JUDGMENT OF THE GENERAL COURT (Fifth Chamber)

1 July 2010 *

In Joined Cases T-568/08 and T-573/08,

Métropole télévision (M6), established in Neuilly-sur-Seine (France), represented by O. Freget, N. Chahid-Nouraï, R. Lazerges and M. Potel, lawyers,

Télévision française 1 SA (TF1), established in Boulogne-Billancourt (France), represented by J.-P. Hordies and C. Smits, lawyers,

applicants,

supported by

Canal +, established in Issy-les-Moulineaux (France), represented by E. Guillaume, lawyer,

intervener,

* Language of the case: French.

European Commission, represented by B. Stromsky and B. Martenczuk, acting as Agents,

defendant,

supported by

French Republic, represented initially by G. de Bergues and A.-L. Vendrolini, and subsequently by G.de Bergues and L. Butel, acting as Agents,

France Télévisions, established in Paris (France), represented by J.-P. Gunther, D. Tayar, A. Giraud and S. Snoeck, lawyers,

interveners,

APPLICATIONS for annulment of Commission Decision C(2008) 3506 final of 16 July 2008 relating to the proposed grant, by the French Republic, of capital funding of EUR 150 million to France Télévisions SA, and applications for an order that the Commission open a formal investigation procedure,

THE GENERAL COURT (Fifth Chamber),

composed of M. Vilaras (Rapporteur), President, M. Prek and V.M. Ciucă, Judges,

Registrar: T. Weiler, Administrator,

having regard to the written procedure and further to the hearing on 10 March 2010,

gives the following

Judgment

Legal context

1 Article 16 EC provides:

'Without prejudice to Articles 73 [EC], 86 [EC] and 87 [EC], and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfil their missions.'

2 Article 86(2) EC provides:

'Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules

contained in this Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.'

3 Article 87(1) EC provides:

'Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.'

4 Article 311 EC provides:

'The protocols annexed to this Treaty by common accord of the Member States shall form an integral part thereof.'

5 The Protocol on the system of public broadcasting in the Member States (OJ 1997 C 340, p. 109, 'the Amsterdam Protocol'), introduced by the Treaty of Amsterdam and annexed to the EC Treaty, provides:

'[The Member States], considering that the system of public broadcasting in the Member States is directly related to the democratic, social and cultural needs of each society and to the need to preserve media pluralism, have agreed upon the following interpretative provisions, which shall be annexed to the [EC] Treaty:

The provisions of the [EC] Treaty shall be without prejudice to the competence of Member States to provide for the funding of public service broadcasting in so far as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and in so far as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account.'

6 On 15 November 2001, the Commission of the European Communities published a Communication on the application of State aid rules to public service broadcasting (OJ 2001 C 320, p. 5, 'the Broadcasting Communication'), in which it set out the principles it will follow in the application of Articles 87 EC and 86(2) EC to State funding of public service broadcasting.

Facts

7 France Télévisions is a French public company, created by French Law 2000-719 of 1 August 2000, amending Law 86-1067 of 30 September 1986, on freedom of communication (JORF No 177 of 2 August 2000, p. 11903), which owns the public service channels France 2, France 3, France 4, France 5, France Ô and RFO (French Overseas Network) which groups together public television and radio broadcasting in the French overseas departments and territories.

8 Following the announcement by the French President, on 8 January 2008, that televised advertising on public television would in due course be abolished, the French Republic notified the Commission, on 11 January 2008, of its plan to provide capital funding of EUR 150 million to France Télévisions.

9 On 18 June 2008, the Commission asked the French Republic for further information, which was provided by letter of 26 June 2008.

10 On 16 July 2008, the Commission adopted Commission Decision C(2008) 3506 final of 16 July 2008 relating to the proposed grant, by the French Republic, of capital funding of EUR 150 million to France Télévisions ('the contested decision'). A summary notice of that decision was published in the *Official Journal of the European Union* of 23 September 2008 (OJ 2008 C 242, p. 2).

11 In the contested decision, the Commission pointed out that the measure notified was set in the general context of the public funding of France Télévisions, which it had already examined in Decision 2004/838/EC of 10 December 2003 on State aid

implemented by France for France 2 and France 3 (OJ 2004 L 361, p. 21, 'the decision of 10 December 2003') and in Decision C(2005) 1166 final of 20 April 2005 on aid granted to France Télévisions [aid E 10/2005 (ex C 60/1999) — France, Audiovisual licence fee], a summary notice of which was published in the Official Journal of 30 September 2005 (C 240, p. 20) ('the decision of 20 April 2005'), but was a different measure from those which were the subject-matter of those decisions (paragraph 3 of the contested decision).

12 In its assessment of the measure notified, the Commission, after finding that the conditions for the existence of State aid, relating to State intervention or the implementation of State resources, the effect on trade between Member States, the existence of an advantage and, finally, the distortion or threat of distortion of competition, were fulfilled (paragraphs 13 to 33 of the contested decision) examined the compatibility of the State aid with the common market pursuant to Article 86(2) EC (paragraphs 34 to 50 of the contested decision).

