures for production and investment obligations is, by means of five subsidiaries, a group. That classification indicates also that, among the ten largest producers for 2005, there were no truly independent producers within the letter and spirit of Directive 89/552.

57 Thirdly, those large communications groups can benefit from the support scheme, without having had to participate to the financing thereof. Apart from the benefit of the support of the COSIP through their integrated producers, they may hold, over the works produced, co-production rights which are not subject to any time-limit and which they may then resell, inter alia to the applicant. Therefore, those large groups enjoy a significant advantage in the creation of catalogues of works and their broadcasting on other platforms, in particular via a land radio relay channel in digital mode, by satellite, internet and third generation telephony. Groups benefiting from works catalogues which have already been created then broadcast via a land radio relay channel in digital mode, competing directly with the applicant.

58 By contrast, television service providers cannot, in practice, acquire catalogues of rights in so far as they cannot own co-production shares in the audiovisual works financed through their obligations to invest in independent production undertakings, since the latter represent two thirds of their expenses under the investment obligations. They can acquire only 'transmission shares', that is to say, broadcasting rights over those works which are limited to a certain number of broadcasts over a limited period.

59 Furthermore, faced with constant pressure from those competing communications groups, the applicant and the other television service providers are, on the expiry

of their broadcasting rights, the duration of the exclusivity of which is limited to 18 months, commercially obliged to repurchase the audiovisual works which they have financed. Since the leading series shown by French television channels continue to be produced over periods the length of which exceeds the duration of the initial broadcasting rights of the first episodes, the repurchase of those rights is essential in order to avoid those episodes being broadcast on competing channels. In reply to the French Republic's invocation of the broad room for manœuvre enjoyed by television service providers at the stage of exploitation of the works and the duration of the broadcasting rights, the applicant asserts that that duration and the number of broadcasts permitted over that period are strictly defined by French law.

60 Fourthly, in the reply, the applicant adds that, under French law, the amount of the investment obligations is calculated on the basis of turnover, and not on the basis of the channel's programming budget, as is provided for by Article 5 of Directive 89/552. Therefore, the applicant's expenses in that regard greatly exceed those of its competitors, in particular France 2, France 3 and M6, at the expense of the freedom to allocate its budget and its freedom with regard to programming choices, which contribute to singling it out in relation to its competitors. The applicant notes also that the contribution to the development of the production of audiovisual works referred, at the date on which the applicant lodged its complaint in 2001, only to the providers of television services broadcast in unencoded form via a land radio relay channel in analogue mode, that is to say, the applicant, the two public channels and M6, as the other communications groups operating in France which do not use that type of channel were not subject to those obligations. Although the legislation has gradually developed in the direction of imposing the same type of obligations on other television service providers, the obligations imposed have not been as restrictive and the amounts invested have not been as significant as those imposed on the applicant. In any event, the fact that the Decision could also affect other operators and is liable to cause wider harm constitutes a further reason why the action should be accepted as being admissible.

61 Fifthly, with regard to the direct and indirect benefit that the applicant allegedly derives from the scheme of support for audiovisual production, the applicant disputes the French Republic's assertions. In that regard, it claims that it does not benefit indirectly from the CNC's support measures. Firstly, the CNC's financial support for a given production benefits exclusively the producer, in particular by crediting its account opened with the CNC and by allowing new aid to be generated automatically. By contrast, it does not reduce the television service provider's investment obligations. Therefore, the financial support granted to producers which are not subsidiaries of the applicant provides no benefit to the latter. Secondly, the grant of that CNC support, based on the financial commitment of a television service provider, such as the applicant, to up to 25 % of the minimum amount of the production estimate, in no way reduces the regulatory obligations or charges of that service provider. Furthermore, the applicant describes as marginal the amount of direct benefit received, through its subsidiaries, from the support scheme for audiovisual production. Only one third of the investment obligations can potentially be realised with its production subsidiaries, of which a small number produces stock programmes and only two of which benefited, in 2005, from CNC financial support for a total amount which was significantly lower than the amount of the Tax that the applicant had to pay that year.

62 In the third place, the applicant submits that, according to the case-law, the particular status of an applicant, within the meaning of *Plaumann* v *Commission*, cited in paragraph 42 above, does not follow exclusively from the substantial effect on its competitive position on the market (Case T-395/04 *Air One* v *Commission* [2006] ECR II-1343, paragraph 32). Furthermore, it notes that Advocate General Jacobs, in points 141 and 142 of his Opinion in *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, cited in paragraph 38 above, argues clearly in favour of an application of the test of individual concern which would no longer be exclusively confined to that sole effect. Other considerations could be taken into account, such as the fact that the applicant's complaints in 2001 and the additional complaint in January 2006 are, contrary to the

French Republic's claims, at the origin of the Decision. The Commission does not dispute this and the Decision, moreover, refers to it and addresses it directly.

