

JUDGMENT OF THE COURT (Fourth Chamber)

13 March 2008^{*}

In Case C-125/06 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 28 February 2006,

Commission of the European Communities, represented by K. Banks and M. Huttunen, acting as Agents, with an address for service in Luxembourg,

appellant,

the other parties to the proceedings being:

Infront WM AG, formerly FWC. Medien AG, then KirchMedia WM AG, established in Zug (Switzerland), represented by M. Garcia, Solicitor,

applicant at first instance,

^{*} Language of the case: English.

French Republic,

United Kingdom of Great Britain and Northern Ireland,

European Parliament,

Council of the European Union,

interveners at first instance,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, G. Arestis, R. Silva de Lapuerta, E. Juhász and J. Malenovský (Rapporteur), Judges,

Advocate General: Y. Bot,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 18 October 2007,

gives the following

Judgment

- ¹ By its appeal, the Commission of the European Communities seeks the setting aside of the judgment of the Court of First Instance of the European Communities of 15 December 2005 in Case T-33/01 *Infront WM v Commission* [2005] ECR II-5897 ('the judgment under appeal'), by which it annulled the Commission's decision contained in its letter of 28 July 2000 to the United Kingdom of Great Britain and Northern Ireland ('the contested decision').

Legal context

Community Legislation

- ² Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23), as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 (OJ 1997 L 202, p. 60; 'Directive 89/552'), is intended to ensure freedom of reception and retransmission of television broadcasts within the European Community by laying down minimum rules with which the Member States are required to ensure that television broadcasters under their jurisdiction comply.

3 The 18th and 19th recitals in the preamble to Directive 97/36 read as follows:

‘(18) ... it is essential that Member States should be able to take measures to protect the right to information and to ensure wide access by the public to television coverage of national or non-national events of major importance for society, such as the Olympic games, the football World Cup and the European football championship; ... to this end Member States retain the right to take measures compatible with Community law aimed at regulating the exercise by broadcasters under their jurisdiction of exclusive broadcasting rights to such events;

(19) ... it is necessary to make arrangements within a Community framework, in order to avoid potential legal uncertainty and market distortions and to reconcile free circulation of television services with the need to prevent the possibility of circumvention of national measures protecting a legitimate general interest’.

4 Under Article 1(b) of Directive 89/552, ‘broadcaster’ means the natural or legal person who has editorial responsibility for the composition of schedules of television programmes and who transmits them or has them transmitted by third parties.

5 Article 3a of Directive 89/552, as inserted by Directive 97/36, is in these terms:

‘1. Each Member State may take measures in accordance with Community law to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive

basis events which are regarded by that Member State as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events via live coverage or deferred coverage on free television. If it does so, the Member State concerned shall draw up a list of designated events, national or non-national, which it considers to be of major importance for society. It shall do so in a clear and transparent manner in due and effective time. In so doing the Member State concerned shall also determine whether these events should be available via whole or partial live coverage, or where necessary or appropriate for objective reasons in the public interest, whole or partial deferred coverage.

2. Member States shall immediately notify to the Commission any measures taken or to be taken pursuant to paragraph 1. Within a period of three months from the notification, the Commission shall verify that such measures are compatible with Community law and communicate them to the other Member States. It shall seek the opinion of the Committee established pursuant to Article 23a. It shall forthwith publish the measures taken in the *Official Journal of the European Communities* and at least once a year the consolidated list of the measures taken by Member States.

3. Member States shall ensure, by appropriate means, within the framework of their legislation that broadcasters under their jurisdiction do not exercise the exclusive rights purchased by those broadcasters following the date of publication of this Directive in such a way that a substantial proportion of the public in another Member State is deprived of the possibility of following events which are designated by that other Member State in accordance with the preceding paragraphs via whole or partial live coverage or, where necessary or appropriate for objective reasons in the public interest, whole or partial deferred coverage on free television as determined by that other Member State in accordance with paragraph 1.'

National legislation

- 6 Sections 98 and 101 in Part IV of the Broadcasting Act 1996, as amended by the Television Broadcasting Regulations 2000 ('the Broadcasting Act'), provide:

'98. Categories of service

- (1) For the purposes of this Part, television programme services and [European Economic Area ("EEA")] satellite services shall be divided into two categories as follows:

(a) those television programme services and EEA satellite services which for the time being satisfy the qualifying conditions, and

(b) all other television programme services and EEA satellite services.

- (2) In this section "the qualifying conditions", in relation to a service, means the conditions:

(a) that the service is provided without any consideration being required for reception of the service, and

- (b) that the service is received by at least 95% of the population of the United Kingdom.

...

101. Restriction on televising of listed event

- (1) A television programme provider providing a service falling within either of the categories set out in subsection (1) of section 98 (“the first service”) for reception in the United Kingdom or in any area of the United Kingdom shall not, without the previous consent of the [Independent Television Commission (“the ITC”)], include in that service live coverage of the whole or any part of a listed event unless:
 - (a) another person, who is providing a service falling within the other category set out in that subsection (“the second service”) has acquired the right to include in the second service live coverage of the whole of the event or of that part of the event, and
 - (b) the area for which the second service is provided consists of or includes the whole, or substantially the whole, of the area for which the first service is provided.

...’

- 7 Those provisions were notified to the Commission on the basis of Article 3a(2) of Directive 89/552 and published in the *Official Journal of the European Communities* (OJ 2000 C 328, p. 2).
- 8 The factors to be considered in giving the consent referred to in Section 101(1) are specified in the Independent Television Commission Code on Sports and other Listed Events, as amended.

Facts

- 9 The facts which gave rise to this dispute, as set forth in paragraphs 7 to 22 of the judgment under appeal, can be summarised as follows.
- 10 Infront WM AG ('Infront'), formerly FWC Medien AG which became KirchMedia WM AG, is involved in the acquisition, management and marketing of television broadcasting rights for sporting events. Typically it purchases such rights from the organiser of the sporting event concerned and resells the rights thus acquired to broadcasters.
- 11 On 10 September 1996, its parent company signed a contract with the Fédération internationale de football association ('FIFA') for the exclusive television broadcasting rights to the final-stage matches of the 2002 and 2006 FIFA World Cups. It acquired, among others, the exclusive television broadcasting rights to those matches in the countries of Europe. Those rights were subsequently assigned to Infront.

- ¹² By letters of 25 September 1998 and 5 May 2000, the United Kingdom notified the Commission, in accordance with Article 3a(2) of Directive 89/552, of the measures adopted pursuant to Article 3a(1).
- ¹³ On 28 July 2000, the Director-General of the Commission's Directorate-General for Education and Culture sent the United Kingdom the contested decision, stating as follows:

'By letter dated 5 May 2000, received by the European Commission on 11 May 2000, the [United Kingdom] Permanent Representation to the European Union notified [to] the Commission a set of national measures concerning the television coverage of events of national interest in the United Kingdom. ...

I have the honour to inform you that pursuant to the examination of the conformity of the measures taken with ... [D]irective [89/552] and on the basis of the facts available in relation to the audiovisual landscape in the United Kingdom, the ... Commission does not intend to object to the measures notified by your authorities.

As required by Article 3a(2) of ... [D]irective [89/552], the Commission will proceed with the publication of the notified measures in the [Official Journal].'

- ¹⁴ The Commission published those measures in the Official Journal on 18 November 2000. They include Sections 98 and 101 of the Broadcasting Act and the list of events of major importance for society designated by the United Kingdom ('the designated events'). Among those events are the FIFA World Cup Finals.

- 15 During the verification procedure of those measures by the Commission, Infront sent it two letters in which it claimed that the list of designated events could not be approved because of its incompatibility with both Article 3a of Directive 89/552 and other provisions of Community law.
- 16 Subsequently, by letter of 7 December 2000, Infront asked the Commission to confirm that it had completed the verification process under Article 3a(2) of Directive 89/552 in connection with the list of designated events and to inform Infront of the outcome of the process, including any relevant Commission measures. The Commission replied to Infront that the procedure had been completed and that the list of designated events had been accepted as compatible with that directive.
- 17 Consequently, Infront brought an action before the Court of First Instance for the annulment of the contested decision.
- 18 The Commission raised a plea of inadmissibility. It contended that it had not adopted the contested decision pursuant to Article 3a(2) of Directive 89/552 and that the contested decision was not of direct or individual concern to Infront.

The judgment under appeal

- 19 In the judgment under appeal, the Court of First Instance rejected the plea of inadmissibility and declared the action admissible.

- 20 It found, first, that the contested decision closed the procedure under Article 3a(2) of Directive 89/552, by virtue of which the Commission is required to verify the compatibility with Community law of national measures adopted pursuant to Article 3a(1). The publication in the Official Journal of those measures approved by the Commission informed the other Member States of their existence and, therefore, enabled them to comply with their obligations under Article 3a(3) of that directive as part of the mechanism for mutual recognition of those measures instituted by the latter provision.
- 21 The contested letter therefore produced, in the Court of First Instance's view, legal effects for the Member States, in so far as it envisaged the publication in the Official Journal of the national measures in question, since the effect of that publication is to trigger the mechanism for mutual recognition laid down by Article 3a(3) of Directive 89/552. It is thus a decision within the meaning of Article 249 EC, although Article 3 of Directive 89/552 does not expressly refer to the adoption by the Commission of a 'decision'.
- 22 Secondly, the Court of First Instance considered whether that decision is of direct concern to Infront. It noted the case-law according to which, in order to be of direct concern to an individual within the meaning of the fourth paragraph of Article 230 EC the contested Community measure must directly affect the applicant's legal situation and its implementation must be purely automatic and result from Community rules alone without the application of other intermediate rules (see Case C-386/96 P *Dreyfus v Commission* [1998] ECR I-2309, paragraph 43 and the case-law cited).
- 23 The Court of First Instance held, first of all, that where Infront assigns its television broadcasting rights to a broadcaster established in the United Kingdom for the purposes of television broadcasting in that Member State, the measures adopted by the United Kingdom authorities exist in law independently of the contested decision.

In so far as the measures notified are applicable to broadcasters established in the United Kingdom under the national law on broadcasting in force in that Member State and not by virtue of the contested decision, Infront is not directly concerned.

24 On the other hand, only the contested decision finding that the measures notified by the United Kingdom are compatible with Community law and providing for the subsequent publication of those measures in the Official Journal enables the mechanism of mutual recognition under Article 3a(3) of Directive 89/552 to operate effectively. It follows that, in that situation, the contested decision validates those measures for the sole purposes of their recognition by the other Member States.

25 Furthermore, the Court of First Instance decided that since such mutual recognition of the national measures adopted pursuant to Article 3a(1) of Directive 89/552 is subject to their approval by the Commission and their subsequent publication in the Official Journal, the contested decision does not leave the Member States any discretion, once that publication has occurred, as to the performance of their obligations. Although the detailed rules for the control which the national authorities are required to exercise under the mechanism of mutual recognition established by Article 3a(3) of Directive 89/552 are determined by each Member State in the framework of its legislation implementing that provision, those authorities must ensure that broadcasters under their jurisdiction comply with the conditions for broadcasting the events designated in the national measures approved and published in the Official Journal by the Commission.

26 The Court of First Instance concluded, therefore, that Infront is directly concerned by the contested decision in so far as it enables the implementation of the mechanism of mutual recognition by the other Member States of the measures adopted by the United Kingdom pursuant to Article 3a(1) of Directive 89/552 .