13 In that connection, the Commission, after finding that the condition linked to the definition of, mandate for and monitoring of the public service task of France Télévisions was fulfilled (paragraphs 36 to 42 of the contested decision), examined the condition of proportionality (paragraphs 43 to 49 of the contested decision).

14 In that regard, the Commission pointed out that the funding of the public service provided by France Télévisions was based on a dual-funding system within the meaning of the Broadcasting Communication, in that it included State funds and income from commercial activities, and that that Communication drew attention to the fundamental freedom of the Member States to choose the methods of financing public service obligations and starts from the consideration that State funding is normally

necessary for this purpose, provided that the State aid does not exceed the net costs of the public service mission, taking also into account other direct or indirect revenues derived from the public service mission. (paragraph 43 of the contested decision).

15 The Commission found that the State aid notified 'provided in the form of capital funding of EUR 150 million exceed[ed] by only approximately EUR ... millions the difference in advertising revenue already established of EUR ... million between the advertising revenue received between January and June 2008 and that received in the same January — June period for 2007'. It added that, '[w]ith confirmation of the Government's intention to abolish advertising on public screens, the continuation of that trend seem[ed] sufficiently predictable for reaching the estimate made by the operator and accepted by the French authorities of EUR ... million in loss of revenue for the whole of 2008' (paragraph 45 of the contested decision).

16 The Commission found that '[i]n that respect, the definition of the obligations and other sources of funding of the public service for France Télévisions remain[ed] unchanged, with increased costs of EUR ... million, according to the French authorities, owing to the need for additional programmes brought about by the abolition of advertising', and held that '[t]he reduction of EUR ... million in advertising revenue [was] likely to bring about an equivalent cut in the net profit from commercial activities thereby automatically and proportionately increasing the net cost of the public service activity which will also be increased by the amount of EUR ... million needed for the additional programmes' (paragraph 46 of the contested decision).

17 The Commission considered that '[i]n those circumstances, an injection of EUR 150 million in additional public funding [was] unlikely to exceed the variations in the net cost of the public service owing to the fluctuations in advertising revenue

for 2008 and to the need for additional programmes' and that '[t]herefore, the capital injection should not lead to an over-compensation of the costs of fulfilling the public service tasks' (paragraph 47 of the contested decision).

18 The Commission pointed out, referring to the undertakings given by the French Republic in connection with other measures to finance France Télévisions examined in the decision of 20 April 2005 (paragraph 12 of the contested decision), that. 'in any event, the allocation of further public funds to France Télévisions remain[ed] subject to compliance with the undertaking given by the French Republic and reflected in its legislation and regulations to prevent the injection of public funds resulting in any over-compensation of the net costs of the public service ...' (paragraph 48 of the contested decision).

19 The Commission stated that, 'in the present procedure, the French authorities [had] confirmed ... that those measures will be applied' and that 'they under[took] to apply them to the planned capital injection for the purpose of allocating it to expenses arising from France Télévisions' public service obligations'. The Commission added that '[the aforementioned] authorities had accordingly undertaken to verify that such is the case and to report [to the Commission] at the latest three months following the closing of the accounts for the financial year 2008', and pointed out that 'the actual variation in France Télévisions' advertising revenue for the whole of 2008 and any programming expenses which increase the cost of the public service should therefore be taken into account' (paragraph 49 of the contested decision).

20 The Commission, in the light of the foregoing, decided, pursuant to Article 4(3) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88 EC] (OJ 1999 L 83, p. 1), not to raise objections to the measure notified, since it was aid compatible with the Treaty, in accordance with Article 86(2) EC, and decided that the French Republic would report to it on the

actual allocation of that aid to finance the public service obligations entrusted to France Télévisions within three months of the closing of the accounts for the financial year 2008 (contested decision, under the heading '5. Decision').

Procedure and forms of order sought by the parties

21 By applications lodged at the Registry of the Court of First Instance on 17 December 2008, the applicants, Métropole télévision (M6) and Télévision française 1 SA (TF1), brought the present actions.

22 By two orders of the President of the Fifth Chamber of the Court of First Instance of 6 May 2009, Canal + was granted leave to intervene in support of the form of order sought by M6, in Case T-568/08, and by TF1, in Case T-573/08.

23 By four orders of the President of the Fifth Chamber of the Court of First Instance of 22 June 2009, the French Republic and France Télévisions were granted leave to intervene in support of the form of order sought by the Commission in Cases T-568/08 and T-573/08.

24 By order of the President of the fifth Chamber of the Court of First Instance of 2 February 2010, these cases were joined for the purposes of the oral procedure and the judgment.

25 By letter of 8 March 2010, Canal + informed the Court that it did not intend taking part in the hearing of 10 March 2010.