63 In the fourth place, an excessively restrictive interpretation of the concept of individual interest in bringing proceedings, such as that put forward by the Commission, would have the result of depriving the applicant of its right to effective judicial protection. Without being able to bring an action before the Court, the applicant would be deprived of any possibility of discussing substantively the nature of the investment obligations as State aid.

Findings of the Court

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

65 In the present case, since the Decision was addressed to the French Republic, it is necessary to examine whether it is of direct and individual concern to the applicant.

66 As regards the condition of individual concern, according to settled case-law, persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of those factors distinguishes them individually just as in the case of the person addressed by the decision (*Plaumann* v *Commission*, cited in paragraph 42 above, at p. 107; Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487,

paragraph 20; Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 14; *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, cited in paragraph 38 above, paragraph 33; and Case C-487/06 P *British Aggregates* v *Commission* [2008] ECR I-10505, paragraph 26).

67 It is consequently for the General Court to determine whether, in the present case, the applicant can be considered to be individually concerned by the Decision.

68 In the present case, the applicant seeks to have a decision which was adopted at the conclusion of the preliminary investigation procedure under Article 88(3) EC annulled by the General Court.

69 In that regard, it must be noted that, in the context of the procedure for reviewing State aid provided for in Article 88 EC, the preliminary stage of the procedure for reviewing aid under Article 88(3) EC, which is intended merely to allow the Commission to form a prima facie opinion on the partial or complete conformity of the aid in question, must be distinguished from the examination under Article 88(2) EC. It is only in connection with the latter examination, which is designed to enable the Commission to be fully informed of all the facts of the case, that the EC Treaty imposes an obligation on the Commission to give the parties concerned notice to submit their comments (*Cook* v *Commission*, cited in paragraph 66 above, paragraph 22; *Matra* v *Commission*, cited in paragraph 66 above, paragraph 16; *Commission* v *Aktionsgemeinschaft Recht und Eigentum*, cited in paragraph 38 above, paragraph 34; and *British Aggregates* v *Commission*, cited in paragraph 66 above, paragraph 27).

70 Where, without initiating the formal investigation procedure under Article 88(2) EC, the Commission finds, on the basis of Article 88(3) EC, that aid is compatible with the

common market, the persons intended to benefit from those procedural guarantees may secure compliance therewith only if they are able to challenge that decision before the Community Courts. For those reasons, an action for the annulment of such a decision brought by a person who is concerned within the meaning of Article 88(2) EC is declared to be admissible where that person seeks, by instituting proceedings, to safeguard the procedural rights available to him under the latter provision (*Commission* v *Aktionsgemeinschaft Recht und Eigentum*, cited in paragraph 38 above, paragraph 35 and the case-law cited; and *British Aggregates* v *Commission*, cited in paragraph 66 above, paragraph 28).

71 The Court of Justice has had occasion to observe that such parties concerned for the purposes of Article 88(2) EC are any persons, undertakings or associations whose interests may be affected by the granting of aid, that is, in particular competing undertakings and trade associations (*Commission* v *Aktionsgemeinschaft Recht und Eigentum*, cited in paragraph 38 above, paragraph 36 and the case-law cited; and *British Aggregates* v *Commission*, cited in paragraph 66 above, paragraph 29).

72 By contrast, if the applicant calls into question the merits of the decision appraising the aid as such, the mere fact that it may be regarded as 'concerned' within the meaning of Article 88(2) EC cannot suffice for the action to be declared admissible. It must then demonstrate that it has a particular status within the meaning of the case-law resulting from *Plaumann* v *Commission*, cited in paragraph 42 above. That would be the case where, inter alia, the applicant's market position is substantially affected by the aid to which the decision at issue relates (*Commission* v *Aktionsgemeinschaft Recht und Eigentum*, cited in paragraph 38 above, paragraph 37; and *British Aggregates* v *Commission*, cited in paragraph 66 above, paragraph 30; see also, to that effect, Case 169/84 *Cofaz and Others* v *Commission* [1986] ECR 391, paragraphs 22 to 25).

73 In the present case, it must first of all be pointed out that the general scope of the Decision, which results from the fact that it is in particular designed to authorise aid schemes which apply to a category of operators defined in a general and abstract manner, is not such as to constitute a barrier to the application of the case-law cited above (see, to that effect, *British Aggregates* v *Commission*, cited in paragraph 66 above, paragraph 31).

74 Furthermore, it should be noted that the applicant has put forward, in support of its action, three pleas. The first plea alleges an infringement of the obligation to state reasons. The second plea alleges an infringement of Article 87(1) EC. The third plea is based on an infringement of Article 87(3)(d) EC.

