

OPINION OF ADVOCATE GENERAL

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delivered on 21 October 2004¹

1. For several years, there has been an increasing number of actions by individuals against decisions of the Commission rejecting complaints in competition matters. Hitherto the Court of Justice has been inclined to admit such actions. Having begun by finding that actions brought by complainants against decisions adopted on the basis of Articles 81 EC and 82 EC were admissible,² the Court then extended this precedent to interested third parties in connection with the supervision of State aid³ and the supervision of mergers.⁴ There is only one area that appears to have remained outside the ambit of such expansion, namely the supervision of public undertakings and undertakings with special or exclusive rights referred to by Article 86 EC. In this area, the Court of Justice has merely stated, in the judgment in *Bundesverband der Bilanzbuchhalter v Commission*,⁵ that ‘the possibility cannot be ruled out that exceptional situations might exist where an individual or, possibly, an association constituted for the defence of the collective interests of a class of

individuals has standing to bring proceedings against a refusal by the Commission to adopt a decision pursuant to its supervisory functions under Article 90(1) and (3)’.⁶

2. In its judgment of 30 January 2002 in *max.mobil v Commission* (‘the judgment under appeal’),⁷ the Court of First Instance attempted to find a way out of the limitations of that formulation by laying down the principle of the admissibility of actions brought by complainants against decisions of the Commission not to take action on their complaint based on Article 86 EC. In the present appeal proceedings, the Court is required to decide whether that attempt is in keeping with the framework laid down by the EC Treaty and by its case-law.

1 — Original language: Portuguese.

2 — Case 26/76 *Metro v Commission* [1977] ECR 1875.

3 — Case 169/84 *Cofaz and Others v Commission* [1986] ECR 391.

4 — Joined Cases C-68/94 and C-30/95 *France and Others v Commission* [1998] ECR I-1375. See also, more recently, Case C-170/02 P *Schlittselverlag J.S. Moser and Others v Commission* [2003] ECR I-9889.

5 — Case C-107/95 P *Bundesverband der Bilanzbuchhalter v Commission* [1997] ECR I-947.

6 — Paragraph 25 of the judgment.

7 — Case T-54/99 *max.mobil v Commission* [2002] ECR II-313. However, it must be observed that the Court of First Instance partly went back on this decision in the recent judgment in Case T-52/00 *Coe Clerici Logistics v Commission* [ECR] 2003 II-2123.

I — Context of the appeal

3. According to the judgment under appeal, the dispute originates from a Commission decision of 11 December 1998 ('the contested measure') not to take action on a complaint seeking a finding that the Republic of Austria had infringed the combined provisions of Articles 82 EC and 86(1) EC.

4. At the time when the complaint was lodged, three operators shared the Austrian GSM market. The first operator on the market was Mobilkom Austria AG ('Mobilkom'). This company had a statutory monopoly in the mobile telephony sector until the arrival of max.mobil Telekommunikation Service GmbH ('max.mobil') on the market. Mobilkom is at present a public limited company, but some of its shares are still held by the Austrian State. The max.mobil company, having obtained a GSM concession in January 1996, entered the market in October of the same year. Then, following the award of a contract in August 1997, a new operator, Connect Austria GmbH, entered the market. The complaint lodged by max.mobil in October 1997 in essence objected, first, to the fact that there was no difference in the fees paid by max.mobil and Mobilkom and, second, to the benefits and support given to the latter by the Austrian authorities.

5. The Commission informed the complainant of its intentions in a letter of 11 December 1998 ('the contested measure'), which stated in particular that, 'as regards [the fact that Mobilkom was not required to pay a fee higher than that paid by max.mobil], the Commission considers, on the other hand, that you have not produced sufficient evidence of the existence of a State measure which induced Mobilkom to abuse its dominant position. In accordance with the policy which it has followed to date, the Commission has not commenced Treaty-infringement proceedings in such cases unless a Member State has imposed a higher fee on a new entrant to the market than on an undertaking already active there (see the Commission Decision of 4 October 1995 concerning the conditions imposed on the second operator of GSM radiotelephony services in Italy (OJ L 280 of 23 November 1995)).'

6. By application lodged at the Registry of the Court of First Instance on 22 February 1999, max.mobil brought an action for the annulment of the contested measure in so far as it constitutes a refusal to act on its complaint. In response, the Commission contended that the action was inadmissible and, in the alternative, unfounded.

7. In the judgment under appeal, the Court of First Instance decided to dismiss the action in substance. However, this conclusion was reached only after a process of

reasoning by stages. First of all, the Court found it necessary to examine the action in the light of general preliminary observations. Accordingly it states that the obligation to deal with a complaint diligently and impartially is 'associated' with the right to sound administration, recognised by Article 41 of the Charter of Fundamental Rights of the European Union proclaimed at Nice on 7 December 2000.⁸

8. According to the judgment under appeal, that obligation originates from two sources. In the first place, it arises from the case-law of the Court of First Instance relating to Articles 81 EC and 82 EC and to Articles 87 EC and 88 EC. According to the Court of First Instance, that case-law should be extended to apply in relation to Article 86 (3) EC. Such extension is justified by the fact that Article 86 EC always applies, as is clear in particular from the first paragraph thereof, in conjunction with other Treaty provisions, including those concerning competition, which, for their part, expressly grant procedural rights to complainants. In the present case, the applicant was indeed in a situation comparable to that referred to in Article 3 of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty,⁹ by virtue of which the applicant was entitled to submit a complaint to the Commission. Second, the said obligation arises from the Commission's general duty of supervision,

which naturally applies in all areas of Community law aimed at the institution of a system ensuring that competition in the common market is not distorted, Article 86 EC being part of that system.

9. In this connection the Court adds that the Article 86 EC procedure must not be confused with that provided for in Article 226 EC. Whereas, under Article 226 EC, the Commission 'may' bring an action against a Member State for failure to fulfil a Treaty obligation, it is well established that, under Article 86(3) EC, it must take the appropriate measures 'where necessary'. It follows that in this respect the Commission has a power 'which is not therefore entirely discretionary'.

10. According to the Court of First Instance, the fact that the Commission has an obligation to carry out a diligent and impartial examination does not mean that it loses the broad discretion recognised by case-law in its choice of action and of the means appropriate for that purpose. However, there are limits to that freedom: first, the Commission has an obligation to examine individual complaints diligently and impartially and, second, the fulfilment of that obligation is subject to judicial review. The Court of First Instance claims to draw two conclusions from this assessment. First, it concludes that complainants must be able to institute proceedings in order to protect their legitimate interests. Second, it follows that the

⁸ — OJ 2000 C 364, p. 1.

⁹ — OJ, English Special Edition 1959-62, p. 87.

role of the Community courts is limited to a circumscribed review confined to verifying that the statement of reasons is *prima facie* consistent, that the facts relied on are materially accurate and that there is no manifest error in the assessment of those facts.

11. The Court of First Instance purported to examine the pleas of the application in the light of those considerations. The question of admissibility is examined on two parallel planes. First, the Court considered that, contrary to the approach taken in relation to State aid, it must be conceded that decisions exist rejecting complaints in the context of Article 86(3) EC. In the present case, the Court appears to be in no doubt that the contested measure must be classified as such. Consequently the applicant, primarily as addressee of the contested measure, has standing to bring an action against the Commission. Nevertheless, if it were assumed that the contested measure is not in the nature of a decision addressed to the complainant, the Court considers, although the point need not be made, that the contested measure is of direct and individual concern to the applicant. For that purpose, the Court sets out six factors relating to the preparation of the measure and the applicant's factual situation.

12. With regard to the substance of the case, the Court of First Instance observes that the review carried out by it is limited to

verification of the Commission's fulfilment of its duty to undertake a diligent and impartial examination of complaints. In this connection, examination of the contested measure shows that the relevant issues in the matter were duly taken into account. There was no manifest error by the Commission in establishing the facts or in the legal assessment of those facts. In addition, the fact that the contested measure was adopted following meetings between the Commission and the applicant shows that the applicant was placed in a position to understand the reasons for the measure. Therefore it could be said that the contested measure was insufficiently reasoned by reference to the requirements of Article 253 EC. The action was accordingly dismissed.

13. It is against one part of that judgment that the Commission has lodged the present appeal. It does not dispute the assessment by the Court of First Instance of the substance of the case. It seeks the annulment of the judgment under appeal only in so far as that judgment rules that the action is admissible. The Commission adduces three pleas in law for this purpose. First, it denies that there is a right to have complaints examined, which would take the form of a right of action for the complainant if his complaint is dismissed. Second, the Commission refuses to recognise that the contested measure is in the nature of a decision addressed to the applicant. Third, it considers that there is nothing that confers upon the applicant the status of a person individually concerned. By means of all these pleas, the Commission submits that the judgment under appeal misconstrued the scope of the judgment in *Bundesverband der Bilanzbuchhalter v Commission*, cited above, which lays down the

framework for access by individuals to the Community courts in that connection. In the submissions in its response, max.mobil seeks the dismissal of the appeal and also lodges a cross-appeal seeking the annulment of the judgment under appeal in so far as it dismissed its action on the substance. By order of 24 October 2002, the French Republic was given leave to intervene in support of the form of order sought by the Commission.

unsuccessful, in whole or in part, in its submissions. Therefore the question arises of whether the fact that the action was dismissed on its substance, in accordance with the form of order sought by the Commission at first instance, is capable of precluding an appeal by the latter seeking partial annulment of the judgment under appeal.