26 In Case T-568/08, M6, supported — except in respect of costs — by Canal +, claims that the Court should:

— declare the action admissible and well founded;

— annul the contested decision;

— require the Commission to initiate the formal investigation procedure;

— order the Commission to pay the costs.

27 In Case T-573/08, TF1, supported — except in respect of costs — by Canal +, claims that the Court should:

— declare the action admissible and well founded;

— annul the contested decision;

— order the Commission to initiate the formal investigation procedure;

— order the Commission to pay the costs.

28 In each of Cases T-568/08 and T-573/08, the Commission, supported by the French Republic and by France Télévisions, contends that the Court should:

— dismiss the application as in part inadmissible and in part unfounded;

— order the applicant to pay the costs.

29 At the hearing of 10 March 2010, the applicants withdrew their third head of claim, seeking an order for the initiation of the formal investigation procedure, which was formally noted in the record of the hearing.

Law

30 M6 raises three pleas in law supporting the claim for annulment, alleging, first, infringement of its procedural rights, second, the inadequacy of the information provided by the Commission and, third, infringement of the obligation to state grounds. TF1 raises two pleas for annulment, alleging, first, infringement of the obligation to initiate the formal investigation procedure when there are serious difficulties and, second, infringement of the obligation to state grounds.

31 As regards M6's first plea for annulment, the admissibility of which was called in question by the Commission in the light of Article 44(1)(c) of the Rules of Procedure of the Court of First Instance, it should be regarded as admissible. This first plea for annulment raised by M6 should be read in conjunction with that applicant's second plea for annulment, with which it seeks, in essence and as TF1's first plea for annulment, the annulment of the contested decision, by reason of the existence of serious difficulties which called for the initiation of the formal investigation procedure.

32 In those circumstances, it is appropriate to begin the examination of these actions considering M6's first and second pleas for annulment, taken together, and TF1's first plea for annulment.

M6's first and second pleas for annulment, taken together, and TF1's first plea for annulment, alleging, in essence, infringement of the obligation to initiate the formal investigation procedure when there are serious difficulties

Arguments of the parties

33 The applicants, supported by Canal +, claim that the contested decision contains a certain number of errors and inaccuracies, which reveal that the Commission was not sufficiently informed and did not adequately examine the specific circumstances, both economic and legal, behind the loss of advertising revenue by France Télévisions. Consequently, the Commission was not in a position to establish the existence of serious difficulties which called for the initiation of the formal investigation procedure.

34 Those errors and inaccuracies include, first, the Commission's findings that 'the announcement of 8 January 2008 and the confirmation of the abolition in due course of advertising [had] an immediate impact on the finances of France Télévisions' (paragraph 9 of the contested decision), whereas it is France Télévisions new general conditions of sale — the adoption of which constitutes a strategic error on the broadcaster's part — which lie behind the losses of advertising revenue suffered by France Télévisions. TF1 adds, as another cause of the fall in France Télévisions' advertising revenue, the market conditions for the sale of advertising space which had prevailed in France since before the presidential announcement of 8 January 2008 and of which the Commission was aware.

35 In the light of these incorrect assessments by the Commission with regard to the cause of the fall in France Télévisions' advertising revenue, the Commission was not in a position to find that that fall was in fact due to a management fault connected with the turnaround in France Télévisions' commercial policy, a finding which might have led it to conclude that the capital injection at issue in fact concealed operating aid designed to relieve France Télévisions of the costs which it would normally have had to bear in connection with its everyday management or its normal activities, aid which could be authorised only in exceptional circumstances.

36 Secondly, the Commission could not reasonably state, without undertaking a specific analysis of the income and costs in the case, that the deficit in advertising revenue 'automatically' increased the net cost of the public service (paragraph 46 of the contested decision). Reference is that made, in that regard, to paragraph 49, final sentence, of the Broadcasting Communication.

37 Thirdly, the Commission's statement, in paragraph 4 of the contested decision, according to which, 'by improving the group's cash flow, the funding should therefore make it possible to undertake the investment necessary for fulfilling its public service tasks, the proper fulfilment of which, according to the French authorities, has become problematic', is suspect since it might be doubted that only the loss, for the first six-month period of 2008, of 37% of the 28% of France Télévisions' income from advertising may affect that company's financial position to such an extent as to render problematic the proper fulfilment of the public service in 2008.

38 Fourth, the Commission (paragraph 9 of the contested decision) stated that France Télévisions' competitors '[were] gradually adjusting their commercial offers in order to attract advertisers by offering preferential advertising space and rates for 2009 provided that part of the volume of business acquired by France Télévisions was entrusted

to them from 2008 onwards', although the applicants had definitely not amended their offers in the circumstances described.

