5. In the case of situations involving complex economic appraisals, such as that confronting the Commission when it receives an application from an undertaking for the adoption of interim measures pursuant to Article 3(1) of Regulation No 17, judicial review must be confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers.

In cases where the institutions of the Community have a power of appraisal in order to be able to fulfil their tasks, observance 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 Commission to examine carefully and impartially all the relevant aspects in the individual case.

JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
24 January 1992 *

In Case T-44/90,

La Cinq SA, a company incorporated under French law, established in Paris, represented by Gilbert Parleani, of the Paris bar, with an address for service in Luxembourg at the Chambers of Philippe Hoss, 15 Cote d'Eich,

applicant,

v

Commission of the European Communities, represented by B. J. Drijber and E. Buissart, members of its Legal Service, with an address for service in Luxembourg at the office of Roberto Hayder, a national civil servant seconded to its Legal Service, Centre Wagner, Kirchberg,

defendant,

* Language of the case: French.

supported by

European Broadcasting Union, an association governed by Swiss law, established in Geneva, represented by Hanns Ullrich, professor at the University of Munich, with an address for service in Luxembourg at the Chambers of Jean Welter, 100 Boulevard de la Pétrusse,

intervener,

APPLICATION for the annulment of the decision of the Commission of 14 August 1990 relating to a proceeding under Articles 85 and 86 of the EEC Treaty (IV/33.249 — La Cinq SA/Union Européenne de Radiodiffusion),

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

composed of: J. L. Cruz Vilaça, President, R. Schintgen, D. A. O. Edward, H. Kirschner and K. Lenaerts, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 2 July 1991,

gives the following

Judgment

Facts

1 This action is brought against a decision of the Commission of 14 August 1990 rejecting a request for interim measures submitted by the applicant in relation to the complaints that it had made to the Commission contesting, with respect to Articles 85 and 86 of the EEC Treaty, the conduct of the European Broadcasting Union (EBU).

2 La Cinq SA (La Cinq) is a company governed by French law, incorporated in 1987 and authorized by the competent French authorities to operate a private land-based off-air uncoded broadcasting service in France for a period of ten years until 1 March 1997.

3 The EBU is an association of broadcasting organizations which has no commercial aim. It was set up in 1950 and has its headquarters in Geneva. In accordance with Article 2 of its statutes, its object is to promote cooperation between its members and with broadcasting organizations of the entire world and to represent the interest of its members in the programme, legal, technical and other fields. It has 39 active members in 32 countries situated in the European Broadcasting Area.

4 At the time when the EBU was set up broadcasting services were provided in Europe almost exclusively by public-sector organizations or by bodies entrusted with the operation of a public service and often enjoying a monopoly. During the second half of the eighties (which were marked by the development of broadcasting undertakings of a predominantly commercial character) the EBU admitted as members private television organizations, like the French companies Canal Plus and TF 1, the latter of which retained its status as an active member after it was privatized in 1986. During that period, as a result of important developments in technology in the audiovisual sector, that sector lost its original relatively uniform nature, since 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.

5 In 1988 the statutes of the EBU were amended in order, according to the EBU itself, to emphasize 'the obligation of the members to carry out a special task relating to the public interest, which is imposed upon them by their legislation and/or by national practice and by virtue of which they constitute a special group of broadcasting organizations with common obligations and common interests.' In

order to take account of the rights acquired by existing members, Article 21 of the statutes, as amended, provides that the new version of Article 3(2) is not to affect the status of members which, on the date of its entry into force — 1 March 1988 — are active members but do not meet all the requirements laid down in that paragraph.

6 The new version of Article 3, in so far as it is relevant to the outcome of the present proceedings, is worded as follows:

'1. Members of the EBU are divided into two classes:

(a) active members,

(b) associate members.

2. Active membership of the EBU is open to broadcasting organizations or groups of such organizations from a member country of the International Telecommunications Union (ITU) situated in the European Broadcasting Area as defined by the Radio Regulations annexed to the International Telecommunications 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.

...

6. Associate members and non-members of the EBU may be granted contractual access to Eurovision. Access shall be granted or withdrawn by decision of the Administrative Council.'

7 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 objects of the EBU. Its function is described in Article 3(5) of the statutes as follows:

'Eurovision is based on the understanding that members offer to the other members, on a 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.'

8 Until 1987 the benefit of the services of the EBU was reserved exclusively for its members. Article 3(6) of the statutes, added at the time of the 1988 revision, provided for contractual access to Eurovision for associate members and non-members of the EBU. That contractual access, or access by sublicence, to the Eurovision programme-exchange system enables non-members to supplement their own programmes (in particular, sports and news) when they have not themselves obtained transmission rights on the market. According to the 'embargo' principle, non-members as a rule obtain solely the right to deferred transmission.