14. As this case raises complex questions of law, I think it will be appropriate to examine first the general questions arising (III). This will throw light on the treatment of the various pleas in support of the appeal and the cross-appeal against the judgment under appeal (IV). However, a question concerning the admissibility of the appeal must be considered beforehand (II).

II — Admissibility of the appeal

15. The respondent contends that this appeal is not admissible on the ground that the Commission was entirely successful at first instance. For this purpose the respondent invokes the second paragraph of Article 56 of the Statute of the Court of Justice ('the Statute'), which provides that an appeal may be brought by any party which has been

16. This question does not appear entirely new. In the judgment in the case of *France v Comafrika and Others*¹⁰ the Court of Justice admitted an appeal against a judgment of the Court of First Instance which had rejected an objection of inadmissibility raised by a party, although it ultimately dismissed the action as unfounded in accordance with the form of order sought by that party. According to the respondent, however, that judgment is not relevant in the present case. It concerned an 'exceptional and rare case' in the sense that the regulation in question in that case was made up of a bundle of individual decisions. The reason for the existence of that case-law was the intention to prevent the likely proliferation of actions against the Commission. According to the appellant, however, the ruling of the Court of Justice in that case applies especially to the present case in so far as the Commission is not only a party unconnected with the dispute, as the French

¹⁰ — Case C-73/97 P [1999] ECR I-185. See also, to the same effect, the judgment of 23 March 2004 in Case C-234/02 P *Médiateur Européen v Lamberts*, ECR I-2803.

Republic was in *France v Comafrika and Others*, but is itself an intervening party.

17. Before settling this question, it must be observed that the Statute distinguishes clearly two categories of persons entitled to lodge an appeal. Under the second paragraph of Article 56, an appeal may be lodged 'by any party which has been unsuccessful, in whole or in part, in its submissions. However, interveners other than the Member States and the institutions of the Communities may bring such an appeal only where the decision of the Court of First Instance directly affects them'. Whereas ordinary appellants must have an interest in the appeal, it is settled that 'the Community institutions do not, therefore, have to show interest in order to bring an appeal against a judgment of the Court of First Instance'.¹¹ It follows that they are not under an obligation to show that the appeal is likely, if successful, to procure them an advantage.¹²

18. The max.mobil company claims, however, that, as the Court of First Instance is free to rule on admissibility, an appeal only against that Court's findings concerning the admissibility of the action at first instance must be held to be inadmissible before the Court of Justice. In this connection max.mobil relies on the judgment in the case of *Council v Boehringer*.¹³

19. This argument cannot be accepted. In that judgment the Court did not dismiss the appeal on the ground that it had been brought against a decision concerning admissibility. The Court dismissed it on the ground that there was no decision open to appeal. It found that the Court of First Instance could, in the circumstances of that case, correctly find in law that it was unnecessary to rule on the objection of inadmissibility raised at first instance. Consequently there was no decision having an adverse effect against which an appeal could be brought within the meaning of the first paragraph of Article 56 of the Statute. The fact that the Community institutions are privileged in relation to appeals does not mean that they have no obligations at all. That judgment means that, before bringing an appeal, they must identify a decision which can be appealed against within the meaning of the first paragraph of Article 56 of the Statute.

20. The same rule forms the basis of the Court's approach in the judgment in *Commission and France v TFI*,¹⁴ in which max.mobil also claims to find support. In that case, an action for failure to act ceased to have any purpose because the Commission expressed its position in the course of the first instance proceedings. It follows that the Court of First Instance correctly found it unnecessary to examine the admissibility of the action in that respect and that any plea in an appeal directed against an alleged deci-

11 — Case C-49/92 P *Commission v Anic Partecipazioni* [1999] ECR I-4125, paragraph 171.

12 — See, to the contrary, Case C-19/93 P *Rendo and Others v Commission* [1995] ECR I-3319, paragraph 13.

13 — Case C-23/00 P [2002] ECR I-1873.

14 — Joined Cases C-302/99 P and C-308/99 P [2001] ECR I-5603.

sion of admissibility was inoperative, as no decision existed.

21. Must it none the less be concluded from this that, if a decision is identified, the Statute authorises a privileged applicant to lodge an appeal in the sole interest of the law? I think there are two reasons precluding any such conclusion, one of a practical nature, the other legal. In practice, it is certainly in the interests of the proper administration of justice to lay down strict limits to the right to lodge appeals. This is particularly necessary in the present context where, by the effect of the transfer of powers provided for by the Treaty, as amended by the Treaty of Nice, the Court of Justice is to have its function as a review court considerably enlarged. A further, purely legal, consideration is entirely consistent with this. The purpose of the second and third paragraphs of Article 56 of the Statute is to facilitate appeals by certain applicants. So far as they are concerned, this provision lays down an exception to the conditions for bringing an appeal. However, outside this exceptional arrangement, such applicants remain subject to the normal framework of an appeal. Although an appeal is not, by nature, concerned with facts, it remains connected with a judgment in a particular case. Although by this means the Court assesses questions of law only, it is still necessary for those questions to have been considered by the court dealing with the substance of the case in order to determine a particular dispute. It is not for the Court to take this as an opportunity to discuss general, hypothetical questions or to deliver a 'law lecture'. This explains *inter alia* the rule that an appeal directed against a

supposedly erroneous finding of law is inadmissible if the disputed finding is shown to have no direct connection with the judgment given by the Court of First Instance.¹⁵ This rule follows from the very nature of the review function, which is to verify the correct interpretation and application of Community law *in a specific case*. Therefore it applies to all appellants without distinction. Consequently the exception laid down by the Statute in favour of some of them must be construed in such a way that it is made easier for them to bring an appeal, without this arrangement at the same time having the effect of changing the objective purpose of this remedy.

22. In this spirit, I suggest that, with regard to the category of appellants privileged by the Statute, the admissibility of an appeal depends not only on the *operative part* but also on the *findings* of law made by the Court of First Instance in the judgment under appeal. Although the operative part of the judgment may grant their applications in full, it must be possible to allow them to appeal against the intermediate findings of the Court of First Instance. In that case, however, two further conditions must be met. First, it is necessary to verify that the contested findings are indeed the consequence of a dispute that arose in the context of the case in question and, second, that they are

15 — See, to that effect, Case C-136/92 P *Commission v Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraphs 34 and 59.

connected with the Court's decision in the operative part.¹⁶

23. If this reasoning is accepted, it no longer appears to be necessary, as max.mobil suggests,¹⁷ to examine the consequences which may arise from the contested part of the judgment for subsequent cases. It also follows that, in accordance with settled case-law, it will not be open to an appellant of any kind to lodge an appeal where the appellant challenges legal grounds which have no connection with a dispute or which have no effect on the operative part of a judgment. Although this conclusion extends the grounds of appeal in favour of certain appellants, it excludes an appeal lodged purely in the interest of law.

24. In the present case, the finding by the Court of First Instance that the action was admissible appears to conflict with the objection of inadmissibility raised by the Commission during the proceedings at first instance. Therefore the first condition, which requires a dispute, is fulfilled. Furthermore, the Court of First Instance manifestly deemed the disputed finding to be a necessary step in reaching a decision in the case in question. Although it does not appear in the operative part of the judgment, the finding concerning admissibility is an inte-

gral part of the judgment given by the Court of First Instance on the law in this case. The requirement of a connection between the contested part of the judgment and the decision reached is also fulfilled. Accordingly I consider that this appeal must be ruled admissible.

III — Preliminary questions

25. There are still two questions to be considered in this matter. One relates to the place of Article 86 EC and the supervisory procedures that it establishes in the general system of the Treaty, while the other concerns the legal nature of the contested measure. These two questions determine many aspects of the problem of access for complainants to the Community courts where the Commission refuses to institute a procedure under Article 86(3) EC.

26. Let me say straightaway that the power conferred upon the Commission by Article 86 EC seems to me capable of having a direct effect on the interests of individuals. However, it must not be concluded that, in relation to each of those interests, capacity to bring proceedings against the measure adopted by the Commission can be recognised. It is also necessary to establish that the conditions of admissibility laid down by the Treaty are fulfilled.

16 — See, to that effect, *Commission and France v TFI*, cited above in footnote 14, paragraph 27.

17 — See paragraph 16 of this Opinion.

A — *The place of supervision under Article 86(3) EC in the general system of the Treaty*

27. Unlike the other branches of competition law, the supervision of the conduct of undertakings maintaining special links with the State has not given rise to the adoption of an implementing regulation. A lacuna of this kind in the law encourages analogies. Accordingly such supervision can be envisaged generally in two ways: either as a special form of action for failure to fulfil Treaty obligations or as a procedure deriving from the monitoring of anti-competitive practices.