39 Fifth, the Commission did not find the means of ascertaining the final use to which the funding notified would be put. Accordingly, it claims itself that it is unaware of that final allocation, since it states that 'new funds made available to [France Télévisions] should normally replenish the group's funds without being formally allocated'. However, this conduct does not reflect the Commission's normal exercise of its powers of review. It did not have to be satisfied with the statements of the French Government and should have investigated whether the aid granted did indeed meet the requirements of the principle of proportionality. Aid granted for advertising campaigns and market studies, designed to market the undertaking's products, constitutes operating aid.

40 In conclusion, the Commission did not have all the information necessary for a proper examination of the funding notified and failed to check the reliability of the information communicated with regard to the causes of France Télévisions' advertising losses, which led it to disregard the existence of serious difficulties of assessment which should have led to the initiation of the formal investigation procedure.

41 Finally, the fact that the assessment of the aid and of its compatibility with the common market lasted only three weeks, an unusually short length of time, and that the Commission made contact only once with the French authorities, give grounds for fearing that the Commission tried to take advantage of the untransparent nature of the preliminary procedure in order quickly to rule out or disregard the significant difficulties which would have justified opening the formal investigation procedure. By omitting to consult the parties concerned, the Commission failed to observe the *inter partes* rule.

42 As regards the Commission's argument that the extent of the fall in revenue and of the increase in programme costs estimated in the contested decision has not been disputed, TFI responds that such a dispute would have been inadmissible, since, as it concerned the assessment of the compatibility of the aid notified with the common market, it would have exceeded the limits of its action, which is restricted to the protection of its procedural rights. This action does not seek, above all, to call in question the assessments made by the Commission in the contested decision, but to show that the information on which they are based is incorrect and accepted without qualification or verification, so that the examination carried out by the Commission is inadequate and incomplete.

43 The Commission, supported by the French Republic and by France Télévisions, contests the applicants' arguments.

44 As regards, first, the applicants' argument that the contested decision is based on material inaccuracies and inadequate information, the Commission points out that such an argument can succeed only if, indeed, the contested decision did contain such inaccuracies or were based on such inadequate information, if the Commission could not be unaware of those inaccuracies or inadequacies and, finally, if they were decisive in its assessment of the compatibility of the aid.

45 As regards, first, the alleged material inaccuracies of the contested decision in respect of the cause of France Télévisions' losses of advertising revenue, it is not the cause or causes of those losses, but the extent of them and the increase in additional programme costs which matter for explaining the contested decision.

46 However, according to the Commission, neither the extent of the losses of advertising revenue nor the increase in additional programme costs incurred by France Télévisions for 2008 are contested by the applicants and it is not alleged that the Commission should have had doubts regarding those points.

47 The information on which the applicants concentrate their criticisms is, in fact, incidental to the broad logic of the Commission's arguments, which are based, in paragraph 45 of the contested decision, mainly on the intermediate conclusion in paragraph 10 of that decision, which has not been called in question by the applicants. Furthermore, that information has been read in isolation by the applicants, although it is qualified by other passages in the contested decision.

48 Consequently, the Commission did not state that the announcement of 8 January 2008 alone explains the whole of the reduction in advertising revenue, nor did it rule out the possibility that that reduction might have other causes. Furthermore, it cannot be denied that that announcement might persuade advertisers to approach other service-providers to broadcast their advertisements. The Commission adds, as a wholly subsidiary point, that the applicants' arguments do not show that the loss in advertising revenue was essentially due to causes unconnected with that announcement.

49 Finally, the Commission points out that, as indicated by the references made in the contested decision to the decisions of 10 December 2003 and 20 April 2005, it certainly did not, contrary to what TF1 suggests, fail to assess in context the information transmitted to it.

50 The applicants' argument that full information on the causes of the advertising losses was necessary on the ground that operating aid cannot be granted to cover France Télévisions' errors in managing its advertising activity, or that such errors should be

penalised by the unavailability of public funds as an alternative to advertising revenue which is nevertheless needed by the public service, is based on a misinterpretation of the contested decision and of the Broadcasting Communication. The Commission states that, in fact, Article 86(2) EC allows for the compensation of the operating cost of the public service and that the Broadcasting Communications provides that the Commission must ensure that the public funding is proportionate to those costs, avoiding any over-compensation, which it has done in the present case. The Broadcasting Communication does not allow only well managed undertakings to benefit from State aid. Even if the need for funding of the public service is the consequence of management errors, that need for funding may give rise to the grant of State aid, provided that there is no over-compensation of the net cost of the public service and that all the other conditions laid down by the Broadcasting Communication are satisfied. It follows that the Commission had no reason to consider the information available to it as insufficient for assessing the compatibility of the aid.

51 As regards, secondly, the argument that it could not reasonably state, without undertaking a specific analysis of the income and costs in the case, that the deficit in advertising revenue 'automatically' and proportionately increased the net cost of the public service (paragraph 46 of the contested decision), the Commission points out that the flow of the net profit from France Télévision's commercial activities, in the short term, depended directly on the flow of that advertising revenue, and there was nothing to indicate that the costs of its commercial activities could vary significantly by the year 2008 examined in the contested decision. It was therefore true that the reduction in commercial revenue was such as to bring about an equivalent reduction in the net profit from the commercial activities and 'automatically' to increase the net cost of the public service activities. The Commission therefore correctly identified, in a long-term assessment, those costs and charges, without prejudice to an *a posteriori* assessment, as stated in paragraph 49 of the contested decision.

