OPINION OF ADVOCATE GENERAL ALBER

delivered on 1 July 1999 *

A — Introduction

1. The appellants are film production and distribution companies who applied for assistance for the distribution of two film productions. That application was rejected by the Commission and the European Film Distribution Office ('EFDO'). The appellants brought an action against that decision before the Court of First Instance. By a judgment of 19 February 1998, the action was dismissed. [1] In these proceedings, the appellants appeal against that judgment.

2. The assistance was refused for two reasons. Firstly, in the case of the first film production, the distribution companies did not constitute at least three separate distributors, being merely subsidiaries of the same distribution company. Secondly, the Commission had not yet terminated the exemption procedure [2] brought under Article 85(3) of the EC Treaty (now Article 81(3) EC) and did not wish to anticipate the outcome of that procedure by a decision on the award of assistance. The appellants argued before the Court of First Instance that the decision to refuse assistance was made in breach of the criteria for granting assistance, and contained several errors of reasoning. Against the Court's judgment dismissing that claim, the appellants now argue that the Court erred in law by proceeding on the basis that the Commission had a discretion over the granting of assistance, that it substituted its own reasoning for that of the Commission, and that it made an invalid connection between the award of assistance and an exemption procedure.

* Original language: German.

1 — Joined Cases T-369/94 and T-85/95 *DIR International Film and Others* v *Commission* [1998] ECR II-357.

2 — In the case of the fourth appellant it was uncertain at the time the refusal decision was made whether the hitherto existing exemption would be renewed. It was clear, however, that the future of the subsidiaries of UIP — the fifth to tenth appellants — depended on that of their parent company, which could not continue to exist without a renewal of the exemption under Article 85(3) of the EC Treaty. In such circumstances, it was obvious that those subsidiaries would not be in a position to continue their activity if the Commission did not renew UIP's exemption.

B — Legal context

3. The appellants had applied for assistance under the MEDIA programme. Concerning that programme, the Court of First Instance stated as follows in paragraphs 1 to 12 of its judgment:

'1. On 21 December 1990, the Council adopted Decision 90/685/EEC of 21 December 1990 concerning the implementation of an action programme to promote the development of the European audiovisual industry (MEDIA) (1991 to 1995) (OJ 1990 L 380, p. 37), the name MEDIA being an acronym for "mesures pour encourager le développement de l'industrie audiovisuelle". The decision began by stating that the European Council regarded it as extremely important to strengthen Europe's audiovisual capacity (first recital in the preamble).... It stressed the need for the European audiovisual industry to overcome fragmentation of the markets and overhaul its excessively narrow and insufficiently profitable production and distribution structures (fourteenth recital), stating that special attention needed to be given in that context to small and medium-sized undertakings (fifteenth recital).

2. Article 2 of Decision 90/685 sets out the aims of the MEDIA programme as follows:

...

— to stimulate and increase the competitive supply capacity of European audiovisual products, with special regard for the role and requirements of small and medium-sized undertakings, the legitimate interests of all professionals who play a part in the original creation of such products and the position of countries in Europe with smaller audiovisual production capacities and/or with a limited geographical and linguistic area;

— to step up intra-European exchanges of films and audiovisual programmes and to make maximum use of the various means of distribution which either exist or are still to be set up in Europe...;

— to increase European production and distribution companies' share of world markets;

— to promote access to and use of the new communications technologies, particularly European ones, in the production and distribution of audiovisual material;

...

3. The Commission stated in its communication on audiovisual policy (p. 9) that... EFDO, an association registered in Hamburg (Germany), "is helping to set up co-distribution networks by fostering cooperation between companies which were previously operating in isolation on their national territory".

4. Article 7(1) of Decision 90/685 provides that the Commission is to be responsible for implementing the MEDIA programme. Under point 1.1 of Annex I to Decision 90/685, one of the mechanisms to be used in implementing the MEDIA programme is to develop significantly the action taken by EFDO to promote the cross-frontier distribution of European films in cinemas.

5. Against that background, the Commission concluded agreements with EFDO concerning the financial implementation of the MEDIA programme....

6. Article 3(2) of that agreement refers to the rules on cooperation, which form an integral part of the agreement and are set out in Annex 3 thereto.... They provide in particular that the prior approval of the Commission's representatives is to be obtained in relation to all matters having an impact on the implementation of the MEDIA programme, particularly where, "in general terms, any negotiations likely to affect relations between the Commission and the political authorities and/or professional organisations" are concerned (paragraph 1(g)).

7. The functioning of EFDO is also subject to guidelines adopted by itself and approved... by the Commission.... Under those guidelines, EFDO administers a fund which grants loans to film distributors of up to 50% of anticipated distribution costs, without interest, and repayable only if the film recoups the anticipated costs in the country for which the loan is granted. The loan serves to reduce the risk in distributing films and helps to ensure the release of films which, without such

financing, would have little chance of being shown in cinemas. Decisions on loan applications are taken by the EFDO Selection Committee.

8. Point VI.2 of the guidelines provides that the EFDO Selection Committee is to examine applications... and to grant loans to eligible projects until the funds are exhausted.

...

10. As regards the conditions to be fulfilled by applicants for EFDO aid, point III.1(a) of the guidelines provides, *inter alia*:

"At least three different distributors from at least three different EU countries or from countries with which cooperation contracts exist must agree to exhibit a film theatrically. The applications must be submitted by all the distributors concerned at the same application deadline."

11. The guidelines also lay down an order of priority in selecting distribution projects (point VI.1):

"1st Priority

Distribution projects (films) that bring together the greatest number of distributors, i.e. that guarantee theatrical distribution in the most countries, shall have priority over projects bringing fewer distributors/countries together.

2nd Priority

Projects from the so-called 'difficult' film export countries have priority over the projects from all other countries. After the evaluation of EFDO's pilot phase and according to the Committee's decision, all countries of the European Union... with the exception of France, Great Britain and Germany are regarded as being 'difficult' export countries...

3rd Priority

In the case of projects of equal standing with regard to the above priorities, preference will be given to films from countries from which no film or only a few have yet received aid.

4th Priority

If further criteria are needed, such projects, due to their distribution concept, will have priority, that show promise of mounting a more successful theatrical release of a film."

12. Finally, under point VI.3 of the guidelines EFDO has the right to reject an application without stating reasons if it has knowledge, directly or indirectly, of any fact giving reason to believe that the loan will not or cannot be duly repaid.'

C — The facts

4. Concerning the facts of the case, the Court of First Instance stated as follows in paragraphs 13 to 22 of its judgment:

'13. The first and third applicants, DIR International Film S.r.l. and Union PN S.r.l., are producers of the Italian film *Maniaci Sentimentali*, and the second applicant, Nostradamus Enterprises Ltd, is the producer of the film *Nostradamus*, an Anglo-German co-production. The fourth applicant, United International Pictures BV ("UIP"), a joint subsidiary of [an American company, a Japanese company and a French company], is involved primarily in the distribution of full-length films around the world, with the exception of the United States, Puerto Rico and Canada. The fifth, sixth, seventh, eighth, ninth and tenth applicants... are subsidiaries of UIP and act as local distributors in the respective countries (and are hereinafter referred to as "the subsidiaries").

14. On 28 July 1994, at the request of the producers of the film *Maniaci Sentimentali*, UIP sent EFDO funding applications for the distribution of that film by its respective subsidiaries in Norway, Finland, Sweden, Denmark,

Greece and Spain (and on behalf of Filmes Lusomundo SARL, a company unconnected with UIP, in Portugal).

15. On the same date, at the request of the producer of the film *Nostradamus*, UIP sent a funding application to EFDO for the distribution of that film in Norway, Finland, Sweden and Denmark by its respective subsidiaries.

16. The correspondence between EFDO and the Commission... shows that in a fax of 7 September 1994 the Commission stated that EFDO should not take a decision on the funding applications by the UIP subsidiaries until the Commission had given its ruling on UIP's application for renewal of its exemption. By a further fax the same day, the Commission again asked EFDO "not to rule on those candidatures [that day], but to keep them in suspense pending the Commission's final decision on the UIP file that it [was] investigating" at the time.