28. According to the first proposition, which is regularly put forward by the Commission,¹⁸ supervision in this field is based essentially on a dialogue between the Commission and the Member State concerned. It follows from this that the Commission has a discretion which precludes a right of individuals to require the Commission to adopt a specific position. No individual right is conferred upon complainants because, in a system thus understood, the subject-matter of the Commission's intervention is entirely a matter for the State and the Community authorities. This contrasts with *max.mobil's* argument in the present case that the supervision exercised on the basis of Article 86 EC must attach to competition law. The fact that this provision was placed in the chapter on competition rules applying to undertakings is said to show a clear intention

on the part of those who drafted the Treaty. Consequently such supervision has an essential subjective component in that it aims, as the Court of First Instance has declared, 'to protect economic operators against measures whereby a Member State might frustrate the fundamental economic freedoms enshrined in the Treaty'.¹⁹ Therefore the discretion conferred upon the Commission in this field is limited by a number of subjective rights conferred upon individuals.²⁰

29. In the judgment under appeal the Court of First Instance expressly agreed with the second view above. The Court of Justice, it seems to me, takes a less categorical position in its decided cases. In the case of *Netherlands and Others v Commission*,²¹ the Court had occasion to observe that such a power may be found essential to allow the Commission to discharge the duty imposed upon it by Articles 81 EC to 88 EC to ensure the application of the rules on competition. Accordingly the Court compared the powers exercised by the Commission in relation to Member States by means of decisions on the basis of Article 86 EC and the powers conferred upon it by Article 88 EC.²² However, in other cases the Court has ruled

18 — See, in particular, *Bundesverband der Bilanzbuchhalter v Commission*, cited above in footnote 5, paragraph 22.

19 — Case T-17/96 *TFI v Commission* [1999] ECR II-1757, paragraph 50.

20 — See, to that effect, the Opinion of Advocate General La Pergola in *Bundesverband der Bilanzbuchhalter v Commission*, cited above in footnote 5, paragraph 21.

21 — Joined Cases C-48/90 and C-66/90 [1992] ECR I-565.

22 — *Netherlands and Others v Commission*, cited above in footnote 21, paragraph 29.

that the supervision of State aid is 'no more than a variant of the action for a declaration of failure to fulfil Treaty obligations'.²³

30. In my view, a clear distinction must be made, as the Court of First Instance does, between Article 86(3) EC and Article 226 EC. However, in the judgment under appeal, that Court was wrong to relate that distinction to the extent of the discretion conferred on the Commission. The freedom which the Commission has cannot be seriously distinguished according to whether it 'may' act or whether it is permitted to act 'where necessary'. If a distinction is to be made between these procedures, it must rather be by reason of a fundamental difference in the conception and nature of the controls provided for by the Treaty.²⁴

31. As the Court of Justice has had occasion to observe, the object of the administrative procedure set out in Article 226 EC is only to 'enable the Member State to comply of its own accord with the requirements of the Treaty'.²⁵ The Commission acts only to clarify a difference of interpretation relating to the obligations of a Member State under the Treaty. However, it is 'not ... empowered

to determine conclusively ... the rights and duties of a Member State or to afford that State guarantees concerning the compatibility of a given line of conduct with the Treaty'.²⁶ The Commission does not have the power to find a breach of obligations and to order the Member State concerned to put an end to it.²⁷ Consequently it is not open to individuals to bring an action against a refusal or omission on the part of the Commission to initiate proceedings against a Member State for failure to fulfil obligations.²⁸ First, access to that procedure remains 'closed to private persons'.²⁹ Second, the purpose of this procedure is not to take decisions conferring rights on individuals.³⁰ Therefore it is quite clear that actions for failure to fulfil Treaty obligations create no direct legal relationship with individuals.³¹

32. The Commission's powers in the framework of Article 86(3) EC are of an entirely different kind. It is clear from the case law that 'the supervisory power conferred on the

23 — Case C-301/87 *France v Commission* [1990] ECR I-307, paragraph 23.

24 — See C.W.A. Timmermans, 'Judicial Protection against Member States: Articles 169 and 177 Revisited', *Institutional Dynamics of European Integration, Essays in Honour of Henry G. Schermers*, vol. II, Nijhoff, Dordrecht, 1994, p. 391.

25 — Case C-191/95 *Commission v Germany* [1998] ECR I-5449, paragraph 44.

26 — *Commission v Germany*, cited above in footnote 25, paragraph 45. In his Opinion in Case C-198/97 *Commission v Germany* [1999] ECR I-3257, Advocate General Jacobs rightly contrasts the limits to the Commission's action under Article 226 EC with decisions taken to enforce the rules of competition (paragraph 11).

27 — Case 7/71 *Commission v France* [1971] ECR 1003, paragraphs 49 and 50. See, in general, D.C. Gray, *Judicial Remedies in International Law*, Clarendon Press, Oxford, 1987, particularly p. 120 et seq.

28 — *Bundesverband der Bilanzbuchhalter v Commission*, cited above in footnote 5, paragraph 19. See the early judgment in Case 48/65 *Lütticke v Commission* [1966] ECR 19. However, it does not follow that individuals have no legal protection at all. Article 234 EC offers another channel for obtaining a finding by the Court that States are in breach of their Community obligations (Case 26/62 *Van Gend en Loos* [1963] ECR I, pp. 24 and 25).

29 — See the Opinion of Advocate General Gand in the case of *Lütticke v Commission*, cited above in footnote 28, p. 46.

30 — Joined Cases 314/81 to 316/81 and 83/82 *Waterkeyn and Others* [1982] ECR 4337, paragraph 15.

31 — See, to that effect, the order in Case C-422/97 *P Sateba v Commission* [1998] ECR I-4913, paragraph 42.

Commission includes the possibility of specifying, pursuant to Article 90(3), obligations arising under the Treaty'.³² The extent of that supervisory power depends on the scope of the Treaty rules with which compliance is to be ensured.³³ Where it applies in conjunction with the competition rules applying to undertakings, it seems logical to acknowledge that the Commission has powers comparable to those which it has in the framework of compliance with those rules. However, the competition rules confer upon the Commission direct powers of supervision in relation to undertakings trading in the common market, giving rise to the adoption of binding decisions that give cause for complaint.

conjunction with the competition rules, Article 86 EC has the object of ensuring that there is no distortion between private undertakings and undertakings controlled or supported by the State in a particular sector. This means that certain State measures that are capable of distorting competition in the common market must be monitored in the light of the Treaty rules.³⁵

33. In the judgment in *Netherlands and Others v Commission* the Court observed that, if the power conferred on the Commission by Article 86(3) EC is not to be deprived of all practical effect, the Commission must be 'empowered to determine that a given State measure is incompatible with the rules of the Treaty and to indicate what measures the State to which the decision is addressed must adopt in order to comply with its obligations under Community law'.³⁴ In the following paragraph the Court added that 'such powers are also essential for the Commission so as to allow it to discharge the duty imposed upon it by Articles 85 to 93 of the Treaty to ensure the application of the rules on competition'. When applied in

34. If, therefore, an analogy is sought with any other procedure provided for by the Treaties, it will be found not so much in Article 226 EC as in Article 88 of the ECSC Treaty, which enabled the Commission to impose obligations and penalties directly on the Member States.³⁶ However, there is no doubt that the individuals concerned in that connection had the right to refer to the

35 — As the Court points out, Article 86(3) EC is concerned with 'measures adopted by the Member States in relation to undertakings with which they have specific links referred to in the provisions of that article. It is only with regard to such measures that Article [86 EC] imposes on the Commission a duty of supervision which may, where necessary, be exercised through the adoption of directives and decisions addressed to the Member States' (*France v Commission*, cited above in footnote 32, paragraph 24).

36 — The wording of that provision should be noted: 'If the Commission considers that a State has failed to fulfil an obligation under this Treaty, it shall record this failure in a reasoned decision after giving the State concerned the opportunity to submit its comments. It shall set the State a time-limit for the fulfilment of its obligation', adding that, if the State does not fulfil its obligation within the time limit set by the Commission, or if it brings an action which is dismissed, the Commission may, with the assent of the Council, suspend the payment of any sums due to the State or authorise the other Member States to take measures by way of derogation. See also the judgment in Case 20/59 *Italy v High Authority* [1960] ECR 325, in which the Court described Article 88 as the '*ultima ratio* enabling the Community interests enshrined in the Treaty to prevail over the inertia and resistance of Member States; it is a procedure far exceeding the rules heretofore recognised in classical international law to ensure that obligations of States are fulfilled' (p. 339).

32 — Case C-202/88 *France v Commission* [1991] ECR I-1223, paragraph 21. Compare with footnote 26 above.

33 — See *France v Commission*, cited above in footnote 32, paragraph 21.

34 — See the judgment cited in footnote 21, paragraph 28. The Court recognised for the first time the compelling legal force of decisions adopted by the Commission under Article 86(3) EC in its judgment in Case 226/87 *Commission v Greece* [1988] ECR 3611, paragraphs 11 and 12.