75 It must be concluded that none of those pleas for annulment seeks to establish the existence of serious difficulties raised by the support measures at issue in the light of their classification as State aid or their compatibility with the common market, difficulties which would have obliged the Commission to initiate formal proceedings. The applicant does not call into question the Commission's refusal to initiate the formal investigation procedure referred to in Article 88(2) EC and it does not plead infringement of procedural rights stemming from that provision, but rather seeks exclusively the annulment of the Decision on the substance, as it confirmed at the hearing in response to a question put by the Court, which was noted in the minutes of the hearing.

76 Since the present action thus does not seek to safeguard the applicant's procedural rights, the mere fact that the latter may be regarded as concerned within the meaning of Article 88(2) EC cannot suffice for the admissibility of the action to be accepted. It must therefore show that it has a particular status within the meaning of the case-law resulting from *Plaumann* v *Commission*, cited in paragraph 42 above, inter alia on the ground that its market position is substantially affected by the measures covered by the Decision.

77 In that regard, it should be noted that an undertaking cannot rely solely on its status as a competitor of the undertaking which benefits from the measure in question; it must also demonstrate the magnitude of the prejudice to its market position (Case C-106/98 P *Comité d'entreprise de la Société française de production and Others* v *Commission* [2000] ECR I-3659, paragraphs 40 and 41; Case C-525/04 P *Spain* v *Commission* [2007] ECR I-9947, paragraph 33; Case T-117/04 *Werkgroep Commerciële Jachthavens Zuidelijke Randmeren and Others* v *Commission* [2006] ECR II-3861, paragraph 53).

78 In the present case, as the applicant confirmed at the hearing in reply to a question put by the Court, the effect on its competitive position must be examined in relation to the beneficiaries of the aid measures at issue. Therefore, since the measures at issue seek to support cinematographic and audiovisual production, it must be assumed that they benefit operators with a production activity in the cinematographic and audiovisual fields, or at the very least in one of those fields, depending on the measures referred to. It is, moreover, not disputed that the applicant, which is a television service provider, is also active in the production of works and may, as such, also be a beneficiary of the support measures at issue.

79 The applicant identifies, as operators in relation to which its competitive position is affected, the other television service providers and large audiovisual communications groups. Furthermore, the applicant maintains that its position is affected on the free-to-air television broadcasting market and on the market for the acquisition of audiovisual rights and content.

80 It must, however, be held that the applicant has not specifically and precisely established in what way its competitive position is substantially affected, in particular on those two markets, in relation to those competitors, television service providers and large audiovisual communications groups which are beneficiaries of the measures at issue.

81 In the first place, the applicant has not put forward any evidence allowing the conclusion to be drawn that its competitive position is substantially affected in relation to the other television service providers, both with regard to the contested investment obligations and with regard to the contested support measures of the CNC.

82 With regard, first of all, to the investment obligations, it must be held, first, that the applicant does not put forward any argument claiming that the other television service providers — which can benefit from those measures for any production activity which they may undertake — are subject to different conditions from those imposed on the applicant in order to benefit therefrom and which are such as to have a substantial effect on the applicant's competitive position.

83 Secondly, the applicant claims that the amount of its expenses under the investment obligations greatly exceeds the amount of those of its competitors, in particular France 2, France 3 and M6, to the detriment of its freedom to allocate its budget and its choice concerning programming, which singles it out in relation to those competitors. However, as the applicant confirmed at the hearing in reply to a question put by the Court, the television service providers with which it competes were, by reason of the measures covered by the Decision, also bound by the investment obligations. Furthermore, it must be noted that the amount of those obligations is determined by application of a percentage to the turnover of the television service provider concerned for the previous year (see paragraph 26 above). Consequently, the fact that, under French law, the competitors referred to by the applicant are bound by the investment obligations to the same extent as is the latter, as a result of the application of the same percentage to their turnover, leads to the conclusion, as arrived at by the Commission and the French Republic, that, should it be established that the amount of the applicant's expenses exceeds that of those competitors, that is the consequence merely of the fact that its turnover is greater than theirs. The applicant cannot therefore rely on that fact in order to demonstrate that it has a special status within the terms of the case-law resulting from *Plaumann* v *Commission*, cited in paragraph 42 above. Furthermore, the applicant has not put forward any evidence demonstrating that its competitive position was substantially affected, at the date on which the Decision was

adopted, as a result of the application of a particular percentage to other television service providers.

84 Thirdly, contrary to the applicant's claims, the fact that the amount of the investment obligations is calculated by reference to the turnover of the television service provider concerned, and not in relation to its programming budget, as provided for by Article 5 of Directive 89/552, does not support the conclusion that the applicant has a special status. First, the applicant has not shown how that method of calculation would place it in a different situation to that of its competitors, being television service providers, the applicant claiming, moreover, that other television service providers could be in a similar situation to its own. Secondly, it is not for the Court to examine, in the context of the present action, the French law at issue in the light of Directive 89/552.