52 As regards, third, the alleged incorrect statement that the funding was necessary in order to enable France Télévisions to make the investments needed to fulfil its public service task, which, according to the French authorities, it has become difficult to fulfil properly, the Commission points out that it is not disputed either that the estimated loss in France Télévisions' advertising revenue in 2008 was approximately 5% of its turnover or that France Télévisions had to bear higher programme costs owing to the abolition of advertising.

53 That reduction in revenue and those new programme costs combined to bring about 'automatically' an increase in the public service net costs of over EUR 300 million, which is therefore much higher than the amount of the funding notified, if the trend observed over the first six months of the year continued.

54 Such a situation was clearly problematical, since, in view of the undertakings given by the French Republic to prevent injections of public funds leading to any overcompensation of the net public service costs, there was every indication that France Télévisions would be unable, using only the resources allocated to it by the State and without the funding notified, to deal with that increase in its net public service costs. In those circumstances, TF1 cannot claim, without any foundation, that that situation was not such as to affect France Télévisions' financial situation to the extent that it had become difficult to fulfil the public service task properly since 2008.

55 As regards, fourth, the allegedly incorrect statement that France Télévisions' competitors are gradually adjusting their commercial offer in order to attract advertisers by offering favourable conditions for 2009 provided that part of the volume of business acquired by France Télévisions is entrusted to them from 2008 onwards, the Commission states that it was informed of that conduct by the lawyers of a

competitor company at a meeting held before notification of the planned aid at issue, on 29 May 2008.

56 That conduct, which reflects 'common sense' and which, anyway, the Commission treats with caution, was, in any case, the subject-matter of only one reason which was incidental and given for the sake of completeness. Consequently, the observations relating to the extent of the fall in advertising revenue are still valid, even if it is not fully established that the offers of France Télévisions' competitors were adjusted so as to acquire the latter's market shares. The Commission points out that it was therefore not necessary to make that information subject to the *inter partes* rule and that M6's argument on that point, since it does not relate to a fundamental part of the Commission's reasoning, cannot result in the annulment of the contested decision.

57 As regards, fifth, the argument relating to the inadequacy of the information concerning the use to which the funding notified would be put, an inadequacy which allegedly carries the risk of authorising operating aid for non-public service activities, the Commission points out that not only was the amount of that funding (EUR 150 million) from the outset much lower than the estimated loss in advertising revenue and the increase in programme costs for 2008 (EUR 300 million), but also the French Republic had adopted, pursuant to its undertakings, measures to prevent the injection of public funds resulting in any over-compensation of the net public service costs. Finally, the aid examined was not aid for advertising campaigns and market studies, but aid intended to compensate the net public service costs.

58 With regard, next, to the applicant' argument based on the duration and circumstances of the preliminary investigation procedure, the Commission points out that the short duration of such a procedure cannot, in itself, be indicative of the existence

of serious difficulties, but rather is an indication that the procedure, which is short by its very nature, is progressing normally. Article 4(5) of Regulation No 659/1999 by no means precludes giving judgment in less than two months.

59 Furthermore, the Commission points out that it was informed of the intended measures long before their notification on 11 June 2008, since the press had commented on the French Government's plans during the first six-month period of 2008 and informal contacts had been made between the French authorities and the Commission during May 2008. It was therefore well aware of the context of the financing of France Télévisions, in the light of its previous decisions on the financing of that public broadcaster. In practice, the examination of the measure took more than seven weeks, five of them following notification, which is not at all unusual. Finally, the intended measure was quite straightforward and its analysis cannot be described as complex.

Findings of the Court

60 According to settled case-law, the formal investigation procedure under Article 88(2) EC is essential whenever the Commission has serious difficulties in determining whether aid is compatible with the common market. The Commission may therefore restrict itself to the preliminary examination under Article 88(3) EC when taking a decision in favour of aid only if it is able to satisfy itself after the preliminary examination that the aid is compatible with the common market. If, on the other hand, the initial examination leads the Commission to the opposite conclusion or if it does not enable it to overcome all the difficulties involved in determining whether the aid is compatible with the common market, the Commission is under a duty to obtain all the requisite opinions and for that purpose to initiate the procedure provided for in

Article 88(2) EC (Case 84/82 *Germany* v *Commission* [1984] ECR 1451, paragraph 13; Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, paragraph 29; Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 33, and Case C-431/07 P *Bouygues and Bouygues Télécom* v *Commissio*n [2009] ECR I-2665, paragraph 61; see also Case T-49/93 *SIDE* v *Commission* [1995] ECR II-2501, paragraph 58).