Court a refusal by the Commission to order the State to comply with its obligations.³⁷

an action to assert that right or those interests.⁴⁰

B — *The legal nature of the contested measure*

35. It follows from what has been said that the powers that the Commission has on the basis of Articles 226 EC and 86 EC have different aims and are subject to different rules. Although the Court's case-law does not impose an obligation on the Commission to act in either case,³⁸ where the Commission has a direct power of decision having effects on the market, as in the area of competition, the case-law requires legal protection to be given to the individual interests affected. Such protection may be more or less extensive, depending on the particular characteristics of the sectors concerned and the measures adopted. In particular, account must be taken of the nature of the interests affected by the Commission's decisions.³⁹ However, in all the sectors where the Commission has such a power, it must be recognised that it is open to persons with a right or interests which are particularly affected by the decision in question to bring

36. To establish whether the contested measure is of the nature of an act that can be challenged within the meaning of the Court's case-law, it is necessary to determine its precise content and scope.

37. In the judgment under appeal, the Court of First Instance describes the contested measure primarily as an individual decision rejecting a complaint, similar to a decision to take no further action on a complaint in the context of Articles 81 EC and 82 EC. According to the Commission, on the contrary, the letter must be regarded as an act which is not in the nature of a decision. The letter is said to be a purely internal act expressing the Commission's intention at a given time. The fact that it was sent to the complainant for information does not mean that it must be deemed to be a decision producing binding legal effects. As for the French Government, it agrees with the view outlined in the alternative by the Court of First Instance and considers that an act adopted in this context can only be a

37 — Joined Cases 7/54 and 9/54 *Groupement des Industries Siderurgiques Luxembourgeoises v High Authority* [1954-1956] ECR 175.

38 — In relation to an action for failure to fulfil Treaty obligations, see Case 247/87 *Star Fruit v Commission* [1989] ECR 291, paragraph 11; in relation to the power on the basis of Article 86(3) EC, see Case T-32/93 *Ladbroke Racing v Commission* [1994] ECR II-1015, paragraph 38.

39 — In my view, this is the effect of the Court's finding in the *Bundesverband der Bilanzbuchhalter v Commission* judgment, cited above in footnote 5, that 'an individual may not, by means of an action against the Commission's refusal to take a decision against a Member State under Article 90(1) and (3), indirectly compel that Member State to adopt legislation of general application' (paragraph 28). It may be presumed that, in this area, supervision of the State as a protagonist in the economy does not meet the same criteria as the scrutiny of its acts as legislature.

40 — On the general principle of legal protection, see the judgment in Joined Cases 46/87 and 227/88 *Hoechst v Commission* [1989] ECR 2859, paragraph 19. See also the Opinion of Advocate General Van Gerven in Case C-70/88 *Parliament v Council* [1990] ECR I-2041, paragraph 6.

decision addressed to the Member State concerned and not to an individual. In this connection the French Government relies on a comparison of the provisions of Article 88 EC with the wording of Article 86(3) EC, which states that the appropriate decisions are to be addressed 'to Member States'.

definitive decision rejecting the complaint, which may be the subject-matter of an action for annulment before the Community courts'. That decision is not expressly provided for by the legislation. However, its existence is justified by the legal status given to the complainant in the context of supervision pursuant to Article 85 EC.

38. I am not entirely convinced by any of those arguments. First, the comparison which the Court of First Instance takes as a basis is open to criticism. The decision to take no further action referred to in paragraph 67 of the judgment under appeal is a reply to a request made pursuant to the regulations implementing Articles 81 EC and 82 EC. The decision closes a procedure which confers on natural or legal persons who claim a legitimate interest certain procedural safeguards in relation to the right to lodge a complaint and the right to submit observations. However, it is precisely by virtue of those safeguards, provided for in Article 3 of Regulation No 17⁴¹ and Article 6 of Regulation No 2842/98⁴² that the Court of Justice upholds the right of complainants to obtain a decision rejecting a complaint. This was the basis of the Court's finding, in the judgment in the case of *Guérin Automobiles v Commission*,⁴³ that, on the completion of that procedure, 'the Commission is bound either to initiate a procedure against the subject of the complaint ... or to adopt a

39. Such status does not exist in the context of Article 86 EC. Although, as the Court of First Instance observes in paragraph 51 of the judgment under appeal, the situation of a person complaining of a breach of Article 86 EC is 'comparable' to that referred to in Article 3 of Regulation No 17, it is still not the same. Certainly it is possible to lodge a complaint in this area. However, it is not protected by law. It is clear that the lodging of a complaint which is not legally protected but merely admitted *de facto* cannot confer any particular rights on the complainant.⁴⁴ In the present case the complainant had no formal right to lodge a request and take part in the investigation procedure conducted by the Commission. Consequently, its complaint did not create a particular legal relationship with the Commission. The Commission's act is not, in law, connected with a request in relation to which it would be a reply in due form. Even if the contested measure originates in fact from a complaint, the latter is not, in terms of law, an act opening an investigation procedure initiated by the Commission and the complainant is not the formal addressee of the act adopted on the completion of the investigation.

41 — It should be noted that this regulation was replaced on 1 May 2004 by Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1). The right to lodge a complaint, provided for in Article 3 of Regulation No 17, has been retained in the same terms in Article 7 of the new regulation.

42 — Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in certain proceedings under Articles 85 and 86 of the EC Treaty (OJ 1998 L 354, p. 18).

43 — Case C-282/95 P [1997] ECR I-1503, paragraph 36.

44 — See, by analogy to the field of State aid, the judgment in Case T-188/95 *Waterleiding Maatschappij v Commission* [1998] ECR II-3713, paragraphs 143 to 145.

Consequently, to determine the legal nature of that act, it is necessary not to focus on its literal form. Although it is addressed to the respondent, the contested measure does not have the status of an individual decision to take no further action on a complaint.

40. Ought greater credence to be attached to the French Government's argument that the contested measure amounts to a decision addressed to the State in question? This argument can cite in support the position taken by the Court in the field of State aid. In the judgment in *Commission v Sytraval and Brink's France*,⁴⁵ the Court took the view that, as neither the Treaty nor Community legislation lays down a procedural system for dealing with complaints objecting to grants of State aid, the decisions adopted by the Commission in the field of State aid are addressed to the Member States concerned. It may appear that, as the same conditions apply in relation to the area of Article 86 EC, the conclusion must be similar, *mutatis mutandis*. However, that would be to misunderstand the special nature of Article 88 EC and the measures implementing it.

41. Measures adopted by the Commission on the basis of Article 88 EC meet an obligation for the notification or constant review of measures taken by the Member States. Unlike the power which it has under Article 86(3) EC, in the area of State aid the Commission has an exclusive power which is exercised in close collaboration with the

Member States. Even when the Commission gives a decision on illegal aid of which it was not notified, it examines the aid in the framework of a dialogue with the Member State concerned. In that case it is not the way in which the Commission was informed of the aid which initiates legally the procedure leading to a decision on the recovery or the compatibility of the aid: that decision is always understood as a reply to the information and the observations submitted by the Member State concerned. Adopting this point of view, Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty⁴⁶ enshrines the principle that all decisions adopted in the matter of State aid are addressed to the Member State concerned.

42. However, the system of Article 86(3) EC is not subject to the same special conditions as Article 88 EC. In the framework of Article 86 EC, measures adopted by the Commission do not in any way form part of an exclusive dialogue with the Member States concerned. Consequently there is no reason to assume that a Commission decision referring to a State measure is necessarily addressed to the State which took the measure.

45 — Case C-367/95 P [1998] ECR I-1719, paragraphs 44 and 45.

46 — Article 25 of Regulation (EC) No 659/1999, OJ 1999 L 83, p. 1.

43. In fact, the measure in issue in this case has no object other than to establish the facts of a particular situation in the light of the rules of competition. The Commission finds that Article 82 EC, in conjunction with Article 86 EC, is not applicable to the situation in question. By means of that measure, the Commission objectively places a particular situation in relation to certain rules of the Treaty and from this draws conclusions with regard to its role as guardian of the provisions of the Treaty. Such a measure has in itself no specific addressee. Just as it does not respond to an application by a complainant who is entitled to receive such a response, the contested measure does not prescribe any particular conduct for the Member State concerned. The fact that it was adopted in the light of the factors mentioned in the complaint and that it refers to a measure of a particular Member State in no way alters its nature, which is to set out an *objective situation of law* relating to the applicability of certain provisions of the Treaty. Nevertheless the measure in question may produce legal effects for the State and the individuals concerned.

44. To determine the status of a Community measure in a dispute context, it is necessary to examine its effects, not its subject-matter. It has consistently been held that all measures adopted by the institutions producing legal effects are challengeable decisions of Article 230 EC.⁴⁷ This applies in particular where the act in question has the effect

of preventing or bringing about the adoption of rules or courses of action which materially alter the legal position of specific persons. Accordingly, the Court of First Instance has held that a statement by a Member of the Commission that a particular concentration did not have a Community dimension, although the statement related to no named addressee, affected the Member States, whose competence in relation to the transaction was therefore confirmed, the undertakings which were parties to the concentration, who were therefore absolved from the obligation to notify the transaction, and the Commission itself, whose conduct thereafter was dictated by the statement.⁴⁸

45. In the present case there seems to be no doubt that the contested measure has legal effects for the Member State concerned, which can be certain that it will not be the subject of a review procedure initiated by the Commission in relation to one of the points mentioned in the complaint. Furthermore, the undertaking referred to by the State measure and the third parties affected by it are deprived of a decision by the Commission as to the compatibility of the measure with the rules of the Treaty. As such a decision would be capable of producing legal effects for those individuals in the market concerned, the same applies to the refusal to take such a decision. I therefore take the view that the contested measure is indeed in the nature of a decision against which an action for annulment may be brought.

47 — See, most recently, the judgment of 13 July 2004 in Case C-27/04 *Commission v Council*, ECR I-6649, paragraph 44. For a different wording, see Case 60/81 *IBM v Commission* [1981] ECR 2639, paragraph 9.

48 — Case T-3/93 *Air France v Commission* [1994] ECR II-121, paragraphs 43 to 54.

46. At the end of this assessment two points become clear. First, contrary to the judgment of the Court of First Instance, the capacity of the applicant at first instance to bring proceedings does not arise from the fact that it is the addressee of the contested measure. But, secondly, the individual interests affected by the measure taken can claim protection.⁴⁹ Therefore it remains to be established whether, in the present case, the applicant at first instance, as a third party to the procedure and to the measure adopted, has capacity to bring proceedings in accordance with the conditions laid down by the fourth paragraph of Article 230 EC.

under appeal, the Court of First Instance appears to conclude that max.mobil has a right to challenge the contested measure before the Community courts because its position is directly affected by that measure. However, it seems to me that the Court's finding introduces an approach alien to the Treaty system for settling disputes. The Treaty confers capacity to bring an action only upon an applicant with special characteristics that differentiate him in a way similar to that of an addressee. Although in competition cases the Community courts have shown flexibility in assessing this condition of admissibility, they do not allow it to be disregarded.⁵⁰

IV — Appraisal of the grounds of the appeal

47. The grounds of the appeal relate to the finding by the Court of First Instance that the action is admissible. The main difficulty concerns the capacity of max.mobil to bring an action.

49. In the present case, there is no doubt that the decision not to bring an action for failure to fulfil Treaty obligations against the Member State concerned *directly* affects the situation of the undertakings in the Austrian GSM market, including max.mobil. However, it does not follow that the contested measure is of *individual* concern to the latter.

48. The finding of capacity to bring an action presupposes a special connection between an applicant and the contested measure. Under the fourth paragraph of Article 230 EC, an applicant must prove that the contested measure is of direct and individual concern to him. In the judgment

50. According to the case-law of the Court of Justice, an individual interest in bringing

49 — In relation to undertakings which are beneficiaries of a State measure which is the subject of a Commission decision under Article 86(3) EC, see the judgment in the case of *Netherlands and Others v Commission*, cited above in footnote 21, and Case T-266/97 *Vlaamse Televisie Maatschappij v Commission* [1999] ECR II-2329.

50 — It should be observed that, where there is no capacity to bring an action before the Community courts, effective protection of the interests in question is not lost. The individuals concerned always have a remedy before the national courts for asserting their rights arising from the competition rules applying to undertakings, whether public or private. This is the result, on the one hand, of the direct effect of Articles 81 EC, 82 EC and 86(2) EC and, on the other, of the obligation of the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection (Case C-50/00 *P Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, paragraph 41).

an action means precisely that an applicant has certain attributes which are peculiar to him, or is in a factual situation which distinguishes him individually just as in the case of the addressee of the decision in question.⁵¹ According to the judgment under appeal, the Court of First Instance claims to find such interest in, on the one hand, the Commission's obligation to examine and reply formally to max.mobil's complaint and, on the other, in a number of considerations relating to its factual situation.

51. The Commission has raised two objections to this assessment. Generally, it contends that no right to the examination of complaints which would confer on the complainant capacity to bring an action exists in this field. In particular, according to the Commission, it has not been shown that the individual is in a factual situation which distinguishes that individual to the requisite legal standard.

A — The complainant's right to examination of its complaint

52. At paragraph 56 of the judgment under appeal the Court of First Instance suggests that such a right may be inferred from the Commission's obligation to carry out a diligent and impartial examination of com-

plaints. The right to have its complaint examined is said to create legitimate interests on the part of the complainant which merit judicial protection. This results in a right to challenge the Commission's decision to take action or not to take action.

53. It is true that the Court of Justice has repeatedly held that a right recognised in the procedure for the adoption of the measure in question confers upon the holder of that right the particular characteristics which could give it a right to bring an action against the measure.⁵² The whole question is therefore whether such a right exists in the context of Article 86 EC.

54. The Court, which has had to rule on this point, has not been satisfied with the existence of vaguely defined procedural rights in order to recognise a right to bring proceedings. The Court generally requires the rights invoked in support of an action to be sufficiently 'precise'.⁵³ That is the case where the individual rights arise from a regulation⁵⁴ or can be derived directly from provisions of the Treaty.⁵⁵ It is confirmed in

52 — The case-law on this point is plentiful. See, in particular, *Metro v Commission*, cited above in footnote 2, Case 11/82 *Piraiki-Patraiki and Others v Commission* [1985] ECR 207, Case 264/82 *Timex v Council and Commission* [1985] ECR 849, and *Cofaz and Others v Commission*, cited above in footnote 3.

53 — Case 191/82 *Fedol v Commission* [1983] ECR 2913, paragraph 25.

54 — See, for example, *Metro v Commission*, cited above in footnote 2, paragraph 13, and *Fedol v Commission*, cited above in footnote 53, paragraph 27.

55 — See, for example, *Cofaz and Others v Commission*, cited above in footnote 3, paragraph 25, and *Piraiki-Patraiki and Others v Commission*, cited above in footnote 52, paragraph 28.

51 — Case 25/62 *Plaumann v Commission* [1963] ECR 95, p. 107.

particular by the judgment in *Metro v Commission*, cited by the Court of First Instance in paragraph 56 of the judgment under appeal. In the judgment in *Metro v Commission*, the Court of Justice found support in the principle of the proper administration of justice in affirming that the legitimate interests recognised in favour of natural or legal persons by a Community regulation cannot be effective if they are not judicially protected.⁵⁶ But the 'legitimate interests' in question in that case are the interests of persons authorised to lodge a complaint under Article 3 of Regulation No 17, who have a number of procedural rights. However, in the context of Article 86 EC there is no measure protecting such interests and conferring on those who have them rights equivalent to those conferred on the basis of Articles 81 EC and 82 EC.⁵⁷ Consequently it is mistaken to assert, as the Court of First Instance does, that this case-law is applicable under the same conditions in the context of Article 86(3) EC.

55. In the absence of a legislative provision conferring procedural rights on complainants in the context of the monitoring of public undertakings or undertakings treated as such, the Court of First Instance claims to find support in a general obligation of diligent and impartial examination established by case-law and justified by the Commission's general duty of supervision. It is clear from the Court's assessment as a whole that it purports to make those obligations into general, overriding rules of

Community law which are capable of limiting the Commission's discretion and forming the basis of the right of complainants to bring proceedings.

56. Such a venture seems to me bound to fail. In my view such obligations cannot form the basis of an individual right of action. As for the general duty of supervision arising from Article 211 EC, its nature is assuredly not such as to establish the existence of rights in favour of the respondent. It cannot be inferred from this general obligation alone that a specific right is granted to complainants in the context of Article 86 EC. With regard to the obligation of diligent and impartial examination, although I concede that the Commission has such an obligation,⁵⁸ it does not seem to me relevant for examining the admissibility of the action. Such an obligation has an objective scope. The requisite diligent and impartial examination is not carried out in relation to the person lodging the complaint, but first of all by reference to the general interest in sound administration and the proper application of the rules of the Treaty.⁵⁹ In that respect this obligation is not comparable to the rights which may be conferred on interested parties to intervene directly in the procedure for the adoption of measures concerning them, such

58 — See paragraph 80 of the present Opinion.

59 — See, to that effect, the Opinion of Advocate General Slynn in Case 246/81 *Lord Bethell v Commission* [1982] ECR 2277, where the Advocate General observes: 'Even if ... the Commission is under a specific duty to investigate each case reported to it where a suspected infringement is alleged (and perhaps (*sed quare*) to give reasons for not doing so) it does not seem to me that this is a duty owed to the person bringing the matter to the Commission's attention and enforceable at his initiative' (p. 2296).

56 — *Metro v Commission*, cited above in footnote 2, paragraph 13.

57 — As the Court of First Instance observed in *Ladbroke Racing v Commission*, cited above in footnote 38, paragraph 43.

as the right to be heard and the right of access to the file. It follows that, unlike those rights, the said obligation cannot create a subjective right to obtain a decision rejecting a complaint or, consequently, a right to institute proceedings against that decision.⁶⁰

which states that in any event the contested measure is of direct and individual concern to the applicant at first instance.