85 Fourthly, with regard to the obligation to earmark at least two thirds of the expenditure under the investment obligations for audiovisual production, and at least three quarters of the expenditure under the investment obligations for cinematographic production, to the development of independent production (see paragraph 9 above), it should be noted that the definition of 'independent production' in French law implies in particular that the producer must be independent of the television service provider which is commissioning the work concerned (point II, paragraph 249, of the Decision), this being a fact which the parties confirmed at the hearing. Therefore, even if such an obligation may, as the applicant claims, limit its possibility of developing its production activity, the applicant does not show how its situation differs from that of the other television service providers with which it is in competition.

86 Consequently, it follows that the applicant has not shown that, with regard to the investment obligations, its competitive position was substantially affected vis-à-vis that of other television service providers.

87 With regard, next, to the CNC support measures disputed in the context of the present action, the applicant does not put forward any argument to demonstrate its particular situation in relation to the other television service providers. Furthermore, and for the sake of completeness, it must be noted that the obligation for a producer, in order to be able to benefit from those measures, to have financing from a television service provider and the corresponding condition that that producer be independent of the television service provider providing that financing apply in the same way to the applicant and the other television service providers, a fact which the applicant does not dispute.

88 With regard to the financing of those CNC support measures, in particular through the payment of the Tax by the television service providers, the applicant confirmed, at the hearing and in reply to a question put by the Court, that its competitors, television service providers, are subject to the Tax. However, it must be stated that the Tax is levied on the turnover of the television service providers and that the amount payable is calculated through the application of a percentage to that turnover. Consequently, the applicant cannot be regarded as being individually affected vis-à-vis the other television service providers with which it is in competition.

89 Therefore, it must be held that the applicant has not demonstrated that its competitive position was substantially affected, vis-à-vis the other television service providers, in regard to the disputed support measures of the CNC.

90 In the second place, with regard to the applicant's claim that its competitive position is affected in relation to large audiovisual communications groups, it must be noted that the applicant does not define those groups precisely and does not indicate, in a sufficiently precise manner, its competitive position in relation to them.

91 It should be noted that the applicant's competitive position must be examined in relation to that of the beneficiaries of the measures at issue. It follows that the large audiovisual communications groups referred to by the applicant must, at the very least, be active in the production of works. Furthermore, in so far as those groups are also active in television broadcasting, it must be held that the applicant in no way indicates how their situation thus differs from that, examined in paragraphs 81 to 89 above, of the television service providers which are active in production.

92 In those circumstances, the applicant's reference to an effect on its competitive position in relation to large audiovisual communication groups is not sufficiently detailed and substantiated to allow a finding to be made that the appellant is individually concerned. In that regard, it should be noted that it is not the task of the General Court to speculate as to the reasoning and precise observations, both in fact and law, which might lie behind the claims in the application (order in Case T-144/04 *TF1* v *Commission* [2008] ECR II-761, paragraph 57).

93 In the light of all of the foregoing, it must be held that the applicant has not demonstrated to the requisite legal standard that its competitive position has been substantially affected and that it cannot be considered to be individually concerned by the Decision. Consequently, it has no standing to bring the action.

94 That conclusion cannot be brought into question by the applicant's argument that, if the present action were to be declared inadmissible, the applicant would have no means of challenging the Decision. Suffice it to note that, in accordance with the settled case-law of the Court of Justice, the conditions governing admissibility of an action for annulment cannot be set aside on the basis of the applicant's interpretation of the right to effective judicial protection. Thus, in relation specifically to the subject-matter of the present action, the Court of Justice has had occasion to state that an individual who is not directly and individually concerned by a Commission decision relating to State aid, and whose interests consequently may not be affected by the State measure covered by that decision, cannot invoke the right to judicial protection in relation to that decision (see Case C-260/05 P *Sniace* v *Commission* [2007] ECR I-10005, paragraphs 64 and 65 and the case-law cited). However, it follows from the information set out above that it is precisely one of those two conditions which is not satisfied in the present case, since the applicant has not established that it was individually concerned by the Decision. It follows that the applicant is not justified in claiming that a declaration that the present action is inadmissible would adversely affect its right to effective judicial protection.

95 It follows from all of the foregoing considerations that the present action must be dismissed as being inadmissible.

Costs

96 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 costs incurred by the Commission, in addition to its own costs, in accordance with the form of order sought by the Commission.

97 Furthermore, under Article 87(4) of those Rules, Member States which have intervened in proceedings are to bear their own costs. Accordingly, the French Republic must bear its own costs.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

1. **Dismisses the action as inadmissible;**

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

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

Vilaras Prek Ciucă

Delivered in open court in Luxembourg on 13 September 2010.

[Signatures]