61 The notion of serious difficulties is an objective one. Whether or not such difficulties exist requires investigation of both the circumstances under which the contested measure was adopted and its content. That investigation must be conducted objectively, comparing the grounds of the decision with the information available to the Commission when it took a decision on the compatibility of the disputed aid with the common market (*Bouygues and Bouygues Télécom*, paragraph 60 above, paragraph 63, and *SIDE* v *Commission*, paragraph 88 above, paragraph 60). It follows that judicial review by the Court of First Instance of the existence of serious difficulties will, by nature, go beyond consideration of whether or not there has been a manifest error of assessment (Case T-73/98 *Prayon-Rupel* v *Commission* [2001] ECR II-867, paragraph 47; see, to that effect, *Cook* v *Commission*, paragraph 60 above, paragraphs 31 to 38; *Matra* v *Commission*, paragraph 60 above, paragraphs 34 to 39; *SIDE* v *Commission*, paragraph 60 above, paragraphs 60 to 75; and Case T-11/95 *BP Chemicals* v *Commission* [1998] ECR II-3235, paragraphs 164 to 200).

62 Moreover, it should be pointed out that, where a State measure for financing a public service constitutes State aid within the meaning of Article 87(1) EC, the measure can nevertheless be declared compatible with the common market if it meets the conditions for applying the derogation provided for in Article 86(2) EC.

63 In paragraph 57 of the Broadcasting Communication, the Commission stated, in respect of the test for the proportionality of the public funding of public service requirements, that, 'in order to satisfy this test, it is necessary that the State aid does not exceed the net costs of the public service mission, taking also into account other direct or indirect revenues derived from the public service mission'. The Commission added that '[f]or this reason, the net benefit that non-public service activities derive from the public service activity will be taken into account in assessing the proportionality of the aid'.

64 In the present case, the Commission found that the funding of EUR 150 million notified by the French Republic was 'unlikely to exceed the variations in the net cost of the public service owing to the fluctuations in advertising revenue for 2008 and the need for additional programmes' (paragraph 47 of the contested decision).

65 It must be stated that the Commission was right to make such a finding and to conclude that there were no serious difficulties regarding the compatibility of the measure at issue with the common market, in accordance with Article 86(2) EC, such as to justify initiating the formal investigation procedure provided for in Article 88(2) EC.

66 It should be noted that the amount of the capital injection constituting the contested measure is much lower than the total estimated amount of additional net costs derived from the figures shown in paragraph 46 of the contested decision and concealed in the public version of that decision.

67 However, first, it must be stated that, in their applications, the applicants did not introduce any objection with a view to disputing the estimated amount of those additional net costs and made no request for the Commission to produce a confidential version of the contested decision of the purposes of such an objection.

68 The applicants did not even contest the fact — although it was apparent from the contested decision as published — that the estimated amount of the advertising losses for 2008 and of the additional programming requirements exceeded, at the very least, EUR 150 million.

69 In its statements in defence, the Commission, which expressly mentioned the lack of an objection on the part of the applicants, stated that the estimated amount of the variations in advertising revenue and of the programming needs, derived from the figures given in paragraph 46 of the contested decision and concealed in the public version of that decision, was more than EUR 300 million.

70 In their replies, the applicants did not contest the amount of EUR 300 million.

71 On the contrary, TF1 expressly acknowledged that lack of objection, pointing out that such an objection, because it would have called in question the compatibility of the aid, would have been inadmissible in an action seeking, as in the present case, only the protection of procedural rights (see paragraph 42 above).

72 It must be stated, however, that, contrary to what TF1 maintains, the cause of the present action would not have prevented it, if it had wished, from contesting the amount of the additional net costs estimated by the Commission for 2008. Indeed, according

to the case-law, the fact that the Court cannot, when there is a serious difficulty and having regard to the exclusive jurisdiction of the Commission to assess the compatibility of State aid with the common market, substitute its assessment for that of the Commission, does not preclude the right of the interested parties to raise, in support of an action for annulment seeking protection of their procedural rights, arguments challenging the compatibility of the aid, those arguments to be assessed by the Court in the light of the existence of a serious difficulty (see to this effect the judgments in Case T-158/99 *Thermenhotel Stoiser Franz and Others* v *Commission* [2004] ECR II-1, paragraph 91; Case T-475/04 *Bouygues and Bouygues Télécom* v *Commission* [2007] ECR II-2097, paragraph 93; of 20 September 2007 in Case T-375/03 *Fachvereinigung Mineralfaserindustrie* v *Commission*, not published in the ECR, paragraph 67; and Case T-289/03 *BUPA and Others* v *Commission* [2008] ECR II-81, paragraph 333.

73 Accordingly, and contrary to what TF1 claims, it would have been fully entitled, if it had wished, to challenge the amount of the increase in the net public service costs estimated by the Commission in the contested decision and expressly stated by the Commission in the defence.