- 27 Thirdly, the Court of First Instance held that Infront is, likewise, individually concerned by the contested decision. That decision concerns Infront by reason of a characteristic peculiar to it, namely its capacity as the exclusive holder of the television broadcasting rights for one of the designated events. Although Infront, in its capacity as broker of the relevant television broadcasting rights is not expressly covered by the national measures approved and published in the Official Journal by the Commission, they impede its ability freely to dispose of its rights by restricting their transfer exclusively to a broadcaster established in a Member State other than the United Kingdom which wishes to broadcast that event in the latter State.
- 28 Moreover, although the legal validity of the contracts concluded with FIFA is not affected by the contested decision, it is of importance that Infront acquired exclusively the television broadcasting rights in question before the entry into force of Article 3a of Directive 89/552 and, a fortiori, before the adoption of the contested decision.
- 29 On the substance, the Court of First Instance annulled the contested decision, on the ground that, being a decision within the meaning of Article 249 EC, it was vitiated by lack of powers. The College of Commissioners had not been consulted and the Director-General who signed the contested decision had received no specific power from the College.

Forms of order sought by the parties

- 30 By its appeal, the Commission claims that the Court should:

— set aside the judgment under appeal;

- give final judgment by declaring that the application before the Court of First Instance was inadmissible, and
- order Infront to pay the Commission's costs at first instance and on appeal.

31 Infront contends that the Court should:

- dismiss the appeal, or
- refer the case back to the Court of First Instance for judgment in accordance with the judgment of the Court of Justice as to law; and
- order the Commission to pay its own and Infront's costs relating to the proceedings before this Court and the Court of First Instance.

The appeal

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

33 In support of its appeal, the Commission pleads two grounds of appeal alleging misapplication of the two latter requirements.

Preliminary observations

34 Prior to examining those grounds of appeal, it is necessary to define the scope and effect of Article 3a of Directive 89/552 and of the contested decision.

35 Under Article 3a(1) of Directive 89/552, each Member State may take measures in accordance with Community law to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following them via live coverage or deferred coverage on free television. To that end, the Member State concerned is to draw up a list of such events.

36 Article 3a(2) of Directive 89/552 requires the Commission to verify that those measures are compatible with Community law and to publish them in the Official Journal. Article 3a(3) puts in place a mutual recognition mechanism by which the other Member States must ensure that broadcasters under their jurisdiction do not circumvent measures adopted pursuant to Article 3a(1) by another Member State, approved by the Commission and published in the Official Journal.

37 That is also stated in the 19th recital in the preamble to Directive 97/36, from the terms of which it is evident that Article 3a of Directive 89/552 is intended to prevent the possibility of circumvention of national measures protecting a legitimate general interest.

38 Pursuant to that legislation, the Commission informed the United Kingdom, by the contested decision, of the approval of the measures it had adopted and of their subsequent publication in the Official Journal. As the Court of First Instance held, that decision thus closed the verification procedure which the Commission was required to carry out under Article 3a(2) of Directive 89/552. The publication in the Official Journal of those measures informed the other Member States of their existence and enabled them to comply with their obligations under Article 3a(3) of Directive 89/552.

39 The contested decision therefore triggered the mutual recognition mechanism under Article 3a(3) of Directive 89/552 and, consequently, activated the other Member States' obligation to ensure that broadcasters under their jurisdiction did not circumvent the measures adopted by the United Kingdom pursuant to Article 3a(1).

40 It is in the light of those considerations that the Commission's grounds of appeal must be examined.

The first ground of appeal, alleging misapplication of the requirement of direct concern

Arguments of the parties

41 The Commission submits that the Court of First Instance erroneously applied the case-law mentioned in paragraph 22 of the present judgment, which defines the requirement of direct concern under the fourth paragraph of Article 230 EC.

- 42 First of all, the contested decision does not affect Infront's legal situation. It requires the Member States other than the United Kingdom to ensure that broadcasters under their jurisdiction do not deprive a substantial proportion of the public in that Member State of the possibility of following certain designated events on free television. For that purpose, legal obligations are therefore to be imposed only on such broadcasters.
- 43 Assuming that a pay television company established in a Member State other than the United Kingdom wished to bid for the exclusive television broadcasting rights in question, the legal restrictions which are imposed on it could lead it to refrain from doing so. Consequently, Infront would have fewer potential purchasers and probably find itself in a worse business situation than it had envisaged, and that would be not because of a change in its legal position, but solely because it would not be in a position to find the purchaser it could have hoped for. It would therefore suffer the indirect economic consequences of the contested decision, whereas its legal position would remain unaltered.
- 44 Next, even those economic consequences are completely uncertain, since there was no broadcaster established in a Member State other than the United Kingdom which would be willing to pay the considerable sum demanded by Infront for the right to broadcast in the United Kingdom the designated events for which it holds the exclusive television broadcasting rights. The Court of First Instance should have required Infront to prove the plausibility of such a factual situation and the probability of economic loss arising from the contested decision. By failing to apply the appropriate burden of proof, it again fell into error of law.
- 45 Finally, the Court of First Instance wrongly found that the Member States have no discretion in the implementation of the obligations laid down by Article 3a(3) of Directive 89/552. Admittedly, the identity of the events considered to be of major

importance for society and the method of their television broadcasting are determined by the notifying Member State and, therefore, by the Commission's decision adopted pursuant to Article 3a(2). However, the extent to which such an event will be broadcast, in practice, in accordance with the interests of that Member State, largely depends on the legislation and the decision-making structure adopted by each Member State under Article 3a(3). That provision itself states that the task entrusted to the Member States must be achieved 'by appropriate means, within the framework of their legislation'. The results in each Member State may be very different depending on the approach followed in each particular case. In those circumstances, the implementation of the contested decision by Member States other than the United Kingdom involves the exercise of a broad discretion.

⁴⁶ Infront submits that the Court of First Instance correctly concluded that the contested decision is of direct concern to it.

Findings of the Court

⁴⁷ In accordance with settled case-law, the condition that the decision must be of direct concern to a natural or legal person, as laid down in the fourth paragraph of Article 230 EC, requires the contested Community measure to affect directly the legal situation of the individual and leave no discretion to its addressees, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules (see, in particular, *Dreyfus v Commission*, cited above, paragraph 43; Case C-486/01 P *Front national v Parliament* [2004] ECR I-6289, paragraph 34; and Case C-417/04 P *Regione Siciliana v Commission* [2006] ECR I-3881, paragraph 28).

48 First, it must be determined whether the contested decision directly affects Infront's legal situation.

49 Under Articles 98 and 101 of the Broadcasting Act, a broadcaster which wishes to broadcast, exclusively and live, a designated event must, if the service is intended to be received in all or part of the United Kingdom, obtain the ITC's consent. Under the Independent Television Commission Code on Sports and other Listed Events, as amended, the factors on which the ITC's consent depends are essentially that the sale of the television broadcasting rights was the subject of a public announcement and that broadcasters had a genuine opportunity to acquire those rights on terms which were fair and reasonable.

50 As has been stated in paragraphs 35 to 39 of the present judgment, Member States other than the United Kingdom must, because of the contested decision, ensure that broadcasters under their jurisdiction do not circumvent the measures adopted by the United Kingdom pursuant to Article 3a(1) of Directive 89/552 and, therefore, that they do not broadcast designated events notwithstanding the requirements of those measures. It follows that those Member States must ensure that such broadcasters do not broadcast those events, exclusively and live, to the United Kingdom public if they acquired the television broadcasting rights to those events through a sale procedure which did not take account of the criteria mentioned in the preceding paragraph.

51 The measures adopted by the United Kingdom and approved by the contested decision thus impose certain restrictions on broadcasters where they envisage broadcasting designated events for which Infront acquired exclusive rights.

52 Since those restrictions are linked to the circumstances in which those broadcasters acquire the television broadcasting rights to designated events from Infront, the effect of the measures adopted by the United Kingdom and the contested decision is to subject the rights held by Infront to new restrictions which did not exist when it acquired those broadcasting rights and which render their exercise more difficult. Thus, the contested decision directly affects Infront's legal situation.

53 The Commission asserts none the less that the reality of such effects on Infront's legal situation is not established because there was no broadcaster established in the Member States other than the United Kingdom which would, in the absence of the contested decision, be interested in purchasing the television broadcasting rights held by Infront and which would be prevented or dissuaded from acquiring them because of the adoption of that decision. In addition, the Court of First Instance reversed the burden of proof in that regard.

54 The Community legislature inserted Article 3a(3) in Directive 89/552 precisely because circumstances can exist in which broadcasters under the jurisdiction of a Member State purchase exclusive television broadcasting rights to an event considered to be of major importance for society by another Member State and broadcast it to the public in that Member State under conditions which deprive a substantial proportion of that public of the possibility of following it.

55 The Court of First Instance ruled on that aspect in paragraphs 148 and 149 of the judgment under appeal. First, it took note of several cases of cross-frontier broadcasts of events considered to be of major importance for society in which broadcasters had acted in that manner. Second, it considered that the Commission had not made out its allegations that the specificity of the television broadcasting market in the United Kingdom precludes, in the circumstances of this case, such situations. In

the light of those matters, the Court of First Instance concluded that the television broadcasting rights in that Member State to the FIFA World Cup finals would not necessarily have been acquired by broadcasters established in that same State.

- 56 By so doing, the Court of First Instance did not reverse the burden of proof on the parties. It made an unfettered assessment of the facts which were intended to establish the reality of cross-frontier broadcasting of the designated events. In that regard, the Court of First Instance is free to take account of the fact that a party has refrained from adducing evidence in support of its own allegations (see Case C-214/05 P *Rossi v OHIM* [2006] ECR I-7057, paragraph 23).
- 57 Moreover it is settled case-law that an appeal lies on points of law only and that the Court of First Instance thus has exclusive jurisdiction to find and appraise the relevant facts and assess the evidence. The appraisal of those facts and the assessment of that evidence thus do not, save where the facts and evidence are distorted, constitute a point of law which is subject, as such, to review by the Court of Justice on appeal (see Case C-104/00 P *DKV v OHIM* [2002] ECR I-7561, paragraph 22 and the case-law cited).
- 58 Distortion of the facts has not been pleaded before the Court of Justice. In those circumstances, it is not for the Court to review whether the Court of First Instance correctly concluded that it had not been proved that the television broadcasting rights concerned would necessarily have been acquired by broadcasters established in the United Kingdom.
- 59 Secondly, it must be considered whether the contested decision leaves any discretion to the national authorities entrusted with the task of implementing it, or whether such implementation is purely automatic and results from Community rules without the application of other intermediate rules.

- 60 It is true that the national authorities are not deprived of any discretion in implementing Article 3a(3) of Directive 89/552 and the contested decision. They may specify appropriate control mechanisms to satisfy the obligations which flow from it.
- 61 None the less, they must ensure that the broadcasters concerned do not circumvent the measures adopted by another Member State pursuant to Article 3a(1) of Directive 89/552 and that they exercise their exclusive rights in such a way as not to deprive the relevant public of the possibility of following, in accordance with the provisions adopted by that other Member State, the events considered to be of major importance for society.
- 62 Thus, as the Court of First Instance correctly stated in paragraph 146 of the judgment under appeal, the national authorities must ensure that broadcasters under their jurisdiction comply with the conditions for the television broadcasting of those events as defined by another Member State in its measures approved and published in the Official Journal by the Commission. It is those measures, and therefore, in this case, the contested decision, which determine the result to be attained. As regards that result, the national authorities therefore have no discretion.
- 63 The prejudice to the legal situations of broadcasters and of Infront is due to the requirement to attain that result.
- 64 Having regard to the foregoing considerations, the first ground of appeal must be rejected as unfounded.

The second ground of appeal, alleging misapplication of the requirement of individual concern

Arguments of the parties

- ⁶⁵ The Commission submits that the Court of First Instance wrongly held that the contested decision was of individual concern to Infront, within the meaning of the fourth paragraph of Article 230 EC and of the Court's case-law.
- ⁶⁶ The Commission maintains that the approach taken by the Court of First Instance leads to the conclusion that all television broadcasting rights holders affected by the measures adopted by the United Kingdom pursuant to Article 3a(1) of Directive 89/552 are individually concerned by those measures, though such broadcasters are numerous. In the same way as all holders of such rights, Infront is concerned by the contested decision only in its objective capacity as a broker of television broadcasting rights to sporting events having purchased those rights for one of the designated events.
- ⁶⁷ Moreover, holders of television broadcasting rights such as Infront are subject only to the economic consequences of the national measures approved by the contested decision. An undertaking cannot be individually concerned by a regulatory provision solely on the ground that it affects its economic activity and that is the more so if such consequences are a normal commercial risk.
- ⁶⁸ The contested decision does not affect Infront by reason of certain attributes which are peculiar to it or by reason of circumstances in which it is differentiated from all other persons.

69 Infront submits that the Court of First Instance correctly noted the matters which distinguish it from others, namely that it holds exclusive television broadcasting rights for an event in the list of designated events, that those rights were acquired before the establishment of that list and its approval by the Commission, and that such approval seriously prejudices the exploitation by Infront of those rights since it cannot license them on an exclusive basis.

Findings of the Court

70 It is settled case-law that persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed by such a decision (see, particularly, Case 25/62 *Plaumann v Commission* [1963] ECR 95, at 107, and Case C-78/03 P *Commission v Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737, paragraph 33).

71 It is also clear from the Court's case-law that where the decision affects a group of persons who were identified or identifiable when that measure was adopted by reason of criteria specific to the members of the group, those persons might be individually concerned by that measure inasmuch as they form part of a limited class of traders (see Case 11/82 *Piraiki-Patraiki and Others v Commission* [1985] ECR 207, paragraph 31, and Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission* [2006] ECR I-5479, paragraph 60).

- 72 As the Advocate General observed in paragraphs 99 and 100 of his Opinion, that can be the case particularly when the decision alters rights acquired by the individual prior to its adoption (see, particularly, Joined Cases 106/63 and 107/63 *Toepfer and Getreide-Import Gesellschaft v Commission* [1965] ECR 405, at 411).
- 73 Infront held exclusive television broadcasting rights, for 2002 and 2006, to the FIFA World Cup finals, which is one of the events in the list of designated events notified to the Commission and approved by the contested decision.
- 74 It is, furthermore, common ground that Infront acquired those exclusive rights prior to the adoption of the contested decision and that, at that time, there were only six companies which had made substantial investments in the acquisition of television broadcasting rights to events in that list.
- 75 It follows that Infront was perfectly identifiable at the time when the contested decision was adopted.
- 76 Finally, it follows from paragraphs 51 and 52 of the present judgment that the contested decision affected the members of the group formed of those six companies, which include Infront, by reason of an attribute which is peculiar to them, that is to say as holders of the exclusive television broadcasting rights to designated events.
- 77 In those circumstances, the Court of First Instance correctly concluded that the contested decision was of individual concern to Infront.

78 Accordingly, the second ground of appeal must be rejected as unfounded and, therefore, the appeal must be dismissed in its entirety.

Costs

79 Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings by virtue of Article 118 thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Infront has applied for costs and the Commission has been unsuccessful, the Commission must be ordered to pay the costs.

On those grounds, the Court (Fourth Chamber) hereby:

- 1. Dismisses the appeal;**
- 2. Orders the Commission of the European Communities to pay the costs.**

[Signatures]