OPINION OF ADVOCATE GENERAL BOT

delivered on 18 October 2007 [1]

1. The legal framework for the present appeal is provided by Council Directive 89/552/EEC, [2] which covers television broadcasting activities in the common market and is intended to ensure the free movement of television services between the Member States.

2. Article 3a of the Directive enables a Member State to decide that events which it considers to be particularly important for society, such as the Olympic Games or the football World Cup, must be broadcast in its territory on free television accessible to a high proportion of the population. That article provides that the measures taken by a Member State for that purpose must be notified to the Commission of the European Communities which is to verify their compliance with Community law.

3. If the Commission considers that those measures do comply, it publishes them in the *Official Journal of the European Communities* and such publication obliges the other Member States to ensure that television broadcasters established in their territory comply with them, if they broadcast to the Member State which established the measures.

4. In its judgment of 15 December 2005 in *Infront WM* v *Commission,* [3] the Court of First Instance of the European Communities held that the action brought by Infront WM AG, formerly KirchMedia WM AG, [4] against the decision of 28 July 2000 adopted by the Commission under Article 3a of the Directive was admissible and well-founded. That decision had found the measures notified by the United Kingdom of Great Britain and Northern Ireland to be in compliance with Community law.

1 — Original language: French.

2 — Directive of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (OJ 1989 L 298, p. 23), as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 (OJ 1997 L 202, p. 60) (hereinafter 'the Directive').

3 — Case T-33/01 [2005] ECR II-5897, hereinafter 'the judgment under appeal'.

4 — Hereinafter 'Infront'.

5. The Court of First Instance held that the decision by which the Commission found the measures to be compliant was a challengeable act. It also held that Infront, which engages in the purchase and resale of rights to broadcast sporting events, was directly and individually concerned by that decision, since it was the holder, for the countries of Europe for the years 2002 and 2006, of the exclusive broadcasting rights in respect of the football World Cup finals organised by the Fédération Internationale de Football Association (FIFA) and those events were included among the events of major importance referred to in the measures notified to the Commission by the United Kingdom.

6. In the present appeal, the Commission does not challenge the Court of First Instance's analysis according to which the decision which the Commission is required to take as part of the procedure under Article 3a of the Directive does constitute a challengeable act. On the other hand, it disputes the assessment that Infront was directly and individually concerned by the decision finding that the measures notified by the United Kingdom complied with Community law.

7. In the present Opinion, I shall show that the Court of First Instance did not, in my view, err in law when finding that Infront had standing to bring the proceedings.

I — The legal framework

8. Article 3a of the Directive was inserted by Directive 97/36. It is worded as follows:

'1. Each Member State may take measures in accordance with Community law to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events via live coverage or deferred coverage on free television. If it does so, the Member State concerned shall draw up a list of designated events, national or non-national, which it considers to be of major importance for society. It shall do so in a clear and transparent manner in due and effective time. In so doing the Member State concerned shall also determine whether these events should be available via whole or partial live coverage, or where necessary or appropriate for objective reasons in the public interest, whole or partial deferred coverage.

2. Member States shall immediately notify to the Commission any measures taken or to be taken pursuant to paragraph 1. Within a period of three months from the notification, the Commission shall verify that such measures are compatible with Community law

and communicate them to the other Member States. It shall seek the opinion of the [Contact] Committee established pursuant to Article 23a [composed of representatives of the competent authorities of the Member States]. It shall forthwith publish the measures taken in the *Official Journal of the European Communities* and at least once a year the consolidated list of the measures taken by Member States.

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

9. The meaning of 'broadcaster' is defined in Article 1(b) of the Directive as 'the natural or legal person who has editorial responsibility for the composition of schedules of television programmes within the meaning of (a) and who transmits them or has them transmitted by third parties'.

II — The facts which gave rise to dispute

10. The facts set out in the judgment under appeal which seem to me to be necessary for an understanding of the legal problems raised by the Commission's appeal are the following.

11. Infront is involved in the acquisition, management and marketing of television broadcasting rights for sporting events and typically purchases those rights from the event's organiser. It resells the rights thus acquired to broadcasters.

12. Infront was assigned by its parent company the exclusive broadcasting rights, which that company had acquired from FIFA for a minimum price of CHF 1.4 billion, in respect of the FIFA World Cup finals for the countries of Europe, except the Federal Republic of Germany, for Russia and the other former Republics of the Soviet Union and for Turkey.

13. The United Kingdom notified the Commission on 25 September 1998, then by letter of 5 May 2000, of the measures

taken under Article 3a(1) of the Directive, including a list of events of major importance for society in that State.

14. By letter of 14 July 2000, addressed to the Commission, Infront submitted that the list drawn up by the United Kingdom could not be approved because it was incompatible both with Article 3a of the Directive and with other provisions of Community law. It alleged that, among other things, the list in question was not drawn up pursuant to a clear and transparent procedure, that it included events which were not of major importance for United Kingdom society and that the national and Community consultation procedures were marred by serious deficiencies, and it criticised the retroactive nature of the relevant legislation.

15. On 28 July 2000, the Director-General of the Commission's Directorate-General for Education and Culture sent a letter to the United Kingdom stating that the measures notified by that Member State concerning the television coverage of events of national interest in the United Kingdom gave rise to no objection on the Commission's part.

16. By letter of 7 November 2000, Infront informed the Commission that it was aware of that approval and complained of the infringement of its property rights.

17. On 18 November 2000, the Commission, in accordance with Article 3a(2) of the Directive, published the measures in question. Those measures include extracts from United Kingdom legislation and the list of events of major importance for society in that Member State, including the FIFA World Cup finals.

18. By letter of 22 January 2001, the Commission, in reply to Infront's requests by letters of 7 and 22 December 2000, informed it that the verification procedure for the measures notified by the United Kingdom had been completed and that the list of events was regarded as being compatible with Community law.

III — Procedure

19. On 12 February 2001, Infront brought an action before the Court of First Instance for the annulment, in whole or in part, of the Commission's decision under Article 3a of the Directive that the measures notified by the United Kingdom were compatible with Community law.

20. By separate document of 11 June 2001, the Commission raised an objection, under Article 114 of the Rules of Procedure of the Court of First Instance, to the admissibility of that action.

21. The Court reserved its decision on that objection for the final judgment. It also granted the Kingdom of Denmark, the French Republic, the United Kingdom, the European Parliament and the Council of the European Union leave to intervene in support of the forms of order sought by the Commission.

22. The Kingdom of Denmark withdrew its intervention. The Council lodged no pleading.

IV — The judgment under appeal

23. The Court of First Instance held that the contested measure was the letter of 28 July 2000, in which the Commission informed the United Kingdom that the measures adopted by that Member State under Article 3a of the Directive were compatible with Community law.

24. It noted that, according to settled case-law, any measure the legal effects of which are binding on, and capable of affecting the interests of, the applicant by bringing about a distinct change in his legal position is an act or decision which may, regardless of its form, be the subject of an action for annulment under Article 230 EC. [5]

25. The Court of First Instance held that the contested letter produced legal effects for the Member States since it envisaged publication in the Official Journal of the measures notified to the Commission and such publication triggered the mechanism for mutual recognition laid down by Article 3a(3) of the Directive. It stated that publication informed the Member States of the existence of those measures and enabled them to comply with their obligations under that provision. [6]

26. In the Court of First Instance's view, Article 3a(2) of the Directive confers on the Commission the power to make a decision, notwithstanding the fact that the provision does not expressly refer to the adoption by the Commission of a 'decision'. [7]

5 — Paragraph 89.
6 — Paragraphs 94 and 95.
7 — Paragraph 107.

27. The Court of First Instance then examined Infront's standing to bring the proceedings. It held that Infront was directly and individually concerned by the contested letter for the following reasons.

A — *The question whether Infront was directly concerned*

28. The Court of First Instance noted, first of all, that it has consistently been held that, in order to be of direct concern to an individual within the meaning of the fourth paragraph of Article 230 EC, the Community measure in question must directly affect the applicant's legal situation and its implementation must be purely automatic and result from Community rules alone without the application of other intermediate rules. [8]

29. It then examined whether, in the light of that case-law, Infront was directly concerned in the two cases envisaged by Infront in its action, namely that in which the television broadcasting rights for the matches of the FIFA World Cup finals, which it held for 2002 and 2006, were sold by it, for retransmission in the United Kingdom, to a television broadcaster under the United Kingdom's jurisdiction, and that in which it wished to assign those rights to a television broadcaster established in another Member State.

30. As regards the first case, the Court of First Instance held that Infront was not directly concerned by the contested measure because the approval, by the Commission, of the measures notified by the United Kingdom had no bearing on their applicability in that Member State. [9]

31. It noted, in that regard, that the measures entered into force in the United Kingdom prior to their notification to the Commission and were therefore capable of producing legal effects there before such notification. It concluded that the Commission, by the contested letter, could neither grant the United Kingdom prior authorisation to adopt those measures nor authorise their retrospective maintenance, but only enabled that State to profit from their mutual recognition by the other Member States. [10]

32. As regards the second case, the Court of First Instance stated that the Member State other than the United Kingdom in which

8 — Paragraph 130.

9 — Paragraph 133.

10 — Paragraphs 134 and 135.

the television broadcaster which acquired Infront's broadcasting rights was established would be required to satisfy itself that that broadcaster did not circumvent the measures approved by the Commission and that that obligation arose from the contested letter which validated those measures, thenceforth, for the purposes of their mutual recognition by the other Member States. [11]

33. The Court of First Instance concluded that the case now before the Court is different from the case which gave rise to the judgment in *DSTV* v *Commission,* [12] cited by the Commission, concerning the second subparagraph of Article 2a(2) of the Directive, which requires a posteriori verification of the compatibility with Community law of the measures adopted by a Member State in order to prevent the broadcasting on its territory of programmes from other Member States.

34. It stated, furthermore, that the contested letter did not leave the national authorities any discretion, once the measures were published, as to the performance of their obligations. In the Court of First Instance's view, '[a]lthough the detailed rules for the control which the national authorities are required to exercise under the mechanism of mutual recognition are determined by each Member State in the framework of its legislation implementing Article 3a(3) of the Directive, those authorities must ensure that broadcasters under their jurisdiction comply with the conditions for broadcasting the events in question as defined by the Member State in its measures approved and published in the Official Journal by the Commission'. [13]

35. The Court of First Instance then considered the Commission's argument that only television broadcasters established in the United Kingdom would be interested in purchasing from Infront the rights to broadcast the FIFA World Cup finals.

36. The Commission maintained, indeed, that even if its preliminary verification of the measures notified were to cause other Member States to ensure that broadcasters in their jurisdiction respected the list of events of major importance for society, that would have no effect in the present case. In the Commission's submission, it was inconceivable that Infront would sub-license its television rights for the United Kingdom to a television broadcaster not established in the United Kingdom, as those rights were granted on a national basis. It stated that, at the national level, the income of television

11 — Paragraphs 138 to 143.

12 — T-69/99 [2000] ECR II-4039.

13 — Paragraph 146.

broadcasters was generated from advertising directed at the national audience, national licence fees or national subscription fees for pay television. As their interest was in providing programmes to a national audience, only those broadcasters reaching a high proportion of the national population would be prepared to pay very large amounts for the broadcasting rights held by Infront. Therefore, since the potential sub-licensees of such rights for the United Kingdom were entities under the jurisdiction of the United Kingdom authorities, only the national measures directly affected Infront. [14]

37. The Commission also noted, in that context, that the television broadcasting market in the United Kingdom was one of the most competitive in Europe and that 25% of the broadcasters operating in the sector were licensed in the United Kingdom. [15]

38. The Court of First Instance held as follows:

'147 Lastly, as regards the Commission's argument that only broadcasters established in the United Kingdom would be interested in purchasing from [Infront] the rights to broadcast the FIFA World Cup finals in order to broadcast them in the United Kingdom, it should be noted that such an assumption deprives Article 3a(3) of the Directive of all practical effect. According to recitals 18 and 19 to Directive 97/36, the purpose of that article is to ensure wide access by the public to television coverage of events considered to be of major importance for society by the Member States and, on the basis of the principle of mutual recognition, to require the Member States to ensure that broadcasters under their jurisdiction respect the list of events established by another Member State so as not to deprive a substantial proportion of the public in that State of the possibility of following the events designated by that State.

148 The facts of the case which gave rise to the judgment of the House of Lords [of 25 July 2001] in *R* v *ITC ex parte TV Danmark 1 Ltd* [2001] UKHL 42 ..., although relating to events designated by the Kingdom of Denmark, also confirm the existence of situations implementing the mechanism of mutual recognition established by Article 3a(3) of the Directive. Furthermore, the 2001 Third

14 — Paragraph 120.
15 — Paragraph 121.

Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the Application of [the Directive] (COM(2001) 9 final) states that in three cases, television broadcasters under the jurisdiction of the United Kingdom have broadcast events listed by the Kingdom of Denmark in a way that prevented a substantial part of the Danish population from seeing those events.

149 In those circumstances, notwithstanding the Commission's unsupported allegations as to the specificity of the television broadcasting market in the United Kingdom (see paragraph 121 [of the judgment under appeal]), it cannot be assumed that the rights to broadcast the FIFA World Cup finals in that State will be acquired by broadcasters established in that State.'

39. The Court of First Instance concluded from the foregoing that Infront was directly concerned by the contested letter in so far as it enabled the implementation of the mechanism of mutual recognition by the other Member States of the measures notified by the United Kingdom.

B — *The question whether Infront was individually concerned*

40. The Court of First Instance noted first of all that, according to well-established case-law, persons other than those to whom a decision is addressed may claim to be individually concerned only if that decision affects them by virtue of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person to whom the decision is addressed.

41. It stated next that Infront held the exclusive television broadcasting rights to the 2002 and 2006 FIFA World Cup finals, which were included among the events of major importance for society chosen by the United Kingdom and approved by the Commission, and that television broadcasters under the jurisdiction of the other Member States had necessarily to deal with Infront in its capacity as broker of the broadcasting rights to the World Cup finals, for the purposes of obtaining licences to broadcast them on television. [16]

42. It stated that the measures adopted by the United Kingdom imposed restrictions on

16 — Paragraphs 160 and 161.

those broadcasters as to the conditions under which they might acquire exclusive broadcasting rights, so that those measures, even if they did not expressly cover Infront, impeded its ability freely to dispose of its rights. [17]

43. It noted that Infront acquired the rights in question exclusively, before the entry into force of Article 3a of the Directive and, a fortiori, before the adoption of the contested letter, with the result that the letter concerned Infront by reason of a characteristic peculiar to it. [18]

C — Substance

44. The Court of First Instance held that the contested measure was vitiated by a breach of essential procedural requirements, on the ground that it was adopted without the College of Commissioners being consulted and that the Director-General who signed it had received no specific power from the College. [19]

45. As set out in the operative part of the judgment under appeal, the decision of the Commission contained in its letter to the United Kingdom was annulled, the remainder of the action was dismissed, the French Republic, the United Kingdom and the Parliament were ordered to bear Infront's costs arising from their interventions, the Commission was ordered to bear its own costs and Infront's apart from those previously mentioned, and the interveners were ordered to bear their own costs.

17 — Paragraphs 162 to 165.
18 — Paragraphs 166 and 167.
19 — Paragraph 177.

V — The appeal

46. The Commission claims that the Court should set aside the judgment under appeal, give final judgment on Infront's application in the case which gave rise to the judgment under appeal by declaring it to be inadmissible, and order Infront to pay the costs arising from that case and the present appeal.

47. Infront contends, in essence, that the appeal should be dismissed and the Commission ordered to pay the costs; it requests the award of costs, pursuant to Article 69(3) of the Rules of Procedure, even if the appeal is allowed, in view of the fact that the Commission is challenging the judgment under appeal only in part.

48. The Commission challenges the Court of First Instance's findings that Infront was directly, and individually, concerned by the contested measure, within the meaning of the fourth paragraph of Article 230 EC, under which any natural or legal person may institute proceedings against a decision which, although in the form of a decision addressed to another person, is of direct and individual concern to the former. I shall examine those two grounds of appeal successively.

A — *The finding that Infront was directly concerned by the contested measure*

1. Pleas in law and arguments of the parties

49. The Commission submits that the Court of First Instance did not show that the two conditions required by the case-law were satisfied, according to which, first, the measure at issue must affect the applicant's legal situation and, second, its implementation must be purely automatic.

50. As regards the first condition, the Commission submits, primarily, that the Court of First Instance does not explain how the contested measure impacted other than indirectly on Infront's business situation.

51. It states that that measure requires the Member States to impose obligations on television broadcasters which could dissuade them from purchasing the broadcasting rights to events covered by the notified measures or lead them to acquire those rights at a price lower than that which they would have been willing to pay in the absence of those measures. A pay television company might decide not to acquire the broadcasting rights to such events as they must also be broadcast by a free-to-air broadcaster covering 95% of the territory of the United Kingdom. Infront would therefore have fewer potential purchasers and find itself, as a result, in a worse business situation. However, these are only indirect economic consequences. Its legal position would remain unaltered.

52. In the alternative, assuming that it would be sufficient for the applicant to be directly concerned by a measure if that measure affects its economic position, the Commission complains that the Court of First Instance did not explain what exactly the business consequences of the contested measure would be for a broker such as Infront. In reality, such consequences are entirely uncertain, because, to the Commission's knowledge, there has never been a television broadcaster established in a Member State other than the United Kingdom which would have been willing to pay the sum expected by Infront for the right to broadcast the FIFA World Cup finals in the United Kingdom. Since the income of television

broadcasters is generated from advertising directed at the national audience, national licence fees or national subscription fees, a potential purchaser, in order to make such an investment, would have to have sufficiently broad coverage within the United Kingdom or wish to refocus its business on those lines.

53. The Court of First Instance therefore made an error of law by not requiring Infront to prove such economic consequences and by indicating that the Commission had not substantiated its allegations as to the specificity of the television broadcasting market in the United Kingdom. Likewise, the Court of First Instance, by stating that the Commission's position deprives Article 3a(3) of the Directive of all practical effect, misinterpreted that provision, because that would mean that for each event designated by a Member State there would necessarily have to be, in other Member States, television broadcasters liable to acquire the exclusive broadcasting rights to that event in the first State.

54. As regards the second condition, that the implementation of the contested measure must be purely automatic and result from Community rules alone without the application of other intermediate rules, the Court of First Instance misconstrued the effect of Article 3a(3) of the Directive.

55. Admittedly, in the Commission's submission, the events and the manner in which they are to be broadcast, whole or in part, live or deferred, are determined by the notifying State and, therefore, by the decision declaring those measures to be compatible with Community law. However, contrary to the Court of First Instance's statement in paragraph 146 of the judgment under appeal, that decision does not deprive the national authorities of any discretion as to the performance of their obligations. The implementation of the obligations set out by the notifying State depends greatly on the legislation applied by and the view taken by the competent national authorities.

56. The reality of such differences is illustrated by the *TV Danmark 1* case, which gave rise to a judgment of the Court of Appeal and another of the House of Lords, regarding the performance in the United Kingdom of obligations set out by the Kingdom of Denmark in relation to events of major importance for society in that Member State.

57. Under the United Kingdom system, it is sufficient if a free-to-air television broadcaster reaching most of the population of the notifying Member State has had a fair opportunity to acquire the exclusive rights in ques-

tion. Under the Danish system, on the other hand, a television broadcaster which has acquired exclusive rights may exercise them only if it is able to make arrangements to ensure the necessary coverage through other broadcasters, unless it can show that this is not reasonably possible.

58. It is therefore wrong to maintain that the implementation of the Commission's decision under Article 3a(2) of the Directive is purely automatic and results from Community rules alone.

59. Infront challenges that analysis and submits that the Court of First Instance correctly held that the contested measure concerned it directly.

2. Appraisal

60. As the Court of First Instance noted, a Community measure is to be considered of direct concern to an individual where it directly affects his legal situation and its implementation is purely automatic and results from Community rules alone without the application of other intermediate rules. [20]

61. The Commission complains that the Court of First Instance did not demonstrate that each of those two conditions was satisfied.

62. As regards, first, the contested measure's effects on Infront's situation, the Commission argues primarily that the contested measure would produce, for that company, only indirect economic consequences and that its legal position would remain unaltered. I do not agree with that analysis for the following reasons.

63. As the Court of First Instance stated in paragraph 165 of the judgment under appeal, the measures notified by the United Kingdom and, consequently, the contested measure have the effect of depriving Infront of the power freely to dispose of its television broadcasting rights to the 2002 and 2006 FIFA World Cup finals. By virtue of the contested measure, Infront is prevented from granting those broadcasting rights exclusively to a pay television channel established

20 — Case C-386/96 *Dreyfus* v *Commission* [1998] ECR I-2309, paragraph 43 and the case-law cited.

in a Member State other than the United Kingdom and which wishes to broadcast the World Cup finals in the United Kingdom. Infront is required to guarantee that those rights are also available to a broadcaster of free television covering a large proportion of the United Kingdom population.

64. The contested measure's impact on Infront's situation is therefore reflected not only in purely economic loss, through a diminution in the market value of its broadcasting rights to the 2002 and 2006 FIFA World Cup finals. The impact also takes the form of infringement of its right to property, by impeding its right to grant exclusive licences. The Court of First Instance therefore decided, in my opinion, correctly and in accordance with the case-law that the contested measure affected Infront's legal situation.

65. The Commission also argues, in the alternative, that the contested measure, in reality, had no effect on Infront because there was no television broadcaster established in a Member State other than the United Kingdom which would be liable to acquire the broadcasting rights to the FIFA World Cup finals in order to broadcast them in the United Kingdom. In addition, the Court of First Instance reversed the burden of proof by indicating that it was for the Commission to prove those facts and it made an error of law in its determination of the effect of Article 3a of the Directive.

66. I consider that these arguments of the Commission raise the issue of whether Infront had a legal interest in bringing the proceedings rather than that of the requirement that it must be directly concerned by the contested measure. They amount to a submission that the annulment of the contested measure would bring Infront no advantage since there was, in any case, no potential purchaser outside the United Kingdom of the broadcasting rights it held.

67. It is settled case-law that, in addition to the conditions set out in Article 230 EC, an individual who challenges a Community measure must have a legal interest in bringing the proceedings, that is to say that he must have an interest in its annulment. That requires that the action be liable, if successful, to procure an advantage for the party who has brought it. [21]

68. Admittedly, as the Commission points out, it is for the applicant to prove that he also satisfies this condition as to

21 — See, in particular, Case T-310/00 *MCI* v *Commission* [2004] ECR II-3253, paragraph 44 and the case-law cited.

the admissibility of his action.[22] Lack of an interest in bringing the proceedings is also an absolute bar to proceedings.[23] In addition, the Commission is right in submitting that it cannot follow from Article 3a(3) of the Directive that, for each event designated by a Member State, there would necessarily have to be, in other Member States, television broadcasters liable to acquire the exclusive broadcasting rights to that event in the first State.

69. It is clear from the system established by Article 3a of the Directive that a Member State which decides to use the power open to it under that provision and thus to establish a list of events which must be broadcast in its territory on free television accessible for the largest number is compulsorily required to notify that list to the Commission, regardless of whether or not the exclusive broadcasting rights to those events are liable to be acquired by television broadcasters established in another Member State.

70. None the less, I do not consider that the Court of First Instance reversed the burden of proof or misinterpreted Article 3a of the Directive.

71. On the burden of proof, while, as we have seen, it is the individual seeking the annulment of a Community measure who has to establish his interest in bringing the proceedings, the fact remains that that requirement cannot relieve the Commission of the duty to adduce evidence of the matters of fact upon which it relies, like any other party to legal proceedings.

72. In this case, the Commission submitted, in its objection to the admissibility of Infront's action, that the television market in the United Kingdom is one of the most competitive in Europe and that 25% of television broadcasters are licenced in that Member State. It was on the basis of those statements that it claimed that it was difficult to envisage that Infront would assign its broadcasting rights to the FIFA World Cup finals to a broadcaster not established in the United Kingdom.

73. By finding that those statements regarding the specificity of the television market in the United Kingdom could not be taken into account because they were unsupported, the Court of First Instance did not, in my view, reverse the burden of proving an interest in bringing proceedings.

22 — Order in Case 206/89 R *S.* v *Commission* [1989] ECR 2841, paragraph 8.

23 — *MCI* v *Commission*, paragraph 45.

74. The onus was all the more on the Commission to establish the truth of those statements as Infront disputed them and had, before the Court of First Instance, referred to several potential purchasers of its broadcasting rights established in Member States other than the United Kingdom.

75. Next, I do not consider that the ground of the judgment under appeal that the Commission's argument deprives Article 3a of the Directive of all practical effect constitutes a misinterpretation of that provision.

76. That ground answers the Commission's argument, summarised in paragraph 120 of the judgment under appeal, that in view of the fact that the income of television broadcasters is generated from advertising directed at the national audience, national licence fees or national subscription fees for pay television, only broadcasters reaching a high proportion of the national population and, consequently, established in the United Kingdom, were prepared to purchase the exclusive broadcasting rights held by Infront.

77. By submitting thus that, in the light of the very high price of exclusive broadcasting rights to sporting events such as the FIFA World Cup finals and of the sources of television broadcasters' revenues, only broadcasters established in the territory of the Member State which has exercised the power made available by Article 3a of the Directive are really in a position to purchase those rights, the Commission casts doubt on the practical relevance of the mutual recognition procedure created by that provision.

78. Indeed, if only television broadcasters established in the Member State which has decided that certain designated sporting events must be broadcast to the entire population were liable to acquire the exclusive broadcasting rights to such events, the procedure laid down by Article 3a(3) of the Directive, which is intended to ensure compliance with the measures taken by that Member State by television broadcasters established in other Member States, would be deprived of relevance.

79. The Court of First Instance therefore did not, as the Commission asserts in its appeal, say that Article 3a(3) of the Directive means that, for no matter what event designated by a Member State, there are necessarily television broadcasters established in other Member States who are liable to acquire the exclusive broadcasting rights to that event. It was responding to the Commission's argument that, for sporting events such as those for which Infront holds the television

broadcasting rights, there are no potential purchasers of those exclusive broadcasting rights other than the national television broadcasters.

80. It follows that the Court of First Instance did not fail to demonstrate that the requirement that the contested measure actually affect Infront's legal situation is satisfied.

81. As regards, secondly, the second condition under the case-law, according to which the contested measure's implementation must be purely automatic and result from Community rules alone without the application of other intermediate rules, I consider that the Court of First Instance likewise made no error of law in finding that that condition is also satisfied.

82. Admittedly, as the Commission points out, Article 3a(3) of the Directive leaves the Member States a discretion in the implementation of the measures taken by a Member State and published by the Commission. However, that discretion is not such as to call into question Infront's standing to bring the proceedings.

83. The factor which it is important to evaluate in the examination of this condition is the causal link between the effects on the applicant's legal situation and the Community measure, the annulment of which he seeks. The condition required by the case-law is satisfied where those effects are the direct consequence of the measure itself. Such is the case, according to the case-law, where the measure in question requires those to whom it is addressed to produce those effects, [24] or where the possibility of those to whom that measure is addressed not giving effect to it and not producing such effects is purely theoretical, because their intention to act in conformity with it is not in doubt. [25]

84. In this case, the Court of First Instance correctly held, in paragraph 146 of the judgment under appeal, that the contested measure leaves the national authorities no discretion, because it requires them to produce the effects on Infront's legal situation of which Infront complains.

85. As we saw earlier, those effects consist of an impediment to its ability to dispose of the exclusive broadcasting rights to the FIFA World Cup finals to a television broadcaster established in a Member State other than the United Kingdom. Those effects do seem to be the direct consequence of the contested

24 — *Dreyfus* v *Commission*, paragraph 43 and the case-law cited.
25 — Ibidem, paragraph 44 and the case-law cited.

measure, since they result directly from the measures adopted by the United Kingdom, which are intended to procure the broadcasting of that event in its territory by a free television channel accessible to a high proportion of the population.

86. In view of those matters, I take the view that the Court of First Instance's finding that Infront was directly concerned by the contested measure is not vitiated by an error of law and that the Commission's appeal on that point should be dismissed as unfounded.

B — *The finding that Infront was individually concerned*

1. Pleas in law and arguments of the parties

87. The Commission argues that the Court of First Instance's reasoning is difficult to understand.

88. In the Commission's submission, Infront was affected by the contested measure only in its objective capacity as a holder of exclusive rights having acquired the broadcasting rights to one of the events covered by the United Kingdom measures. It observes that the Court of First Instance did not say that the contested measure is, as regards the rights holders, a bundle of individual decisions. It also points out that that measure covers only television broadcasters, imposing obligations solely on them. Rights holders suffer only economic consequences and the Court of First Instance, in earlier cases, held that that is not sufficient to differentiate an individual. [26] The Commission submits, in that regard, that the present case is different from those which gave rise to the judgments in *Piraiki-Patraikiand Others* v *Commission,* [27] *Extramet Industrie* v *Council* [28] and *Codorniu* v *Council,* [29] the circumstances of which were special.

89. The Commission maintains that Infront's situation is no different from that of other holders of exclusive rights to broadcast the various events designated by the United Kingdom. It faces a normal commercial risk, which is insufficient to confer upon it a right of action.

90. Finally, the Commission submits that Infront could have challenged the United

26 — The Commission refers to the order in Case T-113/99 *Galileo and Galileo International* v *Council* [2000] ECR II-4141, and to Case T-43/98 *Emesa Sugar* v *Council* [2001] ECR II-3519.

27 — Case 11/82 [1985] ECR 207.

28 — Case C-358/89 [1991] ECR I-2501.

29 — Case C-309/89 [1994] ECR I-1853.

Kingdom measures before a United Kingdom court, so that the fact that its action is inadmissible before the Community courts does not deprive it of the right to legal recourse.

91. Infront disputes the Commission's arguments and contends that the Court of First Instance correctly decided that it was individually concerned by the contested measure.

2. Appraisal

92. I do not share the Commission's view regarding the lack of clarity and the content of the Court of First Instance's reasoning.

93. The Court of First Instance correctly noted, first of all, that persons other than those to whom a decision is addressed may claim to be individually concerned by that decision only if it affects them by virtue of attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the persons to whom the decision is addressed. [30]

94. It then stated that Infront satisfied that condition following an analysis which rests, in essence, on the following three points. First, Infront holds, on an exclusive basis, the television broadcasting rights to the 2002 and 2006 FIFA World Cup finals, which are included in the list of events of major importance for society adopted by the United Kingdom and approved by the Commission in the contested measure. Secondly, it acquired those rights before the adoption of that measure and even before the entry into force of Article 3a of the Directive. Thirdly, that measure, although not referring to Infront, impedes its ability to dispose freely of those rights to a television broadcaster established in a Member State other than the United Kingdom.

95. I take the view that no error of law vitiates the Court of First Instance's assessment.

96. It is clear from the case-law that, in order for a person to be able to be regarded as individually concerned by a Community measure

30 — *Piraiki-Patraiki and Others* v *Commission*, paragraph 11.

which is not addressed to him, he must have been identified or identifiable at the time of the adoption of that measure. [31] It follows from the Court of First Instance's analysis that Infront was clearly identifiable by the Commission at the time of the contested measure's adoption, since it was the holder of the exclusive broadcasting rights to the 2002 and 2006 FIFA World Cup finals, events covered by the list in the measures notified by the United Kingdom.

97. Next, while, as the Commission submits, purely economic loss is not sufficient, in principle, to entitle an individual to bring an action for annulment of a Community measure, it should be pointed out that the Court of First Instance did not decide that Infront was individually concerned by the contested measure for the sole reason that the measure would involve adverse economic consequences for that company. It stated, in paragraph 165 of the judgment under appeal, that the measure impeded Infront's ability freely to dispose of its broadcasting rights to the event exclusively to a pay television channel established outside the United Kingdom wishing to broadcast that event in that State.

98. In other words, the Court of First Instance held that the contested measure affected Infront's right to property.

99. The acceptance of the admissibility of Infront's action seems to me to be consistent with well-established case-law, according to which an individual can challenge the legality of a Community measure where it alters rights acquired by that individual prior to its adoption.

100. The Court so held in *Toepfer and Getreide-ImportGesellschaft* v *Commission*, in which it accepted for the first time that a person could be individually concerned by a decision addressed to a Member State. [32]

31 — Joined Cases 106/63 and 107/63 *Toepfer and Getreide-ImportGesellschaft* v *Commission* [1965] ECR 405, 411; *Piraiki-Patraiki and Others* v *Commission*, paragraphs 21, 28 and 31; Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477, paragraph 11; Case C-390/95 P *Antillean Rice Millsand Others* v *Commission* [1999] ECR I-769, paragraphs 25 to 30; Joined Cases T-480/93 and T-483/93 *Antillean Rice Millsand Others* v *Commission* [1995] ECR II-2305, paragraph 67; and Case T-47/00 *Rica Foods* v *Commission* [2002] ECR II-113, paragraph 41.

32 — The Court held admissible the action by two firms that imported cereals into Germany against the Commission's decision retrospectively authorising that Member State to adopt protective measures under which their applications for import licences had been rejected.

It also adopted that solution in *Bock* v *Commission,* [33] as well as in *Agricole commerciale olio and Others* v *Commission* and *Savma* v *Commission.* [34]

101. In *CAM* v *EEC,* [35] the Court also accepted that an individual had standing to bring proceedings where the contested measure covered a situation ongoing at the time of its adoption and put in question the benefit of rights acquired in respect of future transactions. [36]

102. An expression of that case-law can also be found in *Codorniu* v *Council*, to which the Commission refers, in which a company incorporated under Spanish law, the owner of the trade mark 'Gran Cremant de Codorniu' since 1924, sought the annulment of the article of a Council regulation prohibiting it, in due course, from using the word 'crémant'. [37]

103. That case-law is, I consider, applicable to this case, since Infront had entered into possession of exclusive broadcasting rights to the FIFA World Cup finals before the adoption of the contested measure and even, as the Court of First Instance pointed out, before the entry into force of Article 3a of the

33 — Case 62/70 [1971] ECR 897. In that case, the Court held admissible a foodstuffs-importing firm's action against the Commission's decision authorising the Federal Republic of Germany to exclude from Community treatment certain products originating in China and in free circulation in the Benelux States, in so far as that decision also covered imports of products for which licence applications were pending before the German authorities when the decision entered into force. Thus, on 4 September 1970, the applicant had applied to the competent German authority for an import licence for a consignment of preserved Chinese mushrooms which was in free circulation in the Netherlands. On 11 September 1970, that authority had informed the applicant that it would reject the application as soon as the Commission so authorised. By decision of 15 September 1970, the Commission authorised the Federal Republic of Germany to exclude from Community treatment not only future applications for licences to import black mushrooms originating in China, but also pending applications for import licences.

34 — Case 232/81 [1984] ECR 3881 and Case 264/81 [1984] ECR 3915. The cases concerned actions by successful tenderers against a Commission regulation repealing an earlier regulation on the basis of which the Italian intervention agency had put a quantity of olive oil up for sale. The Court observed that, since the position had been determined between the parties to the sale, 'any intervention on the part of the Community institutions, preventing [the Italian intervention agency] from carrying out its obligations to the tenderers designated by the drawing of lots, necessarily constitutes a measure of direct and individual concern to them' (*Agricola commerciale olioand Others* v *Commission*, paragraph 11, and *Savma* v *Commission*, paragraph 11).

35 — Case 100/74 [1975] ECR 1393.

36 — The case concerned a company which had, on 19 July 1974, obtained an export licence, which was valid until 16 October 1974, for 10 000 tonnes of barley. Under a Council regulation, the target and intervention prices applicable, among other things, to cereals were, with effect from 7 October 1974, to increase by 5%. However, the Commission, by a regulation of 4 October 1974, laid down that the measure would not apply to export licences issued before 7 October, thus depriving the applicant of the benefit of the increase provided for by the Council for the 3 978 tonnes which it was still to export between 7 and 16 October. The Court held that the applicant's action against the Commission regulation was admissible. It held that the regulation, in denying to a class of traders, for specific exports, the benefit of the increase in the amount of the refund, applied to a fixed and known number of cereal exporters and that the measure, even though it formed part of a legislative act, affected those exporters because of a factual situation which differentiated them from all other persons.

37 — See, in support of that analysis, P. Cassia's thesis, *L'accès despersonnes physiques ou morales au juge de la légalité des actes communautaires,* Dalloz, Paris, 2002, p. 752, paragraph 964 et seq.

Directive, on the basis of which that measure was adopted.

104. That is why I am of the opinion that, in the light of that case-law, the Court of First Instance correctly held that Infront was individually concerned by the contested letter. The appeal should also be dismissed as unfounded in so far as it relates to that finding.

C — *Costs*

105. In accordance with Article 69(2) of the Rules of Procedure, which apply to appeals by virtue of Article 118 of those rules, and having regard to Infront's application, if the Court follows my analysis the Commission should bear the costs.

VI — Conclusion

106. Having regard to the foregoing considerations, I suggest that the Court should:

'(1) Dismiss the appeal;

(2) Order the Commission of the European Communities to bear the costs.'