74 As for M6, it did not even react, in the reply, to the Commission's finding in the defence relating to fact that M6 failed to dispute the amount of the increase in the net the public service costs estimated by the Commission in the contested decision.

75 It was only at the hearing that M6 maintained that, if, in its application, it did not dispute the Commission's estimate, it is only because it quite simply was unaware of the amounts at issue, which it discovered only at the hearing. In other words, since the contested decision was published without indicating those amounts, M6 was unable

to raise an objection, or even simply to allege that the Commission should have entertained serious doubts on that point.

76 However, the Court considers that that argument, apart from the fact that it was put forward out of time and is therefore inadmissible under Article 48(2) of the Rules of Procedure, is, in any event, unfounded.

77 In fact, there was nothing to prevent M6, if, as it claims, it intended to base its action for annulment on an objection to the amount of the additional net costs estimated by the Commission in the contested decision, from introducing that objection in its application by combining it — if the Commission had not already sent it a confidential version of the contested decision — with a request for a measure of organisation of procedure or a measure of inquiry seeking the production, by the Commission, of such a confidential version. Also, there was nothing to prevent M6 from maintaining, *a minima*, that the fall in advertising revenue and the increase in programme costs were of a lower amount that the amount of EUR 150 million of the funding notified, or that at least serious doubts should exist in that regard.

78 However, M6 did not, any more than TF1, raise such an objection in its pleadings or make such a request.

79 M6 was therefore wrong, when confronted with the fact that it had not challenged the estimate of the increase in the net public service costs, to try to explain, at the hearing, that failure to challenge by facts which in no way justify it and which — had it wished — it could perfectly well have remedied.

80 It is apparent from the foregoing considerations that neither TF1 nor M6 dispute, in their applications, the estimated amount of the additional net public service costs in 2008, even though no legal or factual circumstance deprived those parties of the opportunity of doing so, had they so wished.

81 Apart from the adequate findings above, the Court can only point out that the applicants had, since before they lodged their applications, information showing them the extent of the fall in France Télévisions' advertising revenue in 2008. That fact may suffice to explain why the applicants did not seek to dispute the increase in net public service costs estimated by the Commission in the contested decision, but reserved their criticisms for other elements in that decision.

82 Thus, at the time of the events, it was a matter of common knowledge that France Télévisions was experiencing a very significant fall in its advertising revenue in 2008. The press articles published at that time and produced by M6 and TF1 as annexes to their applications thus showed a very significant drop in France Télévisions' advertising revenue.

83 Also, apart even from that information given in the press, when M6 and TF1 lodged their applications in December 2008, they had other information underlining the extent of the fall in advertising revenue.

84 Accordingly, it is apparent from a report drawn up in 2008 by a firm of consultants, at the request of an association of private television channels — founded by M6, Canal + and TF1 — and produced by TF1 as an annex to its application, that, over the whole of the first half of 2008, advertising investment in France Télévisions had fallen by 37%.

85 M6, TF1 and Canal +, also refer, in their pleadings, to that 37% fall in France Télévisions' advertising revenue in the first half of 2008, which appears in the report mentioned in the previous paragraph.

86 The same report also mentions that the amount of the annual advertising revenue of France 2, France 3 and France 5, apart from regional switch-overs, an amount which was EUR 638 million in 2007, should drop to EUR 510 million in 2008, that is, a fall of 20% over the year (EUR 128 million).

87 In spite of those considerations relating to the information which the applicants had when they brought their actions, the fact remains that, as is conclusively pointed out in paragraph 80 above, the amount of the increase in the public service costs for 2008 (EUR 300 million) is, for no good reason, not subject to any particular challenge on the part of the applicants.

88 Secondly, the applicants are wrong to claim (see paragraph 36 above), in their arguments designed to establish the inadequacy of the information available to the Commission and of the examination which it carried out, that the Commission could not, without undertaking a specific analysis of the income and costs in the present case, state, in paragraph 46 of the contested decision, that the shortfall in advertising revenue 'automatically' increased the net cost of the public service. Paragraph 49, final sentence, of the Broadcasting Communication is cited in support of this claim.

89 Paragraph 49, final sentence, of the Broadcasting Communication states that '[o]nly on the basis of proper cost and revenue allocation can it be determined whether the public financing is actually limited to the net costs of the public service remit and thus

acceptable under Article 86(2) [EC]'. This sentence underlines the need, when determining the net cost of the public service, to make sure not to count as public service costs expenses which are unconnected with that service, and not to omit to deduct from the gross costs of the public service income acquired, directly or indirectly, from that service.

90 When, in paragraph 46 of the contested decision, the Commission considered that '[t]he reduction of EUR ... million in advertising revenue was likely to bring about an equivalent cut in the net profit from commercial activities', it expressed, succinctly but clearly, the view that the estimated fall in advertising revenue in 2008 is not accompanied by any fall in related commercial costs of a scale capable of preventing the conclusion that there is a relationship of proportionality between the fall in that revenue and the fall in the net profit from commercial activities and, accordingly, between the fall in revenue and the increase in the net costs of the public service.

91 The Commission therefore did not, contrary to what is suggested by the applicants' claim in its reference to paragraph 49 of the Broadcasting Communication, describe the costs incurred in obtaining advertising revenue as public service costs, nor did it consider that the proceeds of the sale by France Télévisions of its advertising slots were unconnected with the public service.

92 Furthermore, although, in the aforementioned paragraph 46 of the contested decision, the Commission did not provide particulars of the evidence which led it to adopt its position, the fact remains that that evidence is also contained in the contested decision and that it is apparent that the Commission was justified in considering that no significant fall in commercial costs in 2008 was reasonably foreseeable.

93 Accordingly, the Commission, after having pointed out that 'the [France Télévisions] group showed a positive net result every year between 2003 and 2007' (paragraph 8 of the contested decision), found, in essence, a sharp fall in the net revenue from commercial activities from the beginning of 2008. Consequently, the Commission stated that the fall in advertising revenue 'damaged the cash flow situation, which became structurally negative in 2008' (paragraph 10 of the contested decision). It pointed out that if that fall 'were to continue for the whole of the year 2008, France Télévisions, and also the French authorities, consider that it would end ... in a negative net result ... in 2008' (paragraph 10 of the contested decision). The Commission also found that the funding notified was designed to cover a reduction in advertising revenue which was 'sudden and unexpected, as shown by France Télévisions' forecast budget for 2008, which was based on hypotheses which took no account of such a reduction' (paragraph 21 of the contested decision).

94 It is apparent, in essence, from those findings made by the Commission in July 2008 on the basis of information available at that date, that the fall in advertising revenue suffered by France Télévisions since the beginning of the year was not accompanied by any significant reduction in the commercial costs connected with France Televisions' advertising activity and that it was not really possible for significant savings to be made in the costs of marketing advertising slots during the second half of 2008.

95 In other words, it is sufficiently clear from the information contained in the contested decision that the Commission was justified in considering that, as regards the year 2008, the only year covered by the funding notified, it was impossible to impose any significant saving of commercial costs which would prevent the conclusion that there was a relationship of proportionality between the fall in commercial income and the fall in net profit.

96 Consequently, the argument that the Commission was not in a position to state, as it did state in the contested decision, that the deficit in advertising revenue for 2008 'automatically' increased the net cost of the public service is unfounded.

97 The Court points out, furthermore, that neither M6 nor TF1 or Canal +, although undertakings familiar — as commercial broadcasters — with the mechanisms and systems for marketing televised advertising slots, maintain that a significant reduction in France Télévisions' commercial costs in 2008, which would preclude the conclusion that there was such a relationship of proportionality between the fall in commercial revenue and the fall in the net commercial profit, would have been possible in practical terms.

98 In conclusion, not only is the amount of the increase in the net public service costs for 2008 (EUR 300 million) estimated by the Commission in the contested decision not subject to any challenge (see paragraphs 67 to 87 above), but that amount is not seriously called in question in the examination of the applicants' claim relating to the relationship of proportionality found by the Commission between the fall in France Télévisions' commercial revenue and the fall in the net commercial profit (see paragraphs 88 to 97 above).

99 In the light of all the foregoing considerations, relating to the failure to dispute or call in question the estimated increase of EUR 300 million in the net public service costs, it must be considered that the Commission, having regard to the amount of the funding notified (EUR 150 million), could not be in any doubt that the proportionality test was satisfied.

100 That conclusion is unaffected by the other arguments put forward by the applicants.

101 As regards TF1's statement (see paragraph 37 above) that it may be doubted that only the loss, for the first half of 2008, of 37% of the 28% of France Télévisions' income from advertising may affect that company's financial position to such an extent as to make it difficult to perform the public service properly in 2008, that statement, apart from the fact that it is unsubstantiated, disregards the situation, pointed out in paragraph 99 above, relating to the difference between, on the one hand, the estimated, undisputed amount of the increase in net public service costs for 2008 and, on the other hand, the amount of the funding notified.

102 As regards the applicant' claims (see paragraphs 34 and 38 above) that the contested decision contained inaccuracies, first, in that the fall in advertising revenue in the first half of 2008 was not caused as much by the announcement of 8 January 2008 as by the conditions on the advertising market or even by a misconceived commercial strategy of France Télévisions and, secondly, in that it has not been established that France Télévisions' competitors adjusted their commercial policy in the terms described by the Commission, those claims, even if they were established, do nothing to detract from the fact that there was a fall in advertising revenue in the first half of 2008, that it was reasonably foreseeable that the trend would continue in the second half of 2008 and that there were additional programme requirements. Consequently, those claims in no way call into question the increase in net public service costs in 2008 estimated by the Commission in the contested decