

JUDGMENT OF THE COURT OF FIRST INSTANCE  
(First Chamber, Extended Composition)  
11 July 1996 \*

In Joined Cases T-528/93, T-542/93, T-543/93 and T-546/93,

**Métropole Télévision SA**, a company incorporated under French law, established in Paris, represented by Pierre Deprez, Philippe Dian and, at the hearing, by Didier Théophile, all of the Paris Bar, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-Rue,

applicant,

**Reti Televisive Italiane SpA**, a company incorporated under Italian law, established in Rome, represented by Carlo Mezzanotte and Giovanni Motzo, of the Rome Bar, and Aurelio Pappalardo, of the Trapani Bar, and, at the hearing, by Massimo Merola, of the Trapani Bar, with an address for service in Luxembourg at the Chambers of Alain Lorang, 51 Rue Albert I<sup>er</sup>,

applicant,

supported by

**Sociedade Independente de Comunicação SA (SIC)**, a company incorporated under Portuguese law, established at Linda-a-Velha (Portugal), represented by Carlos Botelho Moniz, of the Lisbon Bar, with an address for service in Luxembourg at the Chambers of Carole Kerschen, 31 Grand-Rue,

intervener,

\* Languages of the cases: French, Italian and Spanish.

**Gestevisión Telecinco SA**, a company incorporated under Spanish law, established in Madrid, represented by Santiago Muñoz Machado, of the Madrid Bar, with an address for service in Luxembourg at the Chambers of Carlos Amo Quiñones, 2 Rue Gabriel Lippmann,

and

**Antena 3 de Televisión**, a company incorporated under Spanish law, established in Madrid, represented by Fernando Pombo Garcia, Ricardo Garcia Vicente, Emiliano Garayar Gutierrez and Maria Luisa Tierno Centella, of the Madrid Bar, with an address for service in Luxembourg at the Chambers of Claude Wassenich, 6 Rue Dicks,

applicants,

v

**Commission of the European Communities**, represented:

- in Case T-528/93, initially by Berend Jan Drijber, of its Legal Service, and Gérard de Bergues, a national civil servant seconded to the Commission, subsequently by Mr Drijber alone,
- in Case T-542/93, by Berend Jan Drijber, of its Legal Service, assisted by Alberto Dal Ferro, of the Vicenza Bar,
- in Cases T-543/93 and T-546/93, by Berend Jan Drijber and Francisco Enrique González Díaz, of its Legal Service,

and, at the hearing, by Guy Charrier, a national civil servant seconded to the Commission, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

supported

in Case T-528/93 by

**European Broadcasting Union**, an association of broadcasting organizations governed by Swiss law, based in Geneva (Switzerland), represented by Hanns Ullrich, a university professor in Munich, with an address for service in Luxembourg at the Chambers of Jean Welter, 100 Boulevard de la Pétrusse,

in Case T-542/93 by

**Radiotelevisione Italiana SpA (RAI)**, a company incorporated under Italian law, established in Rome, represented by Patrizia Ferrara Ginsburg, of the Luxembourg Bar, Alessandro Pace and Gian Luigi Tosato, of the Rome Bar, with an address for service in Luxembourg at the Chambers of Ferrara Ginsburg, 31 Avenue Guillaume,

and

in Cases T-543/93 and T-546/93 by

**Radiotelevisión Española (RTVE)**, a public body governed by Spanish law, established in Madrid, represented initially by Alfredo Sánchez-Bella Carswell, Rafael Aldama Caso and José Rivas Andrés, of the Madrid Bar, subsequently by Aldama

Caso and Rivas Andrés, with an address for service in Luxembourg at the Chambers of Jean Welter, 100 Boulevard de la Pétrusse,

interveners,

APPLICATION for annulment of Commission Decision 93/403/EEC of 11 June 1993 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/32.150 — EBU/Eurovision System, OJ 1993 L 179, p. 23),

THE COURT OF FIRST INSTANCE  
OF THE EUROPEAN COMMUNITIES  
(First Chamber, Extended Composition),

composed of: A. Saggio, President, H. Kirschner, A. Kalogeropoulos, V. Tiili and R. M. Moura Ramos, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 16 and 17 January 1996,

gives the following

**Judgment**

**Object of the proceedings**

- 1 Métropole Télévision SA (hereinafter 'M6'), the applicant in Case T-528/93, is a general-coverage private television channel which was authorized by decision of

26 February 1987 by the competent French authority to operate a nationwide television service broadcast uncoded, terrestrially and over the air for a ten-year period.

- 2 Reti Televisive Italiane SpA (hereinafter 'RTI'), the applicant in Case T-542/93 and a company incorporated under Italian law, obtained from the competent Italian authority on 13 August 1992 three separate licences to broadcast, nationwide, television programmes produced by three broadcasters (Canale 5, Italia 1 and Retequattro), broadcast by a single State company and distributed by interconnected installations.
- 3 Gestevisión Telecinco SA (hereinafter 'Telecinco'), the applicant in Case T-543/93 and a company incorporated under Spanish law in March 1989, is authorized by the competent Spanish authority to operate a private television service in Spain for a ten-year period, which may be extended.
- 4 Antena 3 de Televisión (hereinafter 'Antena 3'), the applicant in Case T-546/93 and a company incorporated under Spanish law on 7 June 1988, was granted a licence by the competent Spanish authority to operate indirectly the State public television service for an initial period of ten years.
- 5 In these proceedings the applicants seek annulment of Commission Decision 93/403/EEC of 11 June 1993 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/32.150 — EBU/Eurovision System, OJ 1993 L 179, p. 23, hereinafter 'the Decision'), the addressee of which is the European Broadcasting Union (hereinafter 'the EBU').

6 The Decision, which was adopted pursuant to Article 85(3) of the Treaty, declares the provisions of Article 85(1) inapplicable for the period 26 February 1993 to 25 February 1998:

- to the EBU's internal provisions and other regulations concerning the acquisition of television rights to sports events;
- the exchange of sports programmes within the framework of Eurovision;
- contractual access to such programmes for third parties.

### The EBU and the Eurovision System

7 The EBU is a non-profit-making trade association of radio and television organizations set up in 1950 with headquarters in Geneva (Switzerland). According to Article 2 of its Statutes, as amended on 3 July 1992, its objectives are to represent its members' interests in the field of programmes and in the legal, technical and other spheres and in particular to promote radio and television programme exchanges by all possible means — for example, Eurovision and Euroradio — and any other form of cooperation among its members and with other broadcasting organizations or groups of such organizations, and also to assist its active members in negotiations of all kinds and, when asked, to negotiate on their behalf. At the date of the Decision, the EBU had, after its merger with its eastern European counterpart, 67 active members in 47 countries situated in the European broadcasting area, most of them being public-sector broadcasters.

8 At the time when the EBU was set up, radio and television broadcasting services were provided in Europe almost entirely by public-sector organizations or by bodies entrusted with the operation of a public service and often enjoying a

monopoly. In 1984, just before the development of television and broadcasting undertakings of a predominantly commercial character which marked the second half of the 1980s, the EBU for the first time admitted as a member a private television organization, the French company Canal Plus. In addition, in 1986 the EBU authorized the French television channel TF1 to remain an active member after it was privatized. During that period, as a result of important developments in technology in the audiovisual sector, that sector lost its original relatively uniform nature. New types of operator, of a national, regional or cross-frontier character, sometimes specializing in certain kinds of programmes (cultural, sports or musical) or financed by subscription ('pay' television), appeared on the market in order to exploit the distribution of television programmes by cable and satellite.

- 9 On 9 February 1988, the Statutes of the EBU were amended in order, according to the EBU itself, to 'limit the number of members of Eurovision in accordance with its objectives and mode of operation' which mark them out as a special group of broadcasters.
- 10 Article 3 of the Statutes, in the version of 3 July 1992, reads as follows:

‘§1 There are two categories of EBU members:

- active members
- associate members.

(...)

§3 Active membership of the EBU is open to broadcasting organizations or groups of such organizations from a member country of the International Telecommunication Union (ITU) situated in the European Broadcasting Area

as defined by the Radio Regulations annexed to the International Telecommunication Convention, which provide in that country, with the authorization of the competent authorities, a broadcasting service of national character and national importance, and which furthermore prove that they fulfil all the conditions set out below:

- (a) they are under an obligation to cover the entire national population and in fact already cover at least a substantial part thereof, while using their best endeavours to achieve full coverage in due course;
- (b) they are under an obligation to, and actually do, provide varied and balanced programming for all sections of the population, including a fair share of programmes catering for special/minority interests of various sections of the public, irrespective of the ratio of programme cost to audience;
- (c) they actually produce and/or commission under their own editorial control a substantial proportion of the programmes broadcast.'

11 In order to take account of the rights acquired by the old members, the second paragraph of Article 21 of the EBU's Statutes, as amended on 9 February 1988, provided that Article 3, also as amended, was not to affect the status of organizations which were already active members on 1 March 1988 when it entered into force, but did not meet all the requirements laid down therein. In the version of the Statutes of 3 July 1992, that provision appears in the second subparagraph of Article 6(1).

12 Eurovision constitutes the main framework for the exchange of programmes among the active members of the EBU. It has been in existence since 1954 and is one of the main objectives of the EBU. According to Article 3(6) of the Statutes, in the version of 3 July 1992, "Eurovision" is a TV programme exchange system organized and coordinated by the EBU, based on the understanding that members



offer to the other members, on the basis of reciprocity, their news coverage of important events and their coverage of current affairs and of sports and cultural events taking place in their countries and of potential interest to other members, thereby enabling each other to provide a high quality service in these fields to their respective national audiences'. Eurovision members are active members of the EBU and consortia of such members. All active members of the EBU may participate in a system of joint acquisition and sharing of television rights (and of the costs relating thereto) to international sports events, which are referred to as 'Eurovision rights'.

- 13 Until 1 March 1988 the benefit of the services of the EBU and Eurovision was exclusively reserved to their members. However, when the Statutes were amended in 1988 a new paragraph (paragraph 6) was added to Article 3 providing that contractual access to Eurovision may be granted to associate members and non-members of the EBU.
- 14 It appears from the case-file that, since it was formed, M6 has submitted five applications to join the EBU as an active member (in 1987, 1988, 1990 and 1993). Its most recent application, lodged on 8 February 1993, was rejected by letter of 6 July 1993. That letter, from the Secretary General of the EBU, stated in particular that: 'In accordance with EBU internal guidelines relating to the interpretation of the criteria to be fulfilled in order to become a member, M6, as a commercial broadcasting organization, must be regarded *prima facie* (in the absence of proof to the contrary) as not satisfying the requirements for being an active member of the EBU. (...) It has certainly appeared to the [EBU Administrative] Council that since 1990 M6 has changed in a positive manner as regards both coverage and programming, but the Council has not found the proof needed in order to arrive at a contrary conclusion.'
- 15 By letter dated 27 March 1990, Antena 3 applied to join the EBU as an active member. On 4 April 1990 the EBU informed it that, in view of the need to adapt certain EBU rules, no new members would be admitted before early 1991. Eventu-

ally, its membership application was rejected by decision of the EBU Administrative Council, which was notified to the applicant by letter of 3 June 1991. That letter stated in particular that 'this decision is based on the fact that your organization does not fulfil the obligation that the applicant organization must cover the entire national population, which is specified in the first place in Article 3 § (3)(a) of the EBU Statutes as a condition for admission as an active member'.

- 16 In contrast, RTI and Telecinco have never applied to join the EBU.

## Facts

- 17 Following a complaint from the television channel Screensport relating to the refusal of the EBU and its members to grant it sub-licences for the retransmission of sports events, on 12 December 1988 the Commission sent the EBU a first statement of objections, declaring that the granting of an exemption to the rules governing the acquisition and the use of television rights to sports events within the framework of the Eurovision System could be envisaged provided that the EBU and its members accepted an obligation to grant non-members sub-licences for a substantial part of the rights in question and on reasonable terms.
- 18 On 3 April 1989 the EBU notified to the Commission its rules on the acquisition of television rights to sports events, the exchange of sports broadcasts in the context of Eurovision and contractual access of third parties to such broadcasts, and at the same time sought negative clearance or, failing that, an exemption under Article 85(3) of the Treaty. Under those rules, third parties' contractual access to television rights in respect of sports events acquired by EBU members pursuant to agreements concluded within the framework of Eurovision took place through a scheme whereby the EBU or its members granted sub-licences enabling

non-members to complete their own sports and news programmes in so far as they had not themselves acquired retransmission rights on the market. Under the so-called 'embargo' principle, non-members obtained, in principle, only the right to deferred retransmission.

- 19 By letter dated 18 July 1989 the Commission invited M6 to submit observations on the rules notified by the EBU governing contractual access of third parties to broadcasting rights acquired by the EBU and its members. On 15 February 1990 M6 expressed reservations about those rules and also criticized the discrimination to which it was allegedly subject in comparison with, in particular, other private channels which were active members of the EBU.
- 20 By letter dated 29 July 1989 the Commission informed the company controlling RTI (Fininvest) of the existence of the EBU/Eurovision System case and of the sub-licensing scheme which the EBU was preparing to adopt, and invited it to submit observations thereon within six weeks. On 29 January 1990 Fininvest submitted critical observations. It observed in particular that the rules governing the grant of sub-licences were very general, which prevented it from subjecting them to serious evaluation.
- 21 On 3 July 1990 the EBU adopted a first sub-licensing scheme, which had previously been the subject of discussions with the Commission.
- 22 By Notice 90/C 251/02 of 5 October 1990 (OJ 1990 C 251, p. 2) pursuant to Article 19(3) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87, 'Regulation No 17'), the Commission announced its intention to take a decision under Article 85(3) of the Treaty on the rules notified to it by the EBU. After receiving critical observations from third parties, the Commission organized a hearing on 18 and 19 December 1990 attended by interested parties.

- 23 M6 submitted written observations to the Commission by letter dated 5 November 1990 in which it expressed 'the utmost reservations about the scheme for the grant of sub-licences to third parties in respect of EBU sports broadcasts, as described in No C 251/2 of the *Official Journal of the European Communities*'. M6 also took part in the hearing held on 18 and 19 December 1990.
- 24 RTI did not submit any written observations to the Commission. It did, however, attend the hearing on 18 and 19 December 1990.
- 25 By letter dated 5 November 1990 Telecinco submitted observations to the Commission on the EBU/Eurovision System case. It asked the Commission to reject the application for exemption under Article 85(3) of the Treaty as regards the rules notified. Telecinco also attended the hearing on 18 and 19 December 1990.
- 26 Antena 3 neither submitted written observations to the Commission nor attended the hearing held on 18 and 19 December 1990.
- 27 On 24 June 1991 the Commission sent the EBU a second statement of objections, declaring that the sub-licensing scheme 'was not acceptable'. Subsequently, on 8 November 1991, the EBU submitted a new scheme governing contractual access for non-members from which, according to the Commission, most of the clauses of the previous sub-licensing scheme that had been criticized by interested third parties had been removed.
- 28 The Commission adopted the Decision after, on 26 February 1993, the EBU had presented a new version of the rules of the sub-licensing scheme which had been revised in agreement with the Commission.

## The Decision

- 29 The Decision finds that the object and effect of the internal provisions and other regulations of the EBU governing the joint negotiation, acquisition and sharing of television rights to sports events and the related case-by-case agreements between members of the EBU is greatly to restrict, if not, in many cases, eliminate, competition between them, contrary to Article 85(1) of the Treaty (points 47, 48 and 49). In addition, according to the Decision, the joint negotiation and acquisition of rights enable EBU members to strengthen their market position to the disadvantage of their independent competitors (point 51). The Decision further finds that the rules governing membership of the EBU (laid down in particular in Article 3(3) of its Statutes) distort to some extent competition vis-à-vis purely commercial channels, which are not admitted as active members (point 50). Lastly, it finds that trade between Member States is affected in that the Eurovision System concerns cross-border acquisition and use of television rights and that this applies in particular to the joint acquisition and sharing of the rights between members from different countries and to the exchange of the related television signal between them (point 53).
- 30 It considers nevertheless that the Eurovision System and the underlying rules provide for a number of benefits within the meaning of Article 85(3) which relate to the joint acquisition and the sharing of rights as well as to the exchange of the signal and its transport on the common network and to the contractual access granted to non-members (point 58).
- 31 The exemption granted is subject to two conditions. First, there is the obligation for the EBU and its members collectively to acquire television rights to sports events only under agreements which themselves embody one of the following two possibilities: either they allow the EBU and its members to grant access to television rights to third parties or they allow the rights' owners to grant access to third parties in conformity with the access scheme or, subject to the approval of the EBU, on conditions more favourable to the non-member (Article 2(1)). Secondly, the Decision lays down an obligation for the EBU to inform the Commission of

any amendments and additions to the rules notified, of all arbitration procedures concerning disputes under the access scheme and of all decisions regarding applications for membership by third parties (Article 2(2)).

### The course of the procedure

- 32 M6, RTI, Telecinco and Antena 3 brought their actions by applications lodged at the Court Registry on 5, 16 and 18 October 1993 respectively.
- 33 On 25 January 1994 the Commission raised an objection of inadmissibility in Case T-546/93.
- 34 By applications lodged at the Court Registry on 9 February, 2 March and 10 March 1994, the EBU, Radiotelevisione Italiana SpA ('RAI') and Radiotelevisión Española ('RTVE') sought leave to intervene in Cases T-528/93, T-542/93 and in the two cases T-543/93 and T-546/93, respectively, in support of the form of order sought by the defendant. Leave to intervene was granted by orders of the President of the Second Chamber of the Court of First Instance given on 28 March, 17 May and 6 May 1994 respectively.
- 35 By application lodged at the Court Registry on 10 March 1994, Sociedade Independente de Comunicação SA ('SIC') sought leave to intervene in Case T-542/93 in support of the form of order sought by RTI. Leave to intervene was granted by order of the President of the Second Chamber of the Court of First Instance on 13 June 1994.
- 36 By order of 29 September 1994, the Court of First Instance (First Chamber, Extended Composition) decided to reserve the objection raised by the Commission in Case T-546/93 until consideration of the substance.

- 37 The written procedure in Cases T-528/93, T-542/93, T-543/93 and T-546/93 ended respectively on 19 August 1994 when M6's observations were lodged on the statement in intervention of the EBU, on 2 March 1995 when the Commission's observations were lodged on the document submitted by the intervener SIC, on 14 August 1994 when Telecinco's observations were lodged on the statement in intervention of RTVE, and on 9 March 1995 when the observations of the Commission and the intervener RTVE were lodged on the documents submitted by Antena 3 on 13 and 20 February 1995.
- 38 Following the close of the written procedure in each of the four cases and upon hearing the report of the Judge-Rapporteur, the Court (First Chamber, Extended Composition) decided to open the oral procedure and asked the Commission to answer two sets of questions in writing by way of measures of organization of procedure.
- 39 By order of the President of the First Chamber, Extended Composition, of 11 April 1995, the cases were joined for the purposes of the oral procedure.

### Forms of order sought

- 40 In Case T-528/93, M6 claims that the Court should:
- by way of preliminary measure, order the Commission to communicate the Statutes of the EBU and other rules governing the Eurovision System;
  - annul the Decision of 11 June 1993;
  - order the Commission and the EBU to pay the costs.

41 The Commission claims that the Court should:

- dismiss the application for an injunction made by M6;
- dismiss the latter's application;
- order the applicant to pay the costs.

42 In Case T-542/93, RTI claims that the Court should:

- order the EBU to produce the preliminary draft agreement concluded between RAI and the Italian national olympic committee on the broadcasting of sports events;
- annul the Commission's Decision of 11 June 1993;
- order the defendant to pay the costs.

43 The Commission claims that the Court should:

- declare RTI's application inadmissible;
- in the alternative, dismiss its application for measures of inquiry as inadmissible and dismiss its application as unfounded;



- order the applicant to pay the costs;
- order the intervener SIC to pay the costs incurred by the Commission on account of its intervention.

44 In Case T-543/93, Telecinco claims that the Court should:

- declare the application admissible;
- annul the Commission's Decision of 11 June 1993 and, in general, take all such measures as the Court should deem necessary in order to reinstate the Community competition rules on the relevant market;
- order the defendant to pay the costs;
- order the intervener RTVE to pay its own costs.

45 The Commission claims that the Court should:

- dismiss Telecinco's application;
- order the applicant to pay the costs.

46 In its application in Case T-546/93, Antena 3 claims that the Court should:

- annul the Decision of 11 June 1993;
- order the defendant to pay the costs.

47 In its observations on the objection of admissibility raised by the Commission, Antena 3 claims that the Court should:

- declare the Commission's objection unfounded and reserve consideration of the admissibility of the application until consideration of the substance;
- in the alternative, declare the application admissible;
- reserve the costs.

48 The Commission claims that the Court should:

- declare Antena 3's application inadmissible or, in the alternative, dismiss it as unfounded;
- order the applicant to pay the costs.

49 SIC, intervening in support of the form of order sought by RTI in Case T-542/93, claims that the Court should:

— declare the application well founded and, accordingly, annul the Commission's Decision of 11 June 1993;

— order the defendant to pay the costs, including those incurred by the intervener.

50 The EBU, intervening in support of the form of order sought by the Commission in Case T-528/93, claims that the Court should:

— dismiss M6's application;

— order the applicant to pay the costs, including those incurred by the intervener.

51 RAI, intervening in support of the form of order sought by the Commission in Case T-542/93, claims that the Court should:

— declare RTI's application inadmissible;

— in the alternative, dismiss the application as unfounded;

— order the applicant to pay the costs, including those incurred by the intervener.

52 RTVE, intervening in support of the form of order sought by the Commission in Cases T-543/93 and T-546/93, claims that the Court should:

- dismiss the applications brought by Telecinco and Antena 3;
- order those applicants to pay the costs, including those incurred by the interveners.

## Admissibility

### *Admissibility of the application in Case T-546/93 (Antena 3)*

#### Summary of the arguments of the parties

53 The Commission, essentially supported by RTVE, intervening, considers that Antena 3's application is inadmissible on the ground that the Decision is not of direct and individual concern to the applicant within the meaning of Article 173 of the Treaty, as interpreted in settled case-law since Case 25/62 *Plaumann v Commission* [1963] ECR 95, at 107. Apart from the fact that it belongs to a general, abstract class comprising all television companies competing with the EBU or its active members for the acquisition of television rights in respect of international sports events, Antena 3 has not shown that it has any attribute peculiar to it or that there are circumstances differentiating it from all other persons and hence distinguishing it individually just as in the case of the addressee of the Decision, within the meaning of the aforementioned case-law.

54 First, the Decision does not rule on the legality of the application of the EBU's membership rules to specific cases by its management organs. Consequently, the

fact that Antena 3's application for membership was rejected does not put it in a situation differentiating it from all other competitors of the EBU. Secondly, the fact that Antena 3 operates the essential public television service owned by the Spanish State does not confer on it any particular attribute capable of distinguishing it individually just as in the case of the addressee of the Decision. It is not the only television channel in Spain with that attribute and other European undertakings are in the same circumstances.

55 The Commission further observes that, unlike M6, RTI and Telecinco, Antena 3 did not submit observations following the publication made in accordance with Article 19(3) of Regulation No 17 and was not present at the hearing held by the Commission on 18 and 19 December 1990. The Commission recognizes that in principle, in the context of competition law, the fact that an undertaking to which a decision was not addressed participated in the administrative procedure which led to that decision is not the only factor capable of distinguishing it individually for the purposes of Article 173 of the Treaty. It considers, however, that in this case the only factor which would have been capable of distinguishing Antena 3 individually and making its application admissible would have been its participation pursuant to Article 19(3) of Regulation No 17 in the procedure by which the Decision was adopted. If Antena 3 had exercised the procedural rights conferred on it by that provision, it would *ipso facto* have been distinguished individually just as in the case of the addressee of the Decision (Case 75/84 *Metro v Commission* [1986] ECR 3021, paragraphs 20 to 23).

56 Antena 3 argues that, even if the Decision could not be regarded as a decision rejecting the complaints made by it to the Commission pursuant to Article 3(2)(b) of Regulation No 17 on 27 February and 2 March 1992, the Decision is nevertheless of individual concern to it within the meaning of the *Plaumann* case-law, regardless of the fact that it did not voluntarily participate in the procedure by which the Decision was adopted.

57 The truly relevant question is not whether or not a party participated in the administrative procedure for the adoption of a decision, but to what extent such participation helps to put third parties which were not addressees of the Decision in what the judgment in *Plaumann* describes as 'circumstances in which they are differentiated from all other persons and [the decision] by virtue of these factors

distinguishes them individually just as in the case of the person addressed'. In that respect, in Case 26/76 *Metro v Commission* [1977] ECR 1875, the Court of Justice took account, in order to hold that an applicant could bring an action against a Commission decision addressed to another person, not only of the fact that the applicant had made a complaint pursuant to Article 3(2)(b) of Regulation No 17, but also, among other things, of the fact that its application to join the distribution system at issue had been rejected. In Case 75/84 *Metro v Commission*, the Court held that the applicant had *locus standi*, not only because it had submitted observations pursuant to Article 19(3) of Regulation No 17, but also and in particular because its application to join the distribution system in question had been rejected.

- 58 In this case, Antena 3 belongs to a narrower class than that consisting of all the other television channels in a relationship of competition with the EBU or its members. It belongs to the perfectly identifiable class of persons who, prior to the adoption of the Decision, applied to join the EBU and Eurovision, whose applications were rejected in a discriminatory manner even though they fulfilled objectively the requirements laid down for membership, and who were consequently excluded from the system in question. The very content of the Decision contradicts the Commission's argument that the actual application of the EBU's membership rules is not the subject of the Decision. It emerges from point 83 of the Decision that the application of those rules 'in an appropriate, reasonable and non-discriminatory way' is a precondition for granting and maintaining the exemption granted under Article 85(3) of the Treaty. Moreover, by virtue of its particular attribute of operator of the 'essential public television service coming under the State', which was shared in Spain with the only Spanish member of the EBU, Antena 3 is differentiated from every other television channel. In those circumstances, its application should be declared admissible.

## Findings of the Court

- 59 Under Article 173 of the Treaty, any natural or legal person may institute proceedings against a decision addressed to another person only if the decision in question

is of direct and individual concern to the former. Since the Decision was addressed to the EBU, it must be considered whether Antena 3 fulfils the two conditions laid down by that provision.

60 According to settled case-law, provisions of the Treaty concerning the right of interested persons to bring an action must not be interpreted restrictively, and hence, where the Treaty makes no provision, a limitation in that respect cannot be presumed to exist. Persons other than those to whom a decision is addressed may only claim to be individually concerned 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 (see *Plaumann v Commission*, at 107, and Joined Cases T-447/93, T-448/93 and T-449/93 *AITEC and Others v Commission* [1995] ECR II-1971, paragraph 34).

61 In this case, Antena 3 is an undertaking competing with the EBU and with all its members within the common market. In the narrower context of the Spanish market, it is a direct competitor of RTVE, the only active member of the EBU operating on that market. It follows that the Decision affects its competitive position in so far as it enables Antena 3 to be excluded from the benefit of the competitive advantages arising out of membership of the EBU through the exempted rules of the EBU's Statutes. Accordingly, Antena 3 must be classed as an interested third party within the meaning of the first sentence of Article 19(3) of Regulation No 17, as the Commission itself acknowledges. In that capacity, Antena 3 was therefore entitled to be associated by the Commission with the administrative procedure for the adoption of the Decision. In that same capacity, it has to be regarded as being individually concerned by the Decision within the meaning of Article 173 of the Treaty (see, by analogy, Case C-198/91 *Cook v Commission* [1993] ECR I-2487, paragraphs 24, 25 and 26, and Case C-225/91 *Matra v Commission* [1993] ECR I-3203, paragraphs 18, 19 and 20; see also to this effect the order in Case C-295/92 *Landbouwschap v Commission* [1992] ECR I-5003, paragraph 12).

- 62 No argument to the contrary can be derived from the fact that Antena 3 did not avail itself in this case of its procedural rights under Article 19(3) of Regulation No 17 and did not make written or oral observations during the administrative procedure for the adoption of the Decision. If the capacity to bring proceedings of specified third parties who enjoy procedural rights in the administrative procedure were made subject to their actually taking part in that procedure, this would be tantamount to introducing an additional condition of admissibility in the form of a compulsory pre-litigation procedure, which is not provided for in Article 173 of the Treaty (see Case T-96/92 *Comité Central d'Entreprise de la Société Générale des Grandes Sources and Others v Commission* [1995] ECR II-1213, paragraphs 35 and 36, and Case T-12/93 *Comité Central d'Entreprise de la Société Anonyme Vit-tel and Others v Commission* [1995] ECR II-1247, paragraphs 46 and 47).
- 63 Antena 3's capacity to bring proceedings is also confirmed by the fact that it applied to join the EBU and its application was rejected before the Decision was adopted. That specific circumstance is also capable of distinguishing Antena 3 just as in the case of the addressee of the Decision, irrespective of whether or not the Decision rules on the legality of the application by the organs of the EBU of the membership rules exempted by the Decision to actual cases (see Case 26/76 *Metro v Commission*, paragraph 13, and Case 75/84 *Metro v Commission*, paragraphs 18 to 23).
- 64 Antena 3 is, moreover, directly concerned by the Decision. Suffice it to say on this point that there is a direct causal link between the Decision, which requires no implementing measure, and effects on Antena 3's competitive position.
- 65 It follows from the foregoing that the application brought by Antena 3 must be declared admissible.



*Admissibility of the application in Case T-542/93 (RTI)*

Summary of the arguments of the parties

- <sup>66</sup> The Commission, supported by RAI, intervening, questions the admissibility of the application on the grounds that RTI failed, first, to submit written observations following the publication referred to in Article 19(3) of Regulation No 17 and, secondly, to make any comments on the case during the hearing held by the Commission on 18 and 19 December 1990.
- <sup>67</sup> In the first place, the aim of the publication provided for in Article 19(3) is to enable the Commission to have available to it before it takes a decision all the factual and legal information to take a fully informed decision. To allow an action to be brought by an interested third party who has not availed himself of his procedural rights under Regulation No 17 and who has therefore, on his own initiative, not submitted written observations during the administrative proceedings would be tantamount to changing the nature of the action of the Community Court. The review carried out by the Court would no longer relate to compliance with the rights in question, but constitute an alternative procedure to the one provided for in the regulation. The only eventuality in which active participation by an interested third party might not be regarded as a necessary condition for exercising his right to bring judicial proceedings is where he was not aware of the existence of the procedure for reasons not attributable to him.
- <sup>68</sup> Secondly, the absence of any comments from RTI during the hearing on 18 and 19 December 1990 is tantamount to acquiescence or, at the very least, to lack of interest on its part in the procedure, which means that the Decision cannot be regarded as being of individual concern to it.
- <sup>69</sup> Lastly, the application should be declared inadmissible by contrary inference from the judgment in Case T-2/93 *Air France v Commission* [1994] ECR II-323, paragraphs 44, 45 and 46. In this case, none of the three factors are present on which

the Court made the admissibility of an application depend, namely active participation of the applicant in the pre-litigation procedure, assessment by the Commission expressly taking into account the applicant's situation and active involvement of the applicant in the circumstances which were the subject of that assessment.

- 70 RTI observes in the first place that it is in a relationship of direct competition on the Italian market with the only Italian member of the EBU, RAI, as regards both the acquisition of television rights and the sale of advertising time. Consequently, that competitive relationship is not a general one. It is specifically influenced by the rules on the organization and functioning of the EBU.
- 71 Submission of observations following notice pursuant to Article 19(3) of Regulation No 17 and active participation in a hearing could, admittedly, support the idea that a third party is actually concerned by a procedure and even possibly form the basis for a presumption that it has a legitimate interest. However, they could in no case be elevated to the rank of a condition necessary for establishing an interest in bringing proceedings. In this regard, the judgment in Case 75/84 *Metro v Commission*, paragraph 21, should be interpreted as meaning that participation in the administrative procedure constitutes an additional factor going to establish proof of a legitimate interest to bring legal proceedings and not a condition *sine qua non* for the existence of such an interest.
- 72 Consequently, since RTI has proved that it was in a position comparable to that of the addressee of the Decision, having regard to its particular effects on RTI's individual situation, it is unnecessary to have recourse to the presumption resulting from participation in the pre-litigation procedure.
- 73 At the very least, contrary to the Commission's assertions, participation in an administrative procedure could take the practical form of merely attending it. In

this case, that RTI did not adopt a specific position or formulate critical assessments reflected the fact that, for objective reasons not attributable to it, RTI was unable to assess with the requisite precision the implications of a possible exemption decision at the time of publication pursuant to Article 19(3) of Regulation No 17. In any event, that attitude could not be equated with acquiescence, which, apart from the fact that acquiescence could be envisaged solely in respect of definitive measures against which judicial proceedings might lie, should result from express acceptance or from acts incompatible with the intention of seeking redress.

### Findings of the Court

- <sup>74</sup> In this case, it cannot be contested that the Decision is of individual concern to RTI within the meaning of Article 173 of the Treaty.
- <sup>75</sup> As a television channel competing with the EBU and with all its members within the common market, and the only active member of the EBU in the narrower context of the Italian market, RTI is affected in its competitive position by the Decision in so far as it enables RTI to be excluded from the benefit of the competitive advantages arising out of membership of the EBU through the exempted rules of the EBU's Statutes. Accordingly, RTI had the status of an interested third party within the meaning of Article 19(3) of Regulation No 17 and was therefore entitled to be associated by the Commission with the administrative procedure for the adoption of the Decision, a situation which distinguishes it individually just as in the case of the addressee of the Decision (see paragraph 61, above).
- <sup>76</sup> The mere fact that RTI simply attended the hearing organized by the Commission without adopting a specific position cannot call that conclusion in question. The procedural right provided for by Article 19(3) of Regulation No 17 is not subject to any condition relating to the manner of its exercise.

77 The Decision is, moreover, of direct concern to RTI, in the same way as it is to the applicant in Case T-546/93 (see paragraph 64, above).

78 It follows from the foregoing that RTI's application must be declared admissible.

## Substance

79 M6 raises four pleas for annulment alleging, first, infringement of the procedural rules for the adoption of the Decision, secondly, errors and shortcomings in the statement of reasons vitiating the Decision, thirdly, erroneous application of Article 85(3) of the Treaty and, fourthly, violation of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

80 RTI raises four pleas. The first alleges infringement of essential procedural requirements, in so far as the Commission did not comply with the procedural rule laid down by Article 19(3) of Regulation No 17. The second plea alleges misuse of powers, in so far as the Commission exercised powers conferred on it by the Treaty with a view to safeguarding competition in order to regulate the sector concerned. The third plea alleges error of fact in assessing the circumstances warranting the application of Article 85(3). The fourth plea alleges erroneous application of Article 85(3) as a result of the alleged error of fact.

81 Telecinco raises six pleas, the first alleging infringement of essential procedural requirements, the second manifest error of fact, the third infringement of the Community competition rules, in particular Articles 85(3), 86 and 90 of the Treaty, the fourth infringement of the general principle of equality of undertakings, the fifth misuse of powers, and the sixth lack of competence of the Commission to adopt the Decision.

- 82 Antena 3 raises four pleas. In the first place, it alleges that the Decision is vitiated by a manifest error in assessing the factual circumstances. Secondly, the Decision interprets Article 90(2) of the Treaty manifestly erroneously and applies it incorrectly. Thirdly, it interprets Article 85(3) manifestly erroneously and applies it incorrectly. Fourthly, the Decision is vitiated by a misuse of powers.
- 83 The Court considers that it should consider the plea common to the four applications alleging essentially that Article 85(3) of the Treaty was erroneously interpreted and incorrectly applied. It will be appropriate to consider the two limbs of that plea in succession: the first relates to the discriminatory nature of the EBU's membership rules, which, it is argued, should have precluded exemption under Article 85(3)(a); the second to the taking into account, for the purposes of the application of that provision, of the concept of particular public mission which, according to the Decision, members of the EBU have to fulfil.

*Plea alleging infringement of Article 85(3) of the Treaty*

1. The EBU's membership rules having regard to Article 85(3)(a) of the Treaty

— Summary of the arguments of the parties

- 84 All the applicants essentially submit that the examination which the Commission undertook in order to exempt the rules laying down the conditions for becoming an active member of the EBU, as set out in Article 3(3) of the association's Statutes, involves errors of fact and law and omissions.
- 85 In the first place, the Decision wrongly finds that those rules reflect an essential difference between television channels which have to fulfil a particular public mission, such as the members of the EBU, and the new commercial television channels

which, in general, do not fulfil the conditions laid down by those rules. However, according to M6 and Antena 3, it does not appear from the EBU's Statutes that EBU members have to fulfil a particular public mission. This is therefore a new condition, added unjustifiably by the Decision. Taken together with the rules on the admission of new members laid down by Article 3(3) of the Statutes, that condition reinforces the discriminatory nature of the EBU and the Eurovision System, inasmuch as it enables the new channels to be debarred a priori from becoming active members of the EBU on account of their commercial nature, even if they actually fulfil the conditions laid down by that provision for becoming active members. Their discriminatory nature is confirmed by Article 6(1) of the Statutes of the EBU, which overtly recognizes that not all members of that association fulfil the membership conditions. The actual example of this is Canal Plus.

86 Secondly, the applicants submit that the Commission failed to carry out an objective examination, both of the situation of the channels which are not members of the EBU and of that of its members in the light of the exempted membership rules. If it had done so, it would have been bound to find, first, that a number of non-member channels have characteristics identical to those of some members of the EBU, yet without having been admitted to that association, and, secondly, that some members of the EBU do not in fact fulfil the conditions laid down by Article 3(3) of the Statutes. In that regard, RTI and Telecinco point out that the Italian legislation and the Spanish legislation impose on private television licensees particularly strict obligations as regards diversified programming and in-house production. Moreover, the limits on broadcasting advertising are the same for members and non-members of the EBU. In their view, this is sufficient to call in question the Commission's finding that there are in those areas substantial differences between the commercial channels and the channels affiliated to the EBU.

87 According to Antena 3, the omission to carry out that examination conflicts with point 83 of the Decision, which requires the Commission to check during the exemption period whether the EBU membership conditions are applied in an appropriate, reasonable and non-discriminatory way. By granting the exemption, the Commission must have considered, without carrying out any prior examination, that that condition was fulfilled.

- 88 The Commission contends in response that, in the context of the Decision, the concept of particular public mission is intended simply to encapsulate the membership rules set out in the EBU's Statutes and that, as a result, it cannot constitute an additional condition for active membership of that association. That concept denotes the obligations or burdens to which membership of the EBU is subject by virtue of Article 3(3) of its Statutes and does not merge in any case with the concept of a public undertaking or with the concept of an undertaking entrusted with the operation of services of general economic interest appearing in Article 90(2) of the Treaty.
- 89 Turning to the criticism of the content and scope of its examination of the EBU's membership rules, the Commission submits, first, that, for the purposes of the application of Article 85(3), it was not under a duty to carry out a systematic examination of the implementation of those rules by the EBU itself. Consequently, it was legitimately entitled to adopt the Decision without examining the application of Article 3(3) of the Statutes of the EBU on a case-by-case basis.
- 90 More specifically, the Commission argues that it was not under a duty to prove that each of the members of the EBU fulfilled the conditions laid down by the relevant rules of its Statutes. The fact that, for historical reasons, a member of the EBU — such as Canal Plus — does not fulfil all the conditions laid down by Article 3(3) of the Statutes does not invalidate its analysis generally. The Commission unreservedly admits, however, that at present there may be private television channels which also fulfil the conditions in question. Lastly, it observes that it has never ruled on the question as to whether there is discrimination in favour of certain members of the EBU which do not entirely satisfy the membership criteria currently in force.
- 91 On the other hand, the Commission acknowledges that it is for it to supervise that the EBU membership rules exempted by the Decision are complied with by all interested parties. In this connection, it stresses that the Decision placed the EBU under an obligation to inform the Commission of all decisions regarding

applications for membership by third parties. In the event that an application for membership of the EBU were to be unjustifiably refused, this would not lead to the annulment of the Decision. In fact, the Decision would be infringed by the EBU, its addressee.

- <sup>92</sup> EBU, intervening, considers that the decisions admitting members or refusing membership applications which it adopted pursuant to the membership rules at issue were rightly examined by the Commission, not in order to check that they were justified on a case-by-case basis, but in order to limit the cooperation group to what is necessary, or even indispensable, to secure the cohesion and functioning which will enable it to achieve its objectives. The sound functioning of the exempted system and the maintenance of substantial competition depends on the common denominator of members of the EBU, namely fulfilment of a particular public mission.

#### — Findings of the Court

- <sup>93</sup> Two observations should be made *in limine*. First, the grant by the Commission of an individual exemption supposes that the agreement or the decision by an association of undertakings fulfils all four conditions set forth in Article 85(3) of the Treaty. It is sufficient for one of the four conditions not to be met in order for exemption to have to be refused (Joined Cases 43/82 and 63/82 *VBVB and VBBB v Commission* [1984] ECR 19, paragraph 61; order in Case C-137/95 P *SPO and Others v Commission* [1996] ECR I-1611, paragraph 34; Case T-17/93 *Matra Hachette v Commission* [1994] ECR II-595, paragraph 104, and Case T-29/92 *SPO and Others v Commission* [1995] ECR II-289, paragraphs 267 and 286). Secondly, in cases such as this where the Community institutions have a power of appraisal in order to be able to fulfil their tasks, respect of 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 in the individual case (Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraphs 14 and 26, and Case T-44/90 *La Cinq v Commission* [1992] ECR II-1, paragraph 86).



94 Next, it should be observed that, according to point 50 of the Decision, 'competition vis-à-vis purely commercial channels, which are not admitted as members, is to some extent distorted' by the EBU's membership rules, since those channels cannot participate in the rationalization and cost savings achieved by the Eurovision System. According to point 72 et seq., the restrictions of competition caused by those membership rules are nevertheless indispensable within the meaning of Article 85(3)(a) of the Treaty.

95 In order to assess the legality of the Decision in this respect, the Court must first consider, as the Commission was under a duty to do, whether those membership rules (quoted in paragraph 10, above) are objective and sufficiently determinate so as to enable them to be applied uniformly and in a non-discriminatory manner vis-à-vis all potential active members in accordance with well-established case-law (see, for example, Case 26/76 *Metro v Commission*, paragraph 20). The indispensable nature of the restrictions of competition resulting from those rules cannot be correctly assessed unless that prior condition is fulfilled.

96 From reading the Decision the Court finds forthwith that the Commission omitted to carry out such an examination.

97 Next, it finds that the content of the three conditions laid down by Article 3(3) of the EBU's Statutes relating to coverage of the population, to programming and to the production of the programmes broadcast is not sufficiently determinate. Since they refer essentially to unquantified quantitative criteria, they are vague and imprecise. Consequently, in the absence of further specification, they cannot form the basis for uniform, non-discriminatory application.

98 The fact that the EBU, as it stated at the hearing, has itself found it necessary to lay down, *ex post facto*, a note interpreting the first membership condition ('internal guideline' fixing the obligation to cover the population at 90%) confirms this assessment.

- 99 In these circumstances, the Commission should have concluded that it was not even in a position to assess whether the corresponding restrictions were indispensable within the meaning of Article 85(3)(a) of the Treaty. Consequently, it was not entitled to exempt them on that ground.
- 100 For the same reasons, the Commission is not in a position to check during the exemption period in accordance with point 83 of the Decision 'whether the conditions for exemption continue to be fulfilled and whether in particular the membership conditions (...) are applied in an appropriate, reasonable and non-discriminatory way'. Moreover, it admitted at the hearing that it had taken no action on the information which it had received pursuant to Article 2(2) of the Decision relating to decisions taken by the EBU regarding applications for membership by third parties.
- 101 Furthermore, point 83 of the Decision shows that the Commission wrongly considered that it was dispensed from having to examine the implementation by the EBU of the contested membership rules as regards applications for membership from the new television channels before granting exemption. Indeed, the obligation which it undertook in that point of the Decision to check, as a condition for maintaining the exemption at issue, whether the membership conditions are applied in an appropriate, reasonable and non-discriminatory way, should have caused it to consider itself also bound to carry out such a check before granting exemption. Such an approach was necessary especially since the status of active member of the EBU is granted 'by decision of the General Assembly, which takes its decision on the basis of a proposal from the Administrative Council' (Statutes of the EBU, Article 3(12)), which means that applicants for membership of the EBU have to depend on decisions adopted by a body representing the active members of that association (see to this effect *La Cinq v Commission*, paragraph 89).
- 102 It follows from the foregoing that, by failing to examine first whether the membership rules were objective and sufficiently determinate and capable of uniform, non-discriminatory application in order next to assess whether they were indis-

pensable within the meaning of Article 85(3)(a) of the Treaty, the Commission based its decision on an erroneous interpretation of that provision.

103 The first limb of the plea alleging violation of Article 85(3)(a) of the Treaty must therefore be upheld.

2. The concept of particular public mission having regard to Article 85(3)(a) of the Treaty

#### — Summary of the arguments of the parties

104 The applicants argue essentially that the concept of 'particular public mission' purported to be characteristic of members of the EBU, apart from being discriminatory, has nothing to do with the analysis which the Commission is empowered to carry out under Article 85(3) of the Treaty. The Decision was based on that concept in order to favour the undertakings, most of them public, which are members of the EBU by taking them outside the scope of Article 85(1) of the Treaty in breach of the principle of equal treatment. The Commission would not have granted the exemption if it had not recognized the member companies of the EBU, and them alone, as having that common characteristic.

105 It is also claimed that, through that concept, the Commission wrongly applied Article 85(3) in this case in order to grant a derogation under Article 90(2) of the Treaty, since the members of the EBU are not undertakings entrusted with the particular mission of operating services of general economic interest within the meaning of the latter provision.

106 In this regard, Telecinco submits that an undertaking can be regarded as carrying out a particular public mission only where a public authority legally imposes upon it missions or tasks that it would not otherwise assume voluntarily. Consequently, decisions voluntarily taken or obligations voluntarily assumed by television channels with regard to their geographical coverage, programming or in-house production cannot be regarded as aspects of a particular public mission assigned to those channels. In those circumstances, examination of the national legal rules to which the various television channels which are members of the EBU are subject would suffice in order to conclude that fulfilment of a particular public mission cannot be regarded as being a characteristic common to all the members of the EBU and to them alone.

107 In this context, it is also complained that the Decision omitted to consider the privileged public funding (public aid, subsidies, authorizations to run budget deficits, etc.) which most EBU members enjoy. According to SIC, intervening, if specific burdens are possibly imposed on the members of the EBU by the public authorities, those authorities also grant them very specific compensations. Those compensations constitute a relevant aspect of this case which the Commission should have considered carefully and impartially.

108 The Commission observes that, whilst the competition rules of the Treaty have to be applied in the same manner to public undertakings and to private undertakings, this does not mean, however, that it is not entitled to take into consideration, in an exemption procedure under Article 85(3), the particular features of the economic sector in which the — public or private — undertakings operate and the burdens and obligations incumbent upon them, without prejudice to the specific provisions of Article 90(2). More specifically, it considers itself to be entitled to take into consideration under Article 85(3), in the context of a specific sector, the position of a group of undertakings in their relations as between themselves and with third parties, without for all that infringing the principle of equal treatment. Taking the particular features of an economic sector into account in that way does not mean, however, that, in another economic sector, an agreement or a restrictive practice with the same object should necessarily be granted an exemption.

- 109 Moreover, the Decision does not prejudice whether the members of the EBU may or may not be considered undertakings entrusted with the operation of services of general economic interest within the meaning of Article 90(2) of the Treaty.
- 110 In any event, the Decision is based only in the alternative on 'public mission', an expression which, in the context in which it is used, is merely a way of summarizing the conditions laid down by Article 3(3) of the EBU Statutes for active membership of that association. In this case, the Commission confined itself to assessing the positive effects of the decisions and agreements at issue and, in the alternative, to taking account, when examining whether they were indispensable, of the obligations to which membership of the EBU is subject.
- 111 Lastly, the Commission says that it did not carry out a detailed analysis of the alleged system of privileged funding of EBU members in the context of Article 85(3), because the appropriate setting for such an analysis would be Articles 92 and 93 of the Treaty. In any event, the applicants have not proved that the funding system is privileged.
- 112 RAI, intervening, points out that, by virtue of a consistent practice of the Commission, which was approved in particular in Case 26/76 *Metro v Commission* (paragraph 43), the assessments which it makes for the purpose of the application of Article 85(3) also take account of the aspects of the situation falling outside the sphere of competition, in particular socio-economic aspects. It is precisely the protection of pluralism, a task deemed essential in the context of the Community's audiovisual policy, which makes it inevitable to assess the differences between television channels pursuing a public mission and purely commercial channels. In any event, the Decision is based primarily on the strictly economic benefits arising out of the exempted decisions and agreements.

- 113 RTVE, intervening, submits that the concept of 'public service' cannot be equated with 'public service obligation'. The latter concept is to be found in Community terminology in the expression 'service of general economic interest' appearing in Article 90(2) of the Treaty. However, the Decision never started out from the principle that all members of the EBU are broadcasters entrusted with a mission of general economic interest involving their being subject to obligations under their statutes by virtue of an official act. It finds that some members of the EBU are in that situation, but merely takes as a factor distinguishing members of the EBU from commercial channels the formers' self-imposed decision to offer varied programmes necessarily including the less popular sports, irrespective of the ratio between their production cost and their profitability.

— Findings of the Court

- 114 In the context of the supervisory jurisdiction normally exercised by the Court, it considers that it should also consider — *ex abundanti cautela*, given that it has just found an infringement of Article 85(3) of the Treaty warranting the annulment of the Decision — whether or not the concept of particular public mission, as employed in the Decision, constitutes a relevant factor which may be taken into consideration for the purposes of the application of Article 85(3), particularly as regards the condition set out under (a). If it is not such a factor, the Court will have to conclude that the Commission committed a manifest error of law in taking account of such a factor which may have distorted its assessment of the indispensable nature of the restrictions of competition for which it granted exemption (see *La Cinq v Commission*, paragraph 63, and Joined Cases T-163/94 and T-165/94 *NTN Corporation and Koyo Seiko v Council* [1995] ECR II-1381, paragraphs 113 and 114).

- 115 From simply reading the Decision, it must be held that, contrary to the Commission's assertion, the concept of particular public mission which it utilized proves to be a fundamental component of the statement of reasons of the Decision. According to the statement of reasons (points 5, 11, 19, 20, 45, 60, 72 and 74), fulfilment of a particular public mission enables broadcasters to become active members of

the EBU and the constraints associated with such a mission are such as to justify the EBU's having a special status with regard to the competition rules. The concept of particular public mission, as defined by the Commission, is therefore the principal factor in defining the circle of beneficiaries of the exemption at issue.

- 116 According to the Decision, the particular public mission is characterized in particular by the 'obligation to provide varied programming including cultural, educational, scientific and minority programmes without any commercial appeal and to cover the entire national population irrespective of the costs' (point 5). The Decision therefore essentially takes over the elements of the particular mission of operating services of general economic interest provided for in Article 90(2) of the Treaty, as it has been interpreted by the Community Court, namely and in particular, operation 'on behalf of all users throughout the territory of the Member State concerned (...) irrespective of the specific situations or the degree of economic profitability of each individual operation' (see Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraph 15). In order to hold that the condition relating to Article 85(3)(a) of the Treaty was fulfilled, the Commission therefore took account of factors falling within the field of application of Article 90(2) of the Treaty.
- 117 However, inasmuch as, according to the Decision itself (point 78), Article 90(2) is not applicable, factors coming essentially within the ambit of that article cannot in this case constitute a criterion for the application of Article 85(3) in the absence of other justification.
- 118 Admittedly, in the context of an overall assessment, the Commission is entitled to base itself on considerations connected with the pursuit of the public interest in order to grant exemption under Article 85(3) of the Treaty. However, in the present case it should have shown that such considerations required exclusivity of

rights to transmit sports events, which the Decision authorizes for the benefit of members of the EBU, and that that exclusivity was indispensable in order to allow them a fair return on their investments (point 71).

- 119 However, in its answer to a written question from the Court concerning the need for such exclusivity, the Commission, referring to point 24 of the Decision, merely stated that below a certain 'threshold' the acquisition of television rights to sports events at very high prices 'is no longer economically justifiable' and that the 'concept of fair returns cannot be expressed as a precise figure' but corresponds instead to an 'overall financial equilibrium on the part of the broadcasters'.
- 120 It appears from those statements that the Commission did not base itself upon a minimum amount of actual economic data, which might have consisted of figures for the investments made by the members of the EBU in their economically different national contexts and of specific calculations establishing a ratio between those investments and the income associated with the broadcasting of sports events. In those circumstances, the Commission's statement of reasons in this regard is not even amenable to review by the Community Court within the limits set by the case-law.
- 121 In any event, the Commission would not be justified in taking into account, for the purposes of exemption pursuant to Article 85(3), the burdens and obligations arising for the members of the EBU as a result of a public mission, unless it also examined, carefully and impartially, as the case-law cited above (at the end of paragraph 93) requires it to do, the other relevant aspects of the case, such as the possible existence of a system of financial compensation for those burdens and obligations, without prejudice to Articles 92 and 93 of the Treaty. The Commission has, however, expressly stated that it was not necessary to examine the alleged privileged funding of members of the EBU, on the ground that the only appropriate setting for such an examination would be Articles 92 and 93 of the Treaty.



- 122 Furthermore, by exempting membership rules which are not amenable to uniform, non-discriminatory application (see paragraph 97, above), the Decision does not preclude either broadcasters entrusted with a public mission recognized by the competent national authorities from being deprived of the advantages resulting from membership of the EBU or other broadcasters lacking that attribute from continuing to benefit from those advantages.
- 123 It follows that, by using in this case as a criterion for granting exemption from the rules of Article 85(1) of the Treaty simply fulfilment of a particular public mission defined essentially by reference to the mission of operating services of general economic interest referred to in Article 90(2) of the Treaty, the Commission based its reasoning on a misinterpretation of Article 85(3) of the Treaty. That error of law is likely to have distorted the assessment which it made of the indispensable nature of the restrictions of competition for which it granted exemption.
- 124 The second limb of the plea alleging infringement of that provision must therefore be upheld.
- 125 It follows from the considerations formulated with regard to the two limbs of the plea examined that the Commission concluded on the basis of a misinterpretation of Article 85(3) of the Treaty that the restrictions of competition for which it granted exemption, in particular those resulting from the EBU's membership rules, were indispensable within the meaning of that provision.
- 126 Consequently, the Decision must be annulled and it is unnecessary to rule on the other pleas raised or to carry out the measures of inquiry requested by the applicants.

## Costs

- 127 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.
- 128 Since the Commission has been unsuccessful and the applicants and SIC, intervening in Case T-542/93, claimed that it should pay their costs, it should be ordered to bear its own costs and pay those incurred by the applicants and SIC.
- 129 Since M6 claimed that the EBU should be ordered to pay the costs connected with its intervention in Case T-528/93, the EBU should be ordered to bear its own costs and to pay those incurred by M6 in connection with that intervention. Since RTI did not claim that RAI should be ordered to pay the costs connected with its intervention in Case T-542/93, RAI should be ordered only to bear its own costs. In the context of its intervention in Case T-543/93, RTVE must bear only its own costs in accordance with the form of order sought by Telecinco. Lastly, since Antena 3 did not claim that RTVE should be ordered to pay the costs connected with its intervention in Case T-546/93, that intervener must also bear only its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber, Extended Composition)

hereby:

1. Annuls Commission Decision 93/403/EEC of 11 June 1993 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/32.150 — EBU/Eurovision System);

2. Orders the Commission to bear its own costs and to pay the costs incurred by the applicants and those incurred by the intervener Sociedade Independente de Comunicação SA;
3. Orders Reti Televisive Italiane SpA to bear the costs incurred by it in connection with the intervention of Radiotelevisione Italiana SpA; orders Gestvisión Telecinco SA and Antena 3 de Televisión to bear the costs respectively incurred by them in connection with the interventions of Radiotelevisión Española;
4. Orders the intervener European Broadcasting Union to bear its own costs and to pay the costs incurred by the applicant Métropole Télévision SA in connection with its intervention; orders the interveners Radiotelevisione Italiana SpA and Radiotelevisión Española to bear their own costs.

Saggio

Kirschner

Kalogeropoulos

Tiili

Moura Ramos

Delivered in open court in Luxembourg on 11 July 1996.

H. Jung

A. Saggio

Registrar

President