9 On 2 April 1989 the EBU notified the Commission of the rules governing the acquisition of television rights for sports events, the exchange of sports programmes within the Eurovision system and contractual access to such programmes for non-members and asked for negative clearance or exemption under Article 85(3) of the EEC Treaty. By notice pursuant to Article 19(3) of Council Regulation No 17 of 16 February 1962, the first regulation implementing Articles 85 and 86 of the EEC Treaty (Official Journal, English Special Edition 1959-1962, p. 87, hereinafter referred to as 'Regulation No 17'), the Commission published the essential content of that notification in the Official Journal of the European Communities (1990 C 251, p. 2) and announced its intention to adopt a favourable decision. However, during the hearing the Commission informed the Court that, having discovered that the rules notified raised various problems in their practical application, it had subsequently sent a statement of objections to the EBU.

10 The documents before the Court show that since its creation La Cinq has submitted applications for admission to the EBU, either directly or through the Organisme Français de Radiodiffusion et de Télévision (OFRT), of which La Cinq has been a member since 1987 and which is a member of the EBU, on several occasions (in 1987, 1988, 1990 and twice in 1989). The last application, submitted directly to the EBU by La Cinq in February 1990, was rejected by a decision notified on 1 June 1990.

11 Those were the circumstances in which, on 28 July 1989, the applicant submitted an initial complaint to the Commission in which, after mentioning the various rejections of its applications for membership of the EBU, it maintained that it had been a victim of discrimination on the part of that organization, since only indirect contractual access to the services of the EBU, in particular the Eurovision network, was available to it and, moreover, on highly unfavourable terms. The applicant considered that the practices of which it accused the EBU could be regarded as constituting an agreement, decision or concerted practice within the meaning of Article 85(1) of the EEC Treaty or abuse of a dominant position within the meaning of Article 86. It asked the Commission, firstly, to make a finding of the existence of anti-competitive practices incompatible with the common market for which the EBU or its members were responsible and, as a consequence, take the necessary legal steps to put an end to those practices and, for this purpose, to order the EBU to admit La Cinq as a member. As an interim measure, justified by the harm resulting from the restrictions on its access to the

markets in sports and current affairs images and the effects of those restrictions on the market in television advertising, the applicant asked the Commission to make a finding that, notwithstanding the provisions of Article 3 of the statutes of the EBU, which gave it the right to become an active member, the organs of the EBU had rejected its application for admission in an arbitrary and, above all, discriminatory manner, and consequently to order them to adopt a fresh decision on La Cinq's application within a period to be specified or, at least, to place La Cinq in the same position as that which it would enjoy if it was recognized as an active member.

12 On 9 April 1990, in response to a request from Mr Overbury, a director in the Directorate-General for Competition (IV), the applicant sent to the Commission a letter setting out the history of its relationship with the EBU and mentioning the need for every general channel like itself to be an active member of the EBU in order to be in a competitive position in the market in two categories of images in particular: current affairs and sports. In its letter the applicant drew attention to the domination exercised by the EBU over the markets for these two categories of images and endeavoured to prove that it fulfilled all the conditions laid down in the statutes of the EBU to become an active member of that association, while stressing, on the one hand, the discrimination of which it found itself a victim by virtue of the refusal of the EBU to admit it as a member and, on the other hand, the 'alibi' nature of the contractual access open to it.

13 Following the last refusal of admission to the EBU, the applicant submitted to the Commission on 12 July 1990 a 'repeat complaint, with request for protective measures', in which it referred to its previous complaint and again asked, in view of the urgency and the threat of irreparable damage, for protective measures to be adopted, consisting of an order directed to the EBU both to grant to it 'adequate access' pending the final outcome of the dispute, in order to preserve competition with respect to all transmissions of the sports events offered on the Eurovision network and to hold without delay a full and fair discussion on La Cinq's application at an extraordinary general meeting.

14 In the contested decision of 14 August 1990 the Commission rejected the request for protective measures on the grounds that the conditions required for granting them were not fulfilled. It stated that an initial summary examination of the facts did not reveal the prima facie existence of a clear and flagrant breach of Articles 85 and 86 of the EEC Treaty and that no irreparable damage to La Cinq appeared to be likely if the Commission took no action, particularly since La Cinq had contractual access to the pictures of the EBU and could therefore broadcast a considerable number of major sports events; in view of the latter circumstance, there was also no special urgency, in the opinion of the Commission, justifying the adoption of the measures requested.

Procedure

15 By application lodged at the Court Registry on 12 October 1990 La Cinq brought the present action under the second paragraph of Article 173 of the EEC Treaty for the annulment of the Commission's decision of 14 August 1990 (IV/33.249 — La Cinq SA/Union Européenne de Radiodiffusion).

16 After an informal meeting with the parties which took place, at the Court's request, on 31 January 1991, La Cinq, by letter of 11 February 1991, waived its right to submit a reply.

17 The EBU was granted leave to intervene in support of the Commission by order of the Court (First Chamber) of 31 January 1991. The observations of the intervener were lodged at the Registry on 13 March 1991.

18 By letter of 8 April 1991 the Commission submitted its written observations on the EBU's statement in intervention. La Cinq also submitted observations on the statement in intervention on 15 April 1991.

19 After hearing the report of the Judge-Rapporteur the Court (First Chamber) decided to open the oral procedure without any preparatory inquiry and requested La Cinq to supply, in time for the hearing, precise particulars establishing the serious and irreparable damage that it alleged. By a document lodged at the Registry on 27 June 1991, La Cinq replied to the questions which had been put to it by the Court.

20 The parties presented oral argument and replied to the Court's questions at the hearing on 2 July 1991. At the conclusion of the hearing the President declared the oral procedure closed.

21 In its application La Cinq claims that the Court should:

— annul the Commission's decision of 14 August 1990;

— refer the examination of the request for protective measures back to the Commission;

— order the Commission to pay the costs.

22 The Commission contends that the Court should:

— dismiss the application as unfounded;

— order La Cinq to pay the costs.

23 The EBU contends that the Court should:

— dismiss the application as unfounded;

— order La Cinq to pay the costs, including those of the EBU.

Substance of the case

24 In support of its claim for annulment the applicant puts forward, in substance, two pleas in law. It maintains, firstly, that the statement of the reasons on which the decision at issue is based is inadequate and, secondly, that the decision is vitiated by manifest errors of fact and law. Those pleas are raised against the Commission's findings concerning the various conditions that it regarded as necessary to enable it to exercise its power to order interim measures.

25 In that respect the Court observes that in its decision the Commission considered that 'the conditions required for the grant of interim measures in a case such as this are:

— the finding of an infringement on the basis of facts sufficiently clear to show the probable existence of an infringement;

— the probability of serious and irreparable damage to the applicant if the Commission does not intervene;

— urgency, which must be established.'

26 The Court therefore considers it necessary, before examining the parties' pleas in law and arguments, to determine the conditions which, according to the case-law of the Court of Justice, must be fulfilled for the Commission to be able to exercise its power to grant interim measures in the context of the application of the competition rules of the Treaty.

27 The Court observes, firstly that the Commission's power in this sphere was recognized by the Court of Justice in its order in *Camera Care* v *Commission* (Case 792/79 R [1980] ECR 119), according to which it is for the Commission, in the performance of the supervisory task conferred upon it by the Treaty and Regulation No 17 in competition matters, to decide, pursuant to Article 3(1) of Regulation No 17, whether it is necessary to take interim measures when it receives a request to that effect.

28 Moreover, it follows from the case-law of the Court of Justice (order in *Camera Care*, cited above, paragraphs 14 and 18, and the order of the President of the Court of Justice in Cases 228/82 and 229/82 R *Ford* v *Commission* [1982] ECR 3091, paragraph 13) that protective measures may be granted only where the practices of certain undertakings are prima facie such as to constitute a breach of the Community rules on competition in respect of which a penalty could be imposed by a decision of the Commission. Furthermore, such measures are to be taken only in cases of proven urgency, in order to prevent the occurrence of a situation likely to cause serious and irreparable damage to the party applying for their adoption or intolerable damage to the public interest.

29 It follows that the condition concerning urgency, which in the decision at issue the Commission regarded as a third condition for ordering interim measures, is in reality but one aspect of the condition concerning the risk of serious and irreparable damage.

30 It must also be observed that, since the two conditions for ordering the measures are concurrent, failure to fulfil either of them would have sufficed in this case to prevent the Commission from exercising its power in the matter.

31 The Court observes, finally, that in this case the Commission based its refusal to order interim measures on the fact that neither of the conditions to which the exercise of its power is subject was fulfilled.

32 In order to determine whether the Commission's conclusions were justified, the Court must examine the various pleas in law and arguments put forward by the applicant against the Commission's finding regarding each of the two conditions required for the adoption of interim measures, as defined above by the Court, that is to say the probable existence of an infringement and the probability of serious and irreparable damage which establishes the urgent need to adopt the measures.

A — *The condition regarding the probable existence of an infringement*

33 The applicant challenges the Commission's finding that the condition regarding the probable existence of an infringement was not fulfilled. In this respect, it maintains that inadequate reasons were given for the decision and that it was vitiated by manifest errors of law and fact.

The plea alleging inadequacy of the statement of reasons

34 The applicant contends that the Commission maintained complete silence regarding the most decisive arguments and facts set out in its complaint. Specifically, in the applicant's view, the contested decision, by dealing solely with the question whether the applicant fulfils the conditions laid down in Article 3(2) of the statutes of the EBU, evades the very subject of the complaint and the main reason underlying the request for protective measures, namely the manifest discrimination of which the applicant was a victim as compared with certain of its

private competitors, in particular Canal Plus and TF 1, members as of right of the EBU. If only for that reason, Canal Plus, which provides a pay-television service, cannot be subject to the obligation to 'cover the entire national population' and, moreover, its programming is unbalanced, because it is centred on the cinema. With regard to TF 1, its programming has been the subject of the same criticism from the Conseil Supérieur de l'Audiovisuel Français ('the CSA') as that relating to the applicant's own programming.

35 In this context the applicant refers to the case-law of the Court of Justice holding that the Commission is not obliged to respond to every argument put forward by a party, provided that it gives reasons for its decision which are adequate (judgment in Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487), relevant, that is to say adapted to the entire situation of fact and law presented to it, and which enable the Court of Justice to exercise its power of review (judgment in Case 24/62 *Germany* v *Commission* [1963] ECR 131 and in Case 42/84 *Remia* v *Commission* [1985] ECR 2545). The applicant maintains that no reference is made in the decision at issue to the applicant's main argument regarding the serious and manifest discrimination of which it is a victim or to the existence of facts that could invalidate its allegations in this respect. The inadequacy of the statement of reasons is therefore manifest and established in law.

36 The applicant also points out in its observations on the statement in intervention submitted by the EBU that that statement and the Commission's defence are in fact intended to 'rectify' the inadequacy of the statement of reasons for the decision of 14 August 1990 *a posteriori*, thus providing the Court with proof not only that the reasons given were feeble and incomplete, but also that they were manifestly insufficient to enable the Court to exercise its power of review.

37 In reply to the plea alleging that the statement of the reasons for the decision was inadequate the Commission begins by stressing the contradiction between the persistence with which La Cinq applied to become a member of the EBU and its description of the question of the conditions for membership as 'secondary and peripheral' as compared with the question of discrimination.

38 The Commission maintains, moreover, that there are, in fact, two complaints which are closely connected, since the discrimination alleged results from the refusal of the EBU to admit La Cinq as a member, although other channels which do not fulfil the conditions laid down in the statutes of the EBU have been admitted as active members.

39 The Commission contends, furthermore, that, since in this case an emergency procedure was involved, it needed only to show, by reasoned argument, that one of the concurrent elements for the adoption of interim measures (for example, irreparable damage) was lacking. However, although in its opinion it was not obliged to do so, it also analysed one of the two elements that might be regarded as amounting to a prima facie infringement, namely the question whether La Cinq fulfilled the condition for membership of the EBU, but that this does not mean that it failed to deal with the 'discrimination' aspect. That aspect is, moreover, sufficiently complex to merit an examination more thorough than that which can take place in the context of an emergency procedure.

40 In view of the arguments put forward by the parties on this first plea, the Court must, in reviewing the legality of the contested decision, determine whether the Commission complied with the obligation imposed on it by Article 190 of the EEC Treaty to give the reasons for its decision rejecting a request for interim measures.

41 As the Court of Justice has held on numerous occasions (judgments in Case 55/69 *Cassella* v *Commission* [1972] ECR 887 and in Case 56/69 *Hoechst* v *Commission* [1972] ECR 923 and in Joined Cases C-43/82 and 65/82 *VBVB and VBBB* v *Commission* [1984] ECR 19), the Commission is not obliged to adopt a position, in stating the reasons for its decisions, on all the arguments relied on by the parties concerned in support of their request. It is sufficient if it sets out the facts and the legal considerations having decisive importance in the context of the decision.

42 It also follows from established case-law of the Court of Justice (judgments in Case 24/62 *Germany* v *Commission*, cited above, in Case 110/81 *Roquette Frères* v *Council* [1982] ECR 3159 and in *VBVB and VBBB* v *Commission*, cited above) that the statement of the reasons on which a decision adversely affecting a person are based must be such as to enable the Community judicature to exercise its power of review as to the legality of the decision and to enable the person concerned to ascertain the matters justifying the measure adopted, so that he can defend his rights and verify whether the decision is well founded.

43 In this respect the Court observes that, although some of the arguments relied on by the applicant were not examined in the decision at issue, the Commission indicates the essential elements of fact and law relating to the various conditions to which the grant of interim measures is subject which led it to refuse to adopt the measures requested, thus enabling the applicant to challenge the justification for that decision and the Court to exercise its power of review.

44 It follows from the foregoing considerations that the first plea must be rejected.

The plea alleging manifest error of fact and law

45 The applicant maintains that, by failing to inquire whether there was in fact discrimination and by concentrating its analysis on a peripheral aspect, in the event, the question whether La Cinq satisfies the conditions laid down in Article 3(2) of the statutes of the EBU, the Commission confined itself to a partial view of the factual situation, which means that its decision contains a manifest error of fact. At the same time that approach constitutes a manifest error of law, since the Commission refused to contemplate, although required so to do in order to preserve the effectiveness of the rules on competition, the application of Community law to a situation in which an association occupying a dominant position within the market refused to accept as a member a company like La Cinq, which was more entitled to become a member of the EBU than other companies which had been admitted as active members.

46 The applicant further disputes the Commission's assertion that it is not obvious that the applicant fulfils the conditions for membership laid down in the statutes of the EBU with regard to covering the national population and to the quality of programming (Article 3(2)(a) and (b) of the statutes).

47 In this respect the applicant maintains that it is a channel of a national character which already covers more than 72% of the population and is endeavouring to achieve coverage of the entire national territory, whereas there is no television channel which covers an entire national territory and/or the entire population. Furthermore, the applicant criticizes the Commission for having failed to undertake a comparative analysis of its programme schedules and those of the various member-channels of the EBU, which would have enabled the Commission to take cognizance of their great similarity and, therefore, to conclude that the conditions for membership laid down in the statutes of the EBU are less precise and less stringent than the requirements of French internal rules with regard, for example, to the quotas of French-language works, with which the Commission nevertheless established an unjustified parallel.

48 In reply to the applicant's arguments, the Commission maintains, firstly, that it was justified in doubting whether La Cinq unquestionably satisfied all the conditions laid down for membership of the EBU.

49 With regard to the obligation to cover the entire population, the Commission considers that this obligation must be regarded one element of a task of providing a public service (as opposed to a purely commercial 'task') and must not be assimilated to 'having a national character' (as opposed to 'having a local character'). According to the data available to the Commission, La Cinq reaches only about 72% of French households at present and has set itself the objective only of reaching 92%. Those figures clearly show that La Cinq does not satisfy the requirement to cover the entire population, even if 'entire' has to be understood as meaning 95%.

50 With regard to the condition concerning 'varied and balanced programming', the Commission defends itself against La Cinq's accusation that it concurred with criticism expressed by the CSA relating to failure by the channel to comply with certain provisions of national regulations and contends that, on the contrary, concurred only with the criticism concerning the lack of variety and balance in the channel's programming, which is more thematic than general in character and dominated essentially by fiction and information.

51 Secondly, and without dismissing out of hand the possibility of discrimination — since it is not obvious that Canal Plus wholly fulfils the conditions for membership laid down in the present statutes of the EBU — the Commission maintains that the two channels are not prima facie genuine competitors, since Canal Plus has a public-service concession and is a 'pay' channel, the revenue of which is derived mainly from its subscribers, whereas La Cinq obtains its revenue almost exclusively from advertising. In those circumstances, the Commission considers that the existence and the possible degree of the discrimination alleged, and the best method of remedying it, can be determined only at a later stage and on the basis of a scrupulous investigation.

52 The intervener, for its part, disputes the arguments advanced by the applicant in its complaint to justify its request designed to procure its admission to the EBU as an active member by means of a decision of the Commission compelling the EBU to accept its application. In this respect the intervener points out that by founding its complaint on Articles 85 and 86 of the EEC Treaty the applicant has failed *a priori* to provide an adequate legal basis for it, since those provisions relate solely to restrictions on competition and not to supervision of the activities of a trade association as such; moreover, in the intervener's opinion, although those provisions prohibit acts of discrimination against parties with which it has business relations, they do not prohibit horizontal discrimination as such.

53 In that regard, the intervener points, in particular, to what it regards as a fundamental contradiction in the argument put forward by the applicant to show that its admission as an active member of the EBU had to be granted by virtue of both

Articles 85 and Article 86 of the EEC Treaty. The intervener considers that if — as the applicant maintains — it were to be considered that Eurovision constitutes an agreement, decision or concerted practice which does not qualify for exemption under Article 85(3), and that the EBU, furthermore, has a dominant position within the market for rights to broadcast sports events, that situation cannot be rectified by admitting an undertaking which is a victim of discriminatory treatment as a party to the agreement, decision or concerted practice or as a member of the group of undertakings dominating the market. Such a measure would amount to distorting competition even further by helping to extend the agreement, decision or concerted practice or to strengthen the dominant position.

54 The intervener also maintains that, by seeking the adoption of protective measures which would amount to giving it unrestricted access to the Eurovision programme-exchange system, the applicant requested the Commission to adopt a decision which it could not adopt without prejudging the very nature of the remedy to be applied to the situation of presumed infringement, without prejudging its decision whether or not to grant an exemption to the EBU under Article 85(3) of the EEC Treaty and without encroaching on the field of freedom of association. The intervener considers that Article 3 of Regulation No 17 allows the Commission only to require undertakings to terminate an infringement, leaving it to them to determine the manner in which they comply with that negative obligation.

55 The EBU maintains, moreover, that the applicant did not at any time and does not now fulfil the conditions for membership of the EBU.

56 With regard, in particular to the obligation to cover the entire national population, the intervener contends that this is a particularly restricting condition, consisting not only of the obligation to cover the entire population, but also, and concurrently, of the requirement that the applicant for membership should already in fact be serving a substantial part of the population, while using its best endeavours to achieve complete coverage in due course. Since the costs of providing a service reaching the very last viewer rise in a disproportionate and drastic manner that is unjustifiable from the point of view of strict profitability, it is precisely the compulsory coverage of the entire national population which characterizes public-service broadcasting organizations.

57 With regard to the second condition for membership of the EBU, namely the obligation to provide varied and balanced programming for all sections of the population, the intervener refers essentially to the findings of the CSA, while stressing, moreover, the differences between the legislation governing public-service broadcasting organizations in France and that governing commercial undertakings, a fact which demonstrates the legality, with respect to the rules on competition of the EEC Treaty, of the differing treatment applied by the EBU to broadcasting organizations.

58 The intervener states, furthermore, that it has always adhered to a consistent practice of not accepting applications from new commercial broadcasting undertakings, a practice which is explained by the objectives and operating principles which are peculiar to it. In this respect the mere fact that TF 1 and Canal Plus are financed by commercial revenue cannot be adduced as evidence of discrimination, since the differences in treatment are due to the features peculiar to each channel. Moreover, those two channels differ from La Cinq in that account has to be taken of their acquired rights. They had in fact been admitted as active members well before the amendment of the statutes in 1988 and before the emergence of commercial broadcasting undertakings. If commercial broadcasting undertakings were admitted as active members of the EBU alongside public-service broadcasting organizations, the Eurovision programme-exchange system itself could not remain what it is: a system of solidarity between organizations of the same nature indirectly supporting the weakest members.

59 In the light of the foregoing, the Court considers that, in reviewing the legality of the decision at issue, it must determine, firstly, whether the Commission founded the decision on a correct interpretation in law of the condition concerning the probable existence of an infringement and, secondly, whether, as the applicant claims, the Commission committed, in its appraisal of the facts, a manifest error that may have led it to conclude that that condition had not been fulfilled.

60 It must be observed, above all, that the Commission based its conclusion regarding the absence of a probable infringement on the fact that 'an initial summary examination of the facts does not show that there has been clear and flagrant infringement (prima facie infringement) of Articles 85(1) and 86 the Treaty.'

61 As the Court of First Instance held in its judgment in Case T-23/90 *Peugeot* v *Commission* [1991] ECR II-653, thereby upholding the argument put forward by the Commission during the proceedings (see paragraph 59 of the judgment), in proceedings relating to the legality of a Commission decision concerning the adoption of interim measures, the requirement of a finding of a prima facie infringement cannot be placed on the same footing as the requirement of certainty that a final decision must satisfied. In the present case the reasons adopted by the Commission for the decision at issue — confirmed, moreover, during the hearing — amount to requiring that, for a grant of interim measures to be possible, the existence of a clear and flagrant infringement must already be established at the stage of the mere prima facie appraisal which has to serve as the basis for the grant of such measures.

62 It follows that, by identifying the requirement of a 'prima facie infringement' with the requirement of a finding of a 'clear and flagrant infringement' at the stage of interim measures, the Commission based its reasoning on an erroneous interpretation in law of the condition relating to the probable existence of an infringement.

63 The Court considers that the error of law committed by the Commission in interpreting the condition relating to the probable existence of an infringement is such as seriously to affect the legality and the relevance of any appraisal undertaken by the Commission regarding the question whether this first condition for ordering the interim measures requested was in fact fulfilled.

54 This finding of the Court applies to the Commission's appraisal of the question whether the applicant satisfied the requirements laid down in the statutes for becoming an active member of the EBU, in particular those specified in Article 3(2)(a) and (b), the only issue broached by the Commission in concluding that a probable infringement did not exist.

55 The error in the Commission's reasoning emerges clearly from the very wording of the decision at issue, where it states that 'it is not evident that La Cinq fulfils the conditions for membership and ... it is therefore not obvious that the refusal is discriminatory and unjustified' (paragraph 5 of the decision) and that 'it is difficult to maintain on the face of it that La Cinq unquestionably fulfils the conditions for membership laid down in the statutes and that there is obviously an infringement on the part of the EBU' (paragraph 8 of the decision).

56 It follows from the foregoing considerations that the Commission's finding that the condition regarding the probable existence of an infringement was not fulfilled in this case was based on an erroneous interpretation in law of that condition.

B — *The condition regarding the existence of a risk of serious and irreparable damage establishing the urgent need to adopt interim measures*

57 The applicant challenges the Commission's finding that there was no risk of serious and irreparable damage to it, justifying the urgent adoption of the interim measures requested. It maintains that this finding is vitiated by a manifest error of fact, on the ground that the Commission failed to take account of the particular features of the case and of the economic sector in question and, in addition, used manifestly incorrect factual information to support its decision. It claims, moreover, that by failing to take account of all of the relevant factors the Commission also committed a manifest error of law.

The single plea alleging a manifest error of fact and law

68 The applicant maintains that in the actual circumstances of the case the refusal to grant it access to Eurovision as an active member of EBU must necessarily cause it serious and irreparable damage.

69 It claims, in particular, that contractual access to the system, to which the Commission referred in the contested decision, and from which the applicant benefits by virtue of a 'sub-licensing' arrangement with the OFRT, has never enabled it to obtain images of the major sports events offered on Eurovision, except in two cases, and in one of them only after proceedings for interim relief in the French courts. Furthermore, that contractual access to the programme-exchange system was introduced in order to take account of broadcasting channels or organizations which cannot become active members of the EBU because they do not satisfy the relevant requirements. Since this is not the case with regard to itself, the refusal in question constitutes, in the applicant's view, overt and manifest discrimination which has, moreover, already been recognized by the Paris Court of Appeal in a judgment delivered on 15 November 1989.

70 In the applicant's opinion the risk of serious and irreparable damage must not necessarily be identified with the risk of cessation of business or insolvency. In the present case it is rather the risk of non-renewal of its licence to broadcast — which will expire on 1 March 1997 — that should be taken into account for the purposes of the grant of protective measures. In view of the fact that the administrative procedure in progress before the Commission and that the ultimate decision on the merits will probably be the subject of an action before the Court of First Instance and possibly an appeal to the Court of Justice, the applicant considers that in the absence of interim measures it will not be able to receive the damages and compensatory interest to which it will be entitled until, at best, a date fairly close to the expiry of the licence to broadcast granted to it by the French public authorities.

71 In that context the applicant states that the image of a channel in the mind of the public is a decisive factor, whether it be in terms of audience, increase in revenue from 'advertising slots' or from the point of view of the renewal of its licence. An

unfavourable image resulting from discrimination in relation to transmissions can only be corrected slowly, at the pace of changes in public opinion, and not simply by an award of damages, especially as any such award, at the time when it was made, would not enable La Cinq to develop its own capacity. During the hearing the applicant claimed, moreover, that since competition in the advertising market is directly connected with a channel's audience, a situation of competitive disadvantage, such as its own situation, which does not enable it to put advertising slots to profitable advantage, may itself be the cause of serious and irreparable damage which cannot be proved by figures.

2 The applicant maintains that the Commission also failed to take another feature peculiar to the present case into account, namely the fact that if the refusal of the EBU to admit La Cinq as a member is declared unlawful, it will still be necessary to adjust its position retroactively with respect to events already broadcast or to those not yet broadcast but already distributed among the members of the EBU before the Commission's decision, by virtue of agreements covering several years concluded with the major organizers of international sports events.

3 According to the applicant those circumstances establish that there was and is an urgent need to adopt the interim measures requested. That urgency becomes still more clearly apparent if the list of manifestly popular televised events that will be broadcast during 1991 and 1992, of which the applicant will be deprived if the interim measures requested are not adopted, is taken into account.

4 In reply the Commission maintains that La Cinq has unrestricted access to the televised current affairs broadcast every day through the EBU. Furthermore, the documents before the Court show that the applicant is in a strong position with regard to sports events, in particular tennis and car rallies, and has almost exclusive rights in respect of Formula 1 grand prix racing and motor-cycle circuit racing.

75 The Commission contends that even if, as La Cinq claims, such access is purely hypothetical and in practice has merely given rise to the transmission of a few football matches, it cannot be held on the basis of this fact alone that there is serious and irreparable damage that would justify protective measures, especially as La Cinq has not adduced any tangible evidence, such as figures relating to loss of audience or decrease in advertising revenue. La Cinq can, in any event, always develop a policy of counter-programming by broadcasting programmes of a high quality to attract that part of the public which is not interested in sports events.

76 With regard to the urgency of the measures requested, the Commission notes that La Cinq submitted its first application for membership of the EBU in February 1987 and the most recent rejection, in June 1990, in no way altered the situation in which the applicant had already been for three years. It is difficult, therefore, to accept that the situation has all at once become of such urgency as to require action on the part of the Commission to remedy it.

77 The Court observes, as a preliminary point, that in its decision the Commission relied on the following considerations to refute the probability of serious and irreparable damage to the applicant capable of establishing the urgency of the measures requested. Firstly, the Commission states that La Cinq enjoys contractual access to the images of the EBU and was in a position to transmit a large number of major sports events, including matches in the football world cup. Secondly, it maintains that the only damage that can be regarded as irreparable is that which cannot be remedied by any subsequent decision, which would be the case if, for example, owing to the attitude of the EBU, La Cinq was compelled to terminate its activities. The Commission considered that this danger was remote and that any financial damage that La Cinq might suffer could be made good in actions for damages brought before the national courts after it had been found that the EBU had infringed the rules on competition.

78 As in the case of the examination of the case already undertaken by the Court regarding the condition relating to the probable existence of an infringement, it

must now be determined firstly whether the Commission based itself on a correct interpretation in law of the condition relating to the existence of serious and irreparable damage establishing the urgent need to adopt interim measures.

79 In this respect it must be held that, in stating in its decision that 'the only damage that can be regarded as irreparable is that which cannot be remedied by any subsequent decision', the Commission adopted a legally incorrect conception of irreparable damage the existence or risk of which could justify the adoption of interim measures.

80 In formulating the requirement embodied in its conception of irreparable damage, the Commission went beyond what is required by the case-law of the Court of Justice, which merely refers to damage which could no longer be remedied by the decision to be adopted by the Commission upon the conclusion of the administrative procedure (order in *Camera Care*, cited above).

81 Moreover, the Commission's interpretation would make it almost impossible to verify the fulfilment of such a condition, and this would, in practice, amount to depriving of all substance the power granted to it to adopt interim measures.

82 It is in this respect that the Commission failed to take into account, in appraising the serious and irreparable nature of the damage, the limited duration of the licence to broadcast granted to La Cinq and the effect that this circumstance might have on the opportunities available to it in due course — in particular with regard to renewal of its licence — to remedy the consequences of any unlawful acts affecting it and to obtain financial compensation.

83 It follows that the Commission committed an error of law in its interpretation of the condition relating to the existence of a risk of a serious and irreparable damage establishing the urgent need to adopt the interim measures requested.

84 It must now be determined whether, by invoking La Cinq's contractual access to the programmes of the EBU as a ground for declining to verify whether the condition regarding the probability of serious and irreparable damage was satisfied, the Commission committed a manifest error of appraisal.

85 In this respect, it must be observed that, as the Court of Justice has stated, in particular in its judgment in *Remia*, cited above, and in *BAT and Reynolds*, cited above, in the case of situations involving complex economic appraisals, judicial review must be limited to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of appraisal or a misuse of powers.

86 Moreover, as the Court of Justice has held recently in its judgment in Case C-269/90 *Hauptzollamt München-Mitte* v *Technische Universität München* [1991] ECR I-5469, in cases where the institutions of the Community 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.

87 It must be held that although the Commission invoked the applicant's contractual access to Eurovision's images it nevertheless failed to examine the circumstances in which such access could occur.

18 The information provided by the applicant in its complaints of 28 July 1989 and 12 July 1990 and during the proceedings before the Court, which was known to the Commission or of which it could normally have obtained knowledge without any difficulty, is such as to raise serious doubt with regard to the practical importance and the real significance of the system of contractual access or sub-licensing for the purposes of enabling television organizations which are not members of the EBU to obtain competitive access to Eurovision images.

19 In this respect it must be observed, firstly, that Article 3(6) of the statutes of the EBU provides that contractual access to the Eurovision system 'shall be granted or withdrawn by decision of the Administration Council,' which means that television organizations which are not members of the EBU have to depend on decisions adopted by a body composed of administrators representing the active members of the EBU.

20 The Court also observes that although the sub-licensing arrangements relate solely to indirect access to rights already acquired by members of the EBU and, consequently, do not affect direct access to the transmission rights for international sports and other events that the various channels may acquire in the market, the Commission nevertheless failed to take account of the influence that the weight which the EBU carries in the various markets may exert on actual access to Eurovision of the channels which are not members of the EBU, especially if account is taken of the fact that it contains most of the general channels in Europe, that it often participates in negotiations to acquire transmission rights on behalf of its members and that a practice has developed whereby agreements, covering several years, are concluded with the organizers of international sports events. All these circumstances are prima facie of such a nature as to curtail substantially the opportunities to compete available to a channel acting individually in the market in transmission rights in respect of events attracting a large number of spectators, like major international sports events.

21 It must also be observed that, ever since its first complaint, the applicant has alleged, on the one hand, that, on the initiative of the EBU, membership of the

OFRT prevented it from acquiring exclusive broadcasting rights for major sports events taking place abroad and, on the other hand, that the system of contractual access to Eurovision was subject to complex, discriminatory and unfavourable financial conditions, laid down in an agreement on 25 August 1987 between the OFRT and the EBU. In a letter sent on 26 September 1989 to Mr Overbury, the applicant stated that those conditions had been passed on to it by the OFRT, without any possible negotiation, by an agreement dated 1 October 1988.

92 The Court observes, moreover, in this respect, that the applicant has alleged, without being challenged on this point by the Commission, that, with the exception of the Stuttgart v Naples match on 17 May 1989, during the period preceding the adoption of the decision at issue it was only after initiating proceedings for interim relief in the national courts that La Cinq was able to broadcast four matches of secondary importance assigned by Antenne 2 and FR 3 during the last football world cup.

93 Finally, the Court observes that the doubts regarding the capacity of the contractual system instituted in order to enable non-members of the EBU to have alternative access, on competitive conditions, to the Eurovision images are merely confirmed by the change in the Commission's position with respect to that adopted by it in the notice that it had published initially pursuant to Article 19(3) of Regulation No 17. Whereas in that notice it proposed to adopt a favourable decision concerning the Eurovision system, it informed the Court that it had, in the meantime, sent to the EBU a statement of objections replacing its original notice.

94 It follows that the Commission failed to fulfil its obligation to take account of all the relevant facts in the case in order to determine whether there was a risk of serious and irreparable damage to the applicant, establishing an urgent need to adopt the measures requested and that, consequently, the decision at issue is vitiated by a manifest error of appraisal.

From the foregoing considerations it follows that the Commission's conclusion that the condition regarding the existence of a risk of serious and irreparable damage establishing an urgent need to adopt interim measures was not fulfilled in the present case is based on an erroneous interpretation in law of that condition and on a manifest error of appraisal of the facts in question.

Consequently, it was on the basis of an erroneous interpretation in law of the two conditions to which the exercise of its power to order interim measures is subject that the Commission concluded that those conditions were not satisfied in the present case. It follows also, with regard to the second of those conditions, that the Commission in addition committed a manifest error of appraisal. The decision at issue must therefore be annulled.

Costs

Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs. The intervener must bear its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

(1) Annuls the Commission's Decision of 14 August 1990 (IV/33.249 — La Cinq SA/Union Européenne de Radiodiffusion);

(2) Orders the Commission to pay the costs, save those of the intervener, which shall bear its own costs.

Cruz Vilaça Schintgen

Edward Kirschner Lenaerts

Delivered in open court in Luxembourg on 24 January 1992.

H. Jung
Registrar

J. L. Cruz Vilaça
President