17. On 12 September 1994, the UIP subsidiaries received fax letters from EFDO ("the disputed letters"), stating that "[t]he Committee of EFDO [had] postponed the decision on [their] application concerning the films *Nostradamus* and *Maniaci Sentimentali*... until the European Commission [had] taken its general decision upon the status of UIP in Europe". The general decision referred to, according to the parties, was the decision to be taken by the Commission concerning UIP's application for the renewal of its exemption under Article 85(3) of the EC Treaty for the joint venture agreement between its three parent companies providing for its establishment and for related agreements concerning primarily the production and distribution of full-length feature films. The exemption granted by Commission Decision 89/467/EEC of 12 July 1989 relating to a proceeding pursuant to Article 85 of the EEC Treaty (IV/30.566 — UIP) (OJ 1989 L 226, p. 25; "Decision 89/467") expired on 26 July 1993.

18. Following receipt of the disputed letters, the first four applicants contacted EFDO and Commission representatives in order to signify their disagreement and obtain certain information and documents, and to have the applications re-examined. UIP's representatives also contacted the Member of the Commission with responsibility for (*inter alia*) cultural affairs, João de Deus Pinheiro, requesting him to intervene so that the applications could be reconsidered. Having been informed that the file had been transferred to the Directorate-General for Competition, UIP's counsel also wrote to the Member of the Commission with

responsibility for competition matters, Karel Van Miert, asking him for certain information.... The latter emphasised in his reply that there was no link between the procedure concerning UIP's application for the renewal of its exemption under Article 85(3) of the Treaty and the procedure concerning the grant of subsidies by EFDO.

...

20. On 5 December 1994, the EFDO Committee,[3] "following representations by UIP", examined the funding applications referred to above and decided to reject them. That decision was notified to UIP by a letter from EFDO dated 10 January 1995 ("the contested decision").

21. The correspondence between EFDO and the Commission... shows that, on an unspecified date, the Commission recommended to EFDO that it reject the applications as ineligible on the ground that many subsidiaries of the same distribution company did not constitute "different distributors" within the meaning of the EFDO guidelines.

22. According to the contested decision, drafted by EFDO staff, the applications were rejected because "it has not yet been decided by the Commission of the European Union what UIP's status will be in Europe in the future". Since EFDO's loan contracts are based on a five-year period of theatrical release for the supported films, no other decision could be made in order not to interfere with the legal proceedings instituted by UIP against the Commission of the European Union. In addition to that, the Committee[4] of EFDO thinks that UIP does not fully fulfil the aims of the MEDIA programme as described below: "[...] to set up co-distribution networks by fostering cooperation between companies which were previously operating in isolation on their national territory"...'

5. Following the rejection of the application for assistance by the contested decision of 10 January 1995, the appellants brought an action before the Court of First Instance against the contested decision and/or the measure whereby the Commission instructed EFDO to take those decisions.[5] They claimed that the Court should:

— annul the disputed letters and/or the act by which the Commission

3 — The original document in English refers to the 'Committee'. Presumably the reference is to the Selection Committee referred to in paragraph 8 of the judgment.

4 — The original document in English refers to the 'Committee'. Presumably the reference is to the Selection Committee referred to in paragraph 8 of the judgment.

5 — The pleas in law were that, by its actions, the Commission infringed the selection criteria laid down in the EFDO guidelines, that the contested decision was incompatible with the philosophy and aims of the MEDIA programme, and that the reasons for it were insufficiently stated.

instructed EFDO to take those decisions;

— order the Commission to pay the costs.

6. The Commission claimed that the Court should:

— reject the application as unfounded;

— order the applicants to pay the costs.

7. Following the dismissal of the action in the judgment of the Court of First Instance of 19 February 1998, the appellants lodged an appeal, received on 28 April 1998. They claim that the Court of Justice should:

1. set aside the contested judgment and accordingly give final judgment in the case, granting the appellants the form of order sought at first instance and ordering the Commission to pay the costs of the proceedings before both the Court of First Instance and the Court of Justice;

2. in the alternative, refer the case back to the Court of First Instance and reserve the costs.

8. The Commission claims that the Court should:

1. dismiss the appeal;

2. order the appellants to pay the costs of the proceedings.

9. The appeal is based on three legal grounds. In the appellants' submission, the Court of First Instance wrongly considered that the Commission enjoyed discretionary power to assess the eligibility of EFDO funding applications, substituted its own reasoning for one of the two reasons stated in the contested decision, and misinterpreted Article 81 EC in conjunction with Regulation No 17/62, [6] in that it made the grant of assistance from the MEDIA programme conditional upon the granting of an exemption.

6 — 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).

10. The arguments of the parties on the individual grounds of appeal will be commented upon in the analysis which follows.

D — Analysis

(a) Discretion

Arguments of the parties

11. In their first plea, the appellants claim that the Court of First Instance wrongly took the view that the Commission enjoyed a discretionary power in assessing applications for EFDO funding. The Court assumed the existence of such a discretion in its assessment of the criteria for assistance (paragraphs 91 and 93 of the contested judgment) and in respect of the grounds for rejection (paragraph 105 of the judgment).

12. In the appellants' submission, the award of assistance must be made in accordance with clear, uniform and objective rules suitable for determining the class of beneficiaries in advance, thus excluding the possibility of arbitrary measures. Accordingly, in this case, the criteria for assistance were conclusively set out in the EFDO guidelines, leaving no room for discretion in assessing eligibility for assistance. As the institutions are bound by their own rules, the Commission was not entitled, in refusing assistance, to depart from the objective criteria contained in the EFDO guidelines and to rely on its discretion in order to exclude certain applicants from the class of beneficiaries. Even if in principle the EFDO guidelines had to be interpreted entirely in the light of Decision 90/685, that could not result in new criteria being read into those guidelines which the Commission should regard as necessary in individual cases in order to achieve the objectives of that decision. The Court of First Instance thus started out on the basis of a possible interpretation of the guidelines in the light of the purpose of Decision 90/685, but then erred in law by acknowledging the existence of a discretionary power on the part of the Commission, thereby infringing the general principles of legal certainty and the protection of legitimate expectations.

13. The Commission maintains that there is a discretion in the examination of applications for EFDO funding, as the Court of First Instance rightly held. Regarding the interpretation of the assistance criteria carried out by the Commission and confirmed by the Court of First Instance, the appellants have not put forward any arguments to contradict the Commission's manner of proceeding. The Commission thus rightly proceeded on the basis that only applications presented by at

least three distributors which had not previously cooperated in a substantial and permanent manner were to be regarded as eligible for assistance.

14. Concerning the grounds for refusal, the Court of First Instance correctly held that the Commission was entitled in awarding funds to have regard to the fact that they were intended to further the implementation of the aims of the MEDIA programme, even if that was not expressly stated as a ground for refusal in the EFDO guidelines. The Commission further maintains that it is settled case-law of the Court of Justice that, in applying one rule of Community law, the Commission may not infringe other applicable Community law. Even if the decision on the grant of assistance had no influence on an exemption procedure under Article 85(3) of the Treaty, the Commission had to ensure a uniform application of all Community legal provisions. It followed that the Commission was entitled to take the appellants' uncertain legal status into account when refusing assistance.

Assessment

15. There are two aspects to the question whether the Commission had a discretion. The Court of First Instance recognised it as having a discretion, first, in the examination of the criteria for assistance and, secondly, in the examination of the grounds for refusal.

16. Concerning the first problem, the point at issue is the interpretation of the eligibility requirement in the EFDO guidelines [7] that at least 'three different distributors from at least three different EU countries or from countries with which cooperation contracts exist must agree to exhibit a film theatrically'.

17. The Court of First Instance stated on that point that the Commission and the EFDO had a discretion, since that criterion was to be interpreted in the light of the objectives of the MEDIA programme.

18. The wording of that provision does not in itself imply a discretion which would support the Commission's interpretation — at least three distributors which had not previously cooperated in a substantial and permanent manner. Since, however, both the EFDO guidelines and Decision 90/685 are rules of Community law, they are to be

7 — Cited in point 3 of this Opinion, quoting paragraph 10 of the judgment.

judged in accordance with the rules on interpretation in force.

19. The essential objectives of the MEDIA programme are stated in Article 2 of Decision 90/685.[8] In summary, they are to develop Europe's audiovisual capacity through the free movement of programmes, the promotion of the European high-definition television system and a policy of encouraging creativity, production and broadcasting so as to demonstrate the richness and diversity of European culture.[9] In adopting Decision 90/685, moreover, the Council took note of the Commission communication on media policy. In that communication, the Commission stated *inter alia* that EFDO was carrying out a first pilot project to promote cooperation between European distributors. Transfrontier distribution of films could thereby be brought into being in an attempt to create a large internal market for film productions. EFDO also contributed to the creation of co-distribution networks by fostering cooperation between companies which were previously operating in isolation on their national territory. When account is also taken of the 14th and 15th recitals in the preamble to Decision 90/685, according to which the European audiovisual industry was to overcome fragmentation of the markets and small and medium-sized undertakings and countries in Europe with smaller audiovisual capacity were to be given special attention when adapting market structures, the outstanding significance of the creation of co-distribution networks becomes clear.

20. It follows from those considerations — as the Court of First Instance held — that an essential objective of the MEDIA programme lies in the promotion of contacts and cooperation between distributors in the various European countries. It also follows that the MEDIA programme was intended to promote new developments in the European film production market and in particular the creation of new forms of cooperation between participants in the European market.

21. That objective is also to be found in the EFDO guidelines, where they provide that at least three different distributors from at least three different EU countries or from countries with which cooperation contracts exist must agree to exhibit a film theatrically.

22. Thus one of the essential aims of the MEDIA programme may be identified as the creation of co-distribution networks by promoting cooperation between companies which previously carried on their distribution businesses in isolation on their national territory.

23. If, as in this case, it is necessary to interpret the assistance criteria and grounds

8 — See point 3 of this Opinion, citing paragraph 2 of the judgment.

9 — See the first recital in the preamble to Decision 90/685.

for refusal in the EFDO guidelines in the light of the objectives of the MEDIA programme, the Court of First Instance correctly proceeded on the legal basis that the Commission has a discretion in so doing. That is so especially because, under Article 7(1) of Decision 90/685, the Commission is responsible for implementing the programme. Such a responsibility implies that in making its decisions the Commission must always have the objectives of the programme in mind. To that extent, it cannot be deprived of the power to choose a formulation of the programme that is suitable for implementing those objectives.

24. It follows that in carrying out the tasks assigned to them the Commission and EFDO have a discretion with regard to the interpretation of individual criteria. In order to ensure the effectiveness of the assistance programme, that discretion must relate in particular to the interpretation of the assistance criteria, the list of priorities and the grounds for refusal, so as to ensure a sensible and appropriate distribution of the limited funds available.

25. The Court of First Instance was therefore right, in paragraphs 91 and 93 of the contested judgment, to proceed on the basis that the Commission and the EFDO have a discretion in the interpretation of the assistance criteria and the grounds for refusal.

(b) Substitution of reasoning

26. In this ground of appeal, the appellants argue that the Court of First Instance erred in law by substituting its own reasoning for that of the Commission in the rejection decision. This ground relates to the refusal of assistance for the film *Nostradamus*. The reasoning for that was that the Commission had not yet decided what the future status of UIP in Europe was to be, and that it was not possible to decide otherwise without prejudging the legal procedure concerning the exemption.

Arguments of the parties

27. The appellants argue that in paragraph 100 of the contested judgment the Court of First Instance found that the assistance criteria for the distribution of the film *Nostradamus* were fulfilled. In that respect, the Commission testified in the proceedings before the Court of First Instance that the reason for refusal ultimately lay in the uncertain financial situation of UIP. The as yet uncompleted procedure for exemption under Article 85(3) of the Treaty did not lead directly to the refusal of the applications. The Court repeated that line of argument in paragraph 101 of the contested judgment. In contradiction therewith, however, it then stated in paragraph 119 of the contested judgment that an entity such as UIP, being a party to a

proceeding under the competition rules, could not benefit directly, or indirectly through its subsidiaries, from a loan within the context of the MEDIA programme.

28. The appellants see that as an infringement by the Court of First Instance of Article 173 of the EC Treaty (now, after amendment, Article 230 EC) and Article 190 of the EC Treaty (now Article 253 EC). Under Article 173 of the EC Treaty, the function of the Court is to review the legality of acts of the Commission and set them aside in appropriate cases. It did not, however, have the power to substitute the reasoning for a decision. Under Article 190 of the Treaty, it is for the Commission to state reasons for its decisions. That power cannot be conferred on the Community judicature, since otherwise the addressees of such a decision could not be guaranteed effective legal protection.

29. The Commission acknowledges that the Court's interpretation of the disputed part of the refusal decision is not exactly the same as the interpretation put forward by the Commission in the course of the proceedings before the Court. The Commission referred to the exemption proceedings only insofar as they cast doubt on the UIP subsidiaries' ability to repay the loan, whereas the Court based its reasoning essentially on the uncertain legal status. That did not, however, constitute a substitution of the Commission's reasoning. The Court's conduct could not be regarded as an infringement of Article 173 of the EC Treaty, as the interpretation it selected was entirely possible. Nor was there any question of an infringement of the principle of the protection of legitimate expectations, since the appellants had argued against the Commission's interpretation and thus did not rely on a particular interpretation which subsequently appeared to be invalid.

Assessment

30. The Court of First Instance stated in paragraph 101 of the contested judgment that the main reason for the rejection of the applications was that the Commission had not yet decided what UIP's future status in Europe would be, and that no other decision was possible without prejudging the outcome of the court proceedings concerning the exemption. The Court then adds its view that it was indeed the uncertain status of UIP and its subsidiaries that lay at the root of the rejection of the loan applications. As is apparent from paragraph 105 et seq. of the contested judgment, the Court is thereby carrying out an interpretation of the Commission's reasoning of its decision. The Court begins by examining the Commission's submission before it that UIP's involvement in an exemption renewal procedure under Article 85(3) of the Treaty had not led EFDO to reject the applications, and that it was rather uncertainty as to the ability of the UIP subsidiaries to make the necessary repayments which had justified the rejection.

31. It interprets the answer of the Member of the Commission with responsibility for competition matters, Mr Van Miert, as meaning that, from the specific standpoint of Community competition law, the absence at that stage of any decision on UIP's exemption renewal application under Article 85(3) of the Treaty did not preclude the possible grant of the subsidy requested, given that the latter would, if granted, have no impact on the application of the competition rules.

32. For the Court of First Instance, the factual starting-point in the context of this problem was as follows. At the time the refusal decision was taken, UIP was uncertain as to whether its exemption would be renewed. There was, however, no doubt that the future of UIP's subsidiaries depended on that of their parent company, which could not itself continue to exist without renewal of the exemption under Article 85(3) of the Treaty. In those circumstances, it was recognised that those subsidiaries would no longer be able to pursue their activity if the Commission did not renew UIP's exemption. [10] The Court concluded therefrom that, at that time, the situation of UIP and its subsidiaries was entirely uncertain and precarious, since an exemption was necessary in order to render permissible an agreement which could be contrary to Article 85(1) of the Treaty.

10 — Paragraph 103 of the contested judgment.

33. Following that interpretation which it had carried out, the Court could not find any error of assessment by the Commission or EFDO in refusing the assistance.

34. It should be stated at the outset that, in exercising the jurisdiction conferred upon it, the Court of First Instance is required to examine the legality of the actions of the institutions. In carrying out such an examination in the present case, it inevitably has to interpret the disputed Commission decision. In so doing, as has been established in point 24 of this Opinion, the Court correctly proceeded on the basis that the Commission and EFDO have in principle a discretion when deciding upon the award of assistance. That discretion has been recognised, exercised and not clearly exceeded. The question whether the Court correctly interpreted the disputed passage in the refusal decision is to be determined according to whether what was carried out was merely an improvement on the reasoning, which is unobjectionable in Community law, or whether it constituted the introduction of essential new determining factors.

35. On that point, it has to be said that the Court of First Instance is not strictly bound to the wording of the provisions to be interpreted, but rather has to enquire into the actual will of the decision maker. That

is precisely what the Court did in this case, in that it began by enquiring into the aims of the MEDIA programme, then related the facts of the case to those aims, and finally came to the conclusion that, because of the legal uncertainties, financial problems might arise in the form of doubtful ability to repay loans. Even if the Commission laid the emphasis of its reasoning on the financial difficulties, its intention to refuse the grant of assistance on the ground of those difficulties is also discernible in the interpretation by the Court. The motive for the refusal — the fact that a decision was outstanding concerning an exemption — is found both in the Commission's interpretation and in that of the Court. Only the legal analysis of the factual findings differs. That does not imply, however, that the interpretation chosen by the Court was clearly wrong or arbitrary, or ran counter to the Commission's intention.

36. There is therefore no question of there being a substitution of reasoning in this case, since the Court of First Instance merely interpreted the Commission's decision in the context of its review jurisdiction, merely improving the reasoning of that decision without adding any essential new determining factors. Since no new reasoning was thereby introduced, and the content of the decision also remained unchanged, the applicants cannot claim that there has been an infringement of their defence rights or the principle of the protection of legitimate expectations.

(c) Article 85 of the EC Treaty, Regulation No 17/62 and the objectives of the MEDIA programme

Arguments of the parties

37. In this ground of appeal, the appellants allege an error in the reasoning of the contested judgment. Even if — contrary to the appellants' view — the Court of First Instance proceeded on the basis that the Commission had a discretion in taking its decision and interpreted that decision in a lawful manner, the appellants still maintain that the reasoning of the judgment is legally defective. They maintain that co-distribution networks were always capable of falling within the scope of Article 85(1) of the Treaty, with the result that until a decision on an exemption the objectives of the MEDIA programme could not be implemented. Article 85 in conjunction with Regulation No 17/62 do not, they submit, support the conclusion that structures which are potentially incompatible with the competition rules and do not as yet benefit from an exemption decision are in a wholly uncertain legal position and hence cannot be supported. In the first place, the undertakings concerned are not under any duty of notification pursuant to Article 85(1) of the Treaty, and, secondly, Regulation No 17/62 provides merely for an *a posteriori* control. If the Court's findings were correct, applicants would be obliged, in order to obtain assistance, to obtain an exemption for co-distribution networks even before their creation. That would, however, create a link between the two procedures which inherently could not exist. Along those lines, the Member of the

Commission responsible for competition, Mr Van Miert, had already stated in a letter to UIP that there was no link between the exemption procedure and the procedure concerning the grant of subsidies by EFDO. The Commission itself proceeded before the Court on that basis.

38. The reasoning of the Court of First Instance forces applicants to conclude the exemption procedure in order to enjoy subsidies. In addition, the appellants emphasise that the Commission does not take action after each notification under Article 85(3) of the Treaty and that the average duration of the proceedings is between several months and more than two years. All in all, the manner of proceeding approved by the Court would jeopardise precisely the essential aim of the MEDIA programme, namely the creation of co-distribution networks. These were always capable of falling within the scope of Article 85(1) of the Treaty, with the result that until a decision on an exemption the objectives of the MEDIA programme could not be implemented.

on the basis that such facts might also be taken into account by the Commission in the case of a grant of funds, as in the present case. The letter from Mr Van Miert could also be interpreted along those lines. That letter suggested that the absence of a decision in the exemption proceedings did not preclude the granting of funds in principle. If, nevertheless, no funds were granted to the applicants, that would not jeopardise the objectives of the MEDIA programme, since those could also be achieved by supporting other applicants in a legally secure position. Moreover, the simple fact of cooperation in the context of the MEDIA programme did not imply an infringement of Article 85(1) of the Treaty, so that in that respect also, the Commission submits, the appellants' arguments are beside the point. The Commission concludes that this ground of appeal should also be rejected as unfounded.

Assessment

39. The Commission begins by pointing out that agreements between undertakings which fall under Article 85(1) of the Treaty and have not been exempted under Article 85(3) are to be regarded as unlawful and therefore void. Undertakings entering into such agreements therefore found themselves in a legally precarious position. The Court of First Instance was right to proceed

40. The question to be examined here amounts to whether the Court of First Instance was right in law to proceed on the basis that the Commission was entitled to refuse the subsidies applied for on the ground that the applicants were in a legally precarious position through lack of an exemption.

41. The first thing to be said is that, in the context of the refusal decision, the Commission used its discretion. On that point, the Court correctly stated that the Commission did not exceed its discretion. That means that the Commission has not distorted or obviously misassessed any facts, or committed a misuse of powers or abuse of process. [11] Judicial review is therefore limited to the question whether the action of a Community authority reveals an obvious error or misuse of powers, or whether it clearly exceeded the bounds of its discretion. [12]

42. As already shown in points 30 to 36 of this Opinion, it was permissible in principle for the subsidies to be refused on the ground of UIP's uncertain legal status. The appellants are right to the extent that the procedures under Article 85(3) of the Treaty (exemption) and the EFDO guidelines on the granting of subsidies are independent of each other. That does not mean, however, that in taking that decision the Commission was entitled to disregard the particular provisions of the Treaty, especially concerning competition law. It would run counter to the sense and purpose of the Treaty if, by the award of subsidies, the Commission were to support structures potentially incompatible with the common market under Article 85(1) of the Treaty. According to the 24th and 25th recitals in the preamble to Decision 90/685, the MEDIA programme was also designed to create an internal market for film productions. The latter is, however, also based on undistorted competition, as protected by Article 85(1) of the Treaty. That objective would, however, not be achieved if the Commission were to award subsidies conferring advantages on undertakings which had made agreements incompatible with the common market. In taking its decision on the granting of the funds, the Commission was thus not entitled to overlook the danger arising from certain undertakings of competition in the common market being affected.

43. In that respect, the Court stated in paragraph 105 of the contested judgment that granting the loan would have been hard to reconcile with the reasonable condition that the Commission could not support structures that were potentially incompatible with the competition rules. The Court also refers to the essential aim of the MEDIA programme of encouraging the development of a powerful European audiovisual industry capable of meeting all challenges. In this case, because of limited resources, [13] granting the loans to the applicants would have had the result of denying all Community financing to other undertakings whose activity was clearly compatible with the competition rules and which were willing and able to create or develop a distribution network.

11 — On the concept of an error of assessment, see Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 25.

12 — Case C-120/97 *Upjohn* v *Licensing Authority* [1999] ECR I-223, paragraph 34 and references therein.

13 — See point 3 of this Opinion, citing paragraph 8 of the judgment.

44. It must therefore be held that the reasoning of the Court in the contested judgment does not contain any infringement of Article 85 of the Treaty and Regulation No 17/62. The Court correctly recognised that, in granting subsidies for the promotion of films, the Commission is required to pay particular attention to the competition provisions of the Treaty. It was thus lawful for the Commission, in the discretionary determination it undertook in this case, to refuse the subsidies. The third ground of appeal should therefore also be dismissed.

45. The appeal should therefore be dismissed as unfounded in its entirety.

Costs

46. Under Article 69(2) of the Rules of Procedure, which is applicable to the procedure on appeal pursuant to Article 118, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The Commission has pleaded that the appellants should be ordered to pay the costs. Since the latter have been unsuccessful, they must be ordered to pay the costs.

E — Conclusion

47. On the basis of the above considerations, I propose that the Court should rule as follows:

(1) The appeal is dismissed.

(2) The appellants are ordered to pay the costs of the proceedings.