57. I consider therefore that the Court of First Instance was wrong in finding that the obligation of diligent and impartial examination alone was capable of conferring upon complainants a right to institute proceedings in the context of Article 86 EC. Under the system of the Treaty, it proves to be wrong to assert that the existence of an obligation on the part of the Commission creates a judicial remedy available to individuals. The right to institute proceedings must be established on the basis of an assessment of the particular situation of the person concerned.⁶¹ Consequently it is futile to seek to circumvent that system by referring to the principle of the sound administration of justice or the fundamental right to an effective remedy, as the Court of First Instance seeks to do in paragraphs 56 and 57 of the judgment under appeal.

59. First of all, I would point out that, in its assessment, the Court of First Instance misconstrues the relevant case-law of the Court of Justice. It must be observed that the former omits to refer to the case-law to the effect that it is only in 'exceptional situations' that an individual can have capacity to bring proceedings against a refusal by the Commission to adopt a decision in the framework of its supervisory function under Article 86 (3) EC.⁶² In the judgment under appeal there is no express assessment of max.mobil's 'exceptional situation', if any.

B — *The particular situation of the applicant at first instance*

58. The Commission disputes the additional observations of the Court of First Instance,

60. On this point the respondent relies, without success, on the judgment of the Court of First Instance in the case of *TFI v Commission*.⁶³ It is not true that, in that judgment, the Court found that Article 86(3) EC conferred direct protection on complainants equivalent to that granted on the basis of Articles 81 EC and 82 EC. Although the Court of First Instance accepted, in that case, that Article 86(3) EC is intended to protect economic operators, it nevertheless took care to consider whether the applicant was

60 — See, by analogy, the judgment in *Commission v Sytraval and Brink's France*, cited above in footnote 45, paragraphs 45 and 62.

61 — See, to that effect, the Opinion of Advocate General Jacobs in Case C-263/02 P *Commission v Jégo-Quéré*, ECR I-3425, p. 1-3429, paragraph 45.

62 — On this point, see the judgment in *Coe Clerici Logistics v Commission*, cited above in footnote 7, where the decision was based essentially on the case-law of the Court of Justice.

63 — Cited above in footnote 19.

in such an exceptional situation that its action was admissible, in accordance with the judgment in *Bundesverband der Bilanzbuchhalter v Commission*, cited above.⁶⁴

61. However, the question remains whether the limits laid down by the case-law of the Court of Justice are appropriate for regulating access by complainants to the Community courts in the context of Article 86 EC.

62. Let me remind the Court that, according to the *Bundesverband der Bilanzbuchhalter v Commission* judgment, 'the possibility cannot be ruled out that exceptional situations might exist where an individual or, possibly, an association constituted for the defence of the collective interests of a class of individuals has standing to bring proceedings against a refusal by the Commission to adopt a decision pursuant to its supervisory functions under Article 90(1) and (3)'.⁶⁵ What are those situations? In its judgment the Court did not consider it necessary to decide this question.

63. In my view, it should not be thought that, in using those words, the Court intended to remove the need for an applicant to prove the existence of a direct and individual interest in the annulment of the contested measure. The Court's intention is

clear from the sequence in which that observation arose. The Court begins by pointing out that the judgment in the case of *Netherlands and Others v Commission* shows that individuals may, in some circumstances, be entitled to bring an action for annulment under the fourth paragraph of Article 230 EC.⁶⁶ In that case, the individual in question was the public undertaking which was the beneficiary of the State measure to which the Commission objected. The admissibility of the action was not in doubt because there was no question as to the direct and individual connection between the applicant and the contested measure. The situation which formed the context of the *Bilanzbuchhalter* judgment was entirely different. In that case, the action was brought by a German-law professional association against a decision by the Commission to take no action on its complaint, which concerned the German legislation on tax advisers. There was no obvious connection between the applicant and the contested measure. In that case, only exceptional circumstances could justify the admissibility of an action against the Commission's refusal to take action on the complaint.

64. Therefore it seems to me that the exceptional nature of the situations referred to by the Court arises simply from the difficulty of establishing in such cases that a person is individually concerned. As we have seen, third parties affected by the adopted measure have no protected rights to assert in support of an action. Without such rights, it is difficult to derive from a factual situation an individual interest in instituting judicial

64 — *TFI v Commission*, paragraph 52.

65 — Paragraph 25 of the judgment.

66 — *Bundesverband der Bilanzbuchhalter v Commission*, cited above in footnote 5, paragraph 23. The Court refers to the judgment in *Netherlands and Others v Commission*, cited above in footnote 21.

proceedings. In particular, it is common ground that an ordinary competitive relationship between an applicant and the beneficiary of the State measure cannot in itself give rise to an individual interest.⁶⁷ That is why it is necessary to show, in addition, 'specific circumstances'⁶⁸ or a 'special situation'⁶⁹ which differentiates the applicant, as regards the measure in question, from all other traders concerned.

from the case-law that an applicant is individually concerned where his specific situation was taken into consideration in the adoption of the act by the institution in question.⁷² In my view, this must be the decisive criterion.

65. This conclusion concurs with that of Advocate General Mischo in the case of *Commission and France v TFI*.⁷⁰ It compels acceptance all the more since the Court found, in the judgment in the case of *Union de Pequeños Agricultores v Council*,⁷¹ that the condition relating to the individual capacity to bring an action cannot in any case be set aside as otherwise the Community courts would be going beyond the jurisdiction conferred on them.

66. It remains to determine the criterion for establishing an individual interest in bringing an action in such circumstances. It is clear

67. In this connection, the Court of First Instance sets out various factors in the judgment under appeal which are not all equally conclusive.⁷³ In particular, the Court observes that the contested measure is a reaction to a complaint from max.mobil and that the Commission had several meetings with that company. However, as the latter had no formally protected procedural rights, these factors cannot be regarded as decisive. The Court of First Instance adds that a significant part of max.mobil's activities were in competition with a significant part of the activities of the beneficiary of the State measure referred to by the contested measure. However, a competitive relationship is not sufficient. The decisive factor in this case for establishing max.mobil's individual capacity to bring an action appears to be that the Commission based its decision on the fact that the fees imposed on Mobillkom were the same as those imposed on max.mobil. Consequently the decision was adopted on the basis of a comparison between the amount imposed on max.mobil and that imposed on the public operator. Here was a situation which was indeed exceptional because, in this case, the measure adopted

67 — This is clear from the judgment in Joined Cases 10/68 and 18/68 *Eridania and Others v Commission* [1969] ECR 459, paragraph 7. In a context similar to the present case, it was repeated in the *Coe Clerici Logistics v Commission* judgment, cited above in footnote 7, paragraph 90.

68 — *Eridania and Others v Commission*, cited above in footnote 67, paragraph 7.

69 — See, for example, the judgment in Case C-358/89 *Extramet Industries v Council* [1991] ECR I-2501, paragraph 17, and, to the same effect, Case T-435/93 *ASPEC and Others v Commission* [1995] ECR II-1281, paragraphs 64 to 70.

70 — See paragraph 71 of the Opinion in the case of *Commission and France v TFI*, cited above in footnote 14.

71 — Cited above in footnote 50, paragraph 44.

72 — This wording follows clearly from the judgment in Case C-321/95 P *Greenpeace Council and Others v Commission* [1998] ECR I-1651, paragraph 28, where the Court of Justice summarises its settled case-law. See, in general, P. Cassia, *L'accès des personnes physiques ou morales au juge de la légalité des actes communautaires*, Dalloz, Paris, 2002, in particular p. 567 ff.

73 — Paragraph 70 of the judgment under appeal.

by the Commission was to a large extent based on consideration of max.mobil's special situation.⁷⁴ In these circumstances it was clear that max.mobil was not in the situation of an ordinary competitor. It was individually concerned by the contested measure.

menting the protection granted to individuals,⁷⁵ there is no justification for questioning the existence of such protection. In this respect, the nature of the disputed Community act alone is significant. The nature of the State measure which is the subject of the contested act cannot be taken into consideration as otherwise the controls provided for by the Treaty would cease to be effective.

68. Should the proviso added by the Court of Justice in the *Bilanzbuchhalter* judgment be taken into account, when it stated that, in any case, an individual cannot, by means of such an action, compel indirectly the Member State concerned to enact a legislative measure of general application? As the Court of First Instance rightly observes in paragraph 70 of the judgment under appeal, the measure at issue in the present case differs from that in the case which gave rise to the judgment of the Court of Justice. In the present case, max.mobil seeks to call into question State measures laying down fees in relation to particular operators. Consequently the proviso is not applicable.

C — Partial conclusion

70. From the foregoing assessment it appears that the conclusion of the Court of First Instance that 'the applicant's entitlement to bring proceedings derives from the fact that it is the addressee of the contested measure, by which the Commission decided not to take any action against the Republic of Austria under Article 90(3) of the EC Treaty regarding the amount of the fees for mobile radio-telephony concessions' is erroneous. In so far as that Court considers that this conclusion is sufficient to show that the action is admissible, the Court of First Instance erred in law.

69. I also consider that, although it may be legitimate to take account of the nature of the interests likely to be affected in imple-

71. However, this mistake in law cannot entail the annulment in that respect of the judgment under appeal if it can be shown that the contested measure is of direct and

⁷⁴ — See, in this respect, the judgment in *Timex v Council and Commission*, cited above in footnote 52, paragraphs 13 to 16, where the Court based the applicant's individual interest on the fact that the anti-dumping regulation took account of its observations and the situation arising for it from the dumping found to have taken place. See also the judgment in *Case T-266/94 Skibsværftsforeningen and Others v Commission* [1996] ECR II-1399, paragraphs 46 to 48, where the Court of First Instance found that the action was admissible on the ground, first, that the applicants were in direct competition with the undertaking benefiting from the aid referred to in the contested decision and, second, that, in the administrative procedure, the Commission relied on comparisons between the applicants' installations and those of the said undertaking.

⁷⁵ — See paragraph 35 of this Opinion.

individual concern to max.mobil within the meaning of the fourth paragraph of Article 230 EC. In my view, that is the case in this field if max.mobil's situation is significantly differentiated by comparison with that of third parties who are potentially also affected by the contested measure. In the present case, the assessment by the Court of First Instance has shown that the contested measure was adopted in direct consideration of max.mobil's situation. Therefore its action for the annulment of the measure was admissible. Consequently it must be found that the Court of First Instance did not err in law in finding that the application was admissible and the form of order sought in the appeal must be rejected.

A — *Nature of judicial review*

74. To avoid any confusion, I think it is necessary to distinguish clearly two issues: first, the scope of judicial review and, second, the means and criteria of such review.

1. Scope of review

V — **Appraisal of the grounds of the cross-appeal**

72. The respondent's cross-appeal challenges the substantive appraisal of the application. The respondent adduces three grounds relating to factual errors and errors in law on the part of the Court of First Instance.

73. For a proper assessment of the grounds of this appeal, I must revert to the nature of the review carried out by the Community courts in this matter. The account of the framework of the judicial review carried out by the Court of First Instance in paragraphs 58, 59 and 73 of the judgment under appeal betrays a certain degree of confusion which is reflected in the way in which the review was carried out in the present case.

75. According to the Court of First Instance, when carrying out a review of a decision adopted on the basis of Article 86(3) EC, 'the role of the Community judicature is limited to a circumscribed review'⁷⁶ which is 'limited in scope and varies in depth. The material accuracy of the facts relied on must be thoroughly examined by the Court, whereas the *prima facie* appraisal of those facts and, more so, the decision whether it is necessary to take action are subject to limited review by the Court'.⁷⁷

76. These statements are only partly correct.

⁷⁶ — Paragraph 58 of the judgment under appeal.

⁷⁷ — Paragraph 59 of the judgment under appeal.

77. It is settled case-law that the exercise of the Commission's powers under the competition rules involves complex economic appraisals.⁷⁸ It follows that the Community courts must respect this by limiting their review of such appraisals.⁷⁹ Nevertheless the review, understood in this way, is a complete review of legality in the sense that it extends to all the defects normally examined by the Community courts in the context of an action for annulment. In this case, the judicial review covers the questions of whether the facts have been correctly stated, whether the formal and procedural rules have been complied with and whether there has been any manifest error of assessment or misuse of powers.⁸⁰

78. Consequently it is untrue to say that a judicial review is limited in scope. First of all, it is not the extent of the review that is limited, but its depth. The Court merely considers whether there have been any manifest breaches of the Treaty or any rule of law relating to the application of the Treaty. The Court identifies manifest errors in the observance of the applicable law and in the legal assessment of the relevant facts. Second, in view of the Commission's discretion in this respect, it is not for the Court to verify whether it was 'necessary to take action'. The question of the appropriateness

of a measure which falls within the discretion of an institution goes beyond the limits of an ordinary review of legality, irrespective of its depth. It is entirely a matter for appraisal by the political or administrative authorities to which the Treaty entrusts the task of adopting Community measures.⁸¹

79. If there is a special aspect of the judicial review of Commission measures adopted by virtue of a discretionary power, it is more likely to found elsewhere. It lies in the nature of the rules serving as the reference for carrying out such review, that is to say, the sources by reference to which the legality of adopted measures is assessed.⁸²

2. Criteria of review

80. In all cases where the Commission has a discretionary power for fulfilling its functions as the administrative authority of the Community, the Community courts have strengthened their review powers by the addition of new resources. This was laid

78 — This has been repeatedly decided by the Court since the judgment in Joined Cases 56/64 and 58/64 *Consten and Grundig v Commission* [1966] ECR 299, 347.

79 — See, for example, Case 42/84 *Remia and Others v Commission* [1985] ECR 2545, paragraph 34. In connection with Article 86 EC, see Case T-106/95 *FFSA and Others v Commission* [1997] ECR II-229, paragraph 100.

80 — For a recent example, see Joined Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia v Commission* [2003] ECR I-4035, paragraph 39.

81 — For the treatment of complaints in the context of competition law, see inter alia Case 125/78 *GEMA v Commission* [1979] ECR 3173, paragraph 18, and Case T-24/90 *Automec v Commission* [1992] ECR II-2223, paragraphs 73 to 77.

82 — See D. Ritleng, 'Le juge communautaire de la légalité et le pouvoir discrétionnaire des institutions communautaires', *Actualité juridique. Droit administratif*, 1999, p. 645.

down by the Court for the first time in its judgment in *Technische Universität München*.⁸³ In that case the Court held that, in the context of an administrative procedure entailing complex evaluations, 'respect for the rights guaranteed by the Community legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case [and] the right of the person concerned ... to have an adequately reasoned decision'.⁸⁴ Similar safeguards have been extended to all procedures pursuant to competition rules. Incidentally, this is the origin of Article 41 of the Charter of Fundamental Rights of the European Union, referred to by the Court of First Instance in the judgment under appeal.⁸⁵

to argue that such safeguards are only the corollaries of the procedural rights. The Court of Justice normally differentiates between the application of those safeguards and the application of the procedural rights of individuals.⁸⁶

82. Consequently, the Court of First Instance was quite justified in reviewing the application of the safeguards in a case where the Commission refuses to take action on a complaint pursuant to Article 86(3) EC. On the other hand, that Court was not justified in concluding from this that such review must be confined to ascertaining that 'the contested measure includes a statement of reasons which is *prima facie* consistent and reflects due consideration of the relevant aspects of the case'.⁸⁷

81. In the case-law, these safeguards are understood as a means, first, of laying down limits to the Commission's discretionary power and, second, of protecting third parties whose interests are affected but who have no procedural protection equal to that of persons to whom decisions are addressed. In this connection the Commission is wrong

83. This statement is not in keeping with the criteria for review laid down by the case-law of the Court of Justice. There are two factors which argue against the assessment of the Court of First Instance on this point. First, the judgment under appeal overlooks the fact that, whenever the Commission exercises a discretion in applying the competition rules, a statement of reasons which is '*prima facie* consistent' is not sufficient. In the present case, it is no doubt necessary to take account of the nature of the measure adopted. However, in any case, the statement of reasons required by Article 253 EC 'must disclose in a clear and unequivocal fashion the reasoning followed by the institution

83 — Case C-269/90 [1991] ECR I-5469.

84 — Paragraph 14 of the judgment in *Technische Universität München*, cited above in footnote 83.

85 — The explanatory notes provided by the Presidency of the Convention which drafted the Charter refer to this judgment. It should be observed that the draft text laying down a Constitution for Europe states that 'the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared at the instigation of the Praesidium'. Therefore it is now legitimate to assess the meaning of this article in the light of the case-law of the Court of Justice.

86 — See, for example, *Schlüsselverlag I.S. Moser and Others v Commission*, cited above in footnote 4, paragraph 29, and *Commission v Sytraval and Brink's France*, cited above in footnote 45, paragraphs 62 to 64.

87 — Paragraph 58 of the judgment under appeal.

which adopted the measure in such a way as to enable those concerned to ascertain the reasons for the measure and the competent court to exercise its power of review'.⁸⁸ Consequently a mere review of the logic of the statement of reasons is not sufficient; it is also necessary to ensure that the institution in question has provided an adequate account of the circumstances and the grounds on which its assessment is based.

84. In the second place, the Court of First Instance appears to place the need to take into consideration the relevant aspects of the case, based on the obligation to carry out a diligent and impartial examination, solely in the context of scrutinizing the duty to state reasons. However, it is not disputed that these two obligations belong to different classes of judicial resources. The obligation to state sufficient reasons is connected with examination of the formal rules governing the contested measure. It is a matter of setting out, in the main body of the measure, the reasons for adopting it. In contrast, the obligation of an impartial examination of a complaint forms part of the examination of the substantive legality of the contested measure. It means that, for the measure in question to be valid, a manifestly correct legal appraisal is not sufficient; such appraisal must also include a diligent examination of all the matters of law or of fact which are capable of justifying that measure.

85. It follows that 'the plea alleging breach of the obligation to state reasons and the plea

alleging a manifest error of assessment as to whether or not [Articles 82 EC and 86 EC] have been infringed' cannot be 'considered together', as the Court of First Instance states in paragraph 73 of the judgment under appeal. Such juxtaposition is likely to lead to confusion between assessment of the grounds and assessment of the statement of reasons for the contested measure. Therefore, as the Court of Justice has already shown in the context of *Commission v Sytraval and Brink's France*, the Court of First Instance fails to appreciate the limits to its review by not making, if only in the formal respect, 'the necessary distinction between the requirement to state reasons and the substantive legality of the decision'.⁸⁹

86. It is also necessary to verify that the Court of First Instance did not err in law in finding that the contested measure did not breach either of those two requirements taken separately.

B — Judicial review

87. The respondent adduces three heads of complaint concerning the assessment of the substance of the case by the Court of First Instance.

⁸⁸ — Case C-163/99 *Portugal v Commission* [2001] ECR I-2613, paragraph 38.

⁸⁹ — *Commission v Sytraval and Brink's France*, cited above in footnote 45, paragraph 72.

1. Factual error

88. First, the respondent claims that the Court of First Instance failed to consider a number of factual matters which indicate that the fees paid by max.mobil and Mobilkom are not in reality the same.

Mobilkom, the respondent is in reality referring to an alleged error on the part of the Court of First Instance in the legal appraisal of the relevant facts. That question must therefore be dealt with in relation to the second alleged ground.

2. Error in law in the review of the legal appraisal of the facts

89. It should be borne in mind that, in the context of an appeal, it is not for the Court to give a ruling on the assessment of factual matters by the Court of First Instance, unless there is distortion of those facts by it.⁹⁰ In the present case, however, no distortion whatever has been established. It is not disputed that the fees paid by the operators in question are formally of the same amount. Therefore the Court of First Instance did not err in finding that the contested measure was based on those facts, the truth of which is not contested. It follows that this ground of appeal must be dismissed as manifestly unfounded.

91. The respondent's second ground of appeal is that there was a manifestly erroneous legal assessment. The Court of First Instance ought to have recognised that the identical treatment of two fundamentally different situations, namely that of max. mobil and that of Mobilkom, constituted discrimination prohibited by the Treaty.

90. With its submission that there is a difference between the fees paid by the operators concerned because of a discount and deferment of payment allowed to

92. At paragraph 75 of the judgment under appeal, the Court of First Instance based its assessment entirely on the factors set out by the Commission in the contested measure, namely, first, the payment of an identical fee by the two operators concerned and, second, the fact that the Commission's conclusion was consistent with its previous practice. That was sufficient for the Court of First Instance to find that there was no manifest error of assessment on the Commission's part.

⁹⁰ — See, in particular, the order of 11 November 2003 in Case C-488/01 P *Martinez v Parliament*, not yet published in the ECR I-13355, paragraph 53.

93. However, in making that finding, the Court of First Instance failed to appreciate the limits of the review by which it rightly considered itself bound. In regard to manifest error of assessment, it was the Court's duty to ascertain whether the obligation to carry out an impartial and diligent examination had been fulfilled. That obligation entails a careful examination of all the factual and legal circumstances submitted by the complainant to the Court for its assessment. In the present case, such circumstances consisted, as shown in paragraphs 30 to 34 of the judgment under appeal, in the possible existence of financial benefits granted to Mobilkom, the allegation that the concession granted to Mobilkom was of greater value, and the need for equal treatment of the different operators in the grant of concessions in such markets.

94. It is clear that the Court of First Instance erred in law by refraining from verifying whether the Commission took into consideration all the relevant aspects of the case which were placed before it, and it is unnecessary to give a ruling on the conclusion which the Court of First Instance ought to have reached if it had done so, particularly as to whether the Commission omitted to find manifest discrimination in the situation in question.⁹¹

⁹¹ — In this connection it should be noted that, in the recent judgment in Case C-462/99 *Connect Austria* [2003] ECR I-5197, concerning the Austrian GSM market, the Court stated that the existence of discrimination in relation to fees imposed on operators is assessed in terms of economic equivalence of their positions in the market concerned (paragraph 116).

3. Error in law in the review of the lack of a statement of reasons

95. Finally, the respondent complains of an error in law on the part of the Court of First Instance in finding that the contested measure was adequately reasoned in relation to the requirements of Article 253 EC.

96. At paragraph 79 of the judgment under appeal, the Court of First Instance held that the statement of reasons was adequate because max.mobil was in a position to understand the reasons set out in the grounds of the contested measure. That was so because the contested measure had been adopted following a number of meetings between max.mobil and the Commission and in a context with which the former was familiar.

97. It is common ground that the question whether the statement of reasons of a decision is adequate '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'.⁹² According to the case-law, consideration of the context in this way may justify some modification in the stringency of the requirement for a statement of reasons, particularly with regard to the 'knowledge acquired'. If there are good reasons for believing that an applicant was in a position to know the grounds of the decision finally taken by the Commission, it

⁹² — See, in particular, the judgment of 22 June 2004 in Case C-42/01 *Portugal v Commission*, ECR I-6079, paragraph 66.

may be presumed that the requirement for a statement of reasons has been met in its case.⁹³ However, caution is necessary when applying this reasoning, as otherwise the protection due to interested parties may be jeopardised.⁹⁴ There must be no doubt at all that the person concerned has actually acquired knowledge. In any case, a reference to previous decisions⁹⁵ or a reference to the interveners' submissions⁹⁶ is not sufficient as a statement of reasons for the decision adopted. This applies in particular where the Commission has a broad discretion in complex economic situations. In that case the persons concerned have a legitimate interest in being notified in due form of the reasons which led the Commission to adopt a measure.⁹⁷ Not only the addressees of the measure, but also the other persons to whom it is of direct and individual concern within the meaning of the fourth paragraph of Article 230 EC must be recognised as having such an interest.⁹⁸

98. In the present case, the Court of First Instance relies entirely on supplementary statements lodged by max.mobil with the Commission in the course of the procedure for examining the complaint. Such an approach is manifestly erroneous. The obligation laid down in Article 253 EC requires not only knowledge of the context in which the decision was adopted, but also knowledge of the reasons for the decision. Although some interpretative effort may be required of the persons involved in the decision-making process, this cannot go so far as to require them to infer the reasons for a decision from the background and the context of the case in question. It follows that it is not sufficient, as the Court of First Instance observed, to put the applicant at first instance in a position to understand those reasons. It is necessary at least to ensure that the reasons were given to that applicant at a particular time in the decision-making process. In omitting to verify that point, the Court of First Instance erred in law.

93 — See, to that effect, Case 1252/79 *Lucchini v Commission* [1980] ECR 3753, paragraph 14.

94 — See, to that effect, the Opinion of Advocate General Roemer in Case 24/62 *Germany v Commission* [1963] ECR 63, at p. 73, in which he observed: 'I would like to reject the proposition that the statement of reasons for the decision can be proportionate to the other opportunities to obtain information available to the parties to whom the decision is addressed, because we know from other actions that it is a matter of controversy as to who, in cases similar to the present one, apart from the persons mentioned in the decision, is affected by it and has a right to make an application. Moreover, and I believe the applicant to be right on this point, one must not forget the useful function which the obligation to state reasons performs for the purposes of a logical strengthening of the protection afforded by the law, in so far as it forces the Executives, when they formulate the statement of reasons for a decision, to give careful consideration to the conditions giving rise to the decision'.

95 — See, to that effect, Case 294/81 *Control Data v Commission* [1983] ECR 911, paragraph 15.

96 — See, to that effect, Case 323/82 *Intermills v Commission* [1984] ECR 3809, paragraph 38.

97 — See, to that effect, Case C-358/90 *Compagnia italiana alcool v Commission* [1992] I-2457, paragraphs 42 and 43, and also *Technische Universität München*, cited above in footnote 83, paragraph 27.

98 — Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek v Commission* [1985] ECR 809, paragraph 19, *Commission v Sytraval and Brink's France*, cited above in footnote 45, paragraph 63, and Joined Cases T-371/94 and T-394/94 *British Airways and Others and British Midland Airways v Commission* [1998] ECR II-2405, paragraph 64.

VI — Summary

99. It is clear from the foregoing discussion as a whole that the judgment under appeal is vitiated by errors of law. The errors relating to the admissibility of the action at first instance quite easily permit a substitution of grounds, so that the finding of the Court of First Instance concerning the admissibility of the action appears well-founded in law. However, the same does not apply to the errors relating to the examination of the substance of the case. These cannot be

rectified and therefore provide justification for allowing the appeal. Under the first paragraph of Article 61 of the Statute of the Court of Justice, if the appeal is well founded, the Court of Justice is to quash the decision of the Court of First Instance. It may itself then give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.

100. As the Court of First Instance did not assess to what extent the Commission took into consideration all the aspects of the case or ascertain whether the decision in question included an adequate statement of reasons, in view of the conditions in which it was adopted, the state of the proceedings does not permit final judgment. Consequently the case must be referred back to the Court of First Instance and the costs must be reserved.

VII — Conclusion

101. In the light of the foregoing observations, I propose that the Court rule as follows:

- (1) The judgment of the Court of First Instance of 30 January 2002 in Case T-54/99 *max.mobil v Commission* is quashed.
- (2) The case is referred back to the Court of First Instance.
- (3) The costs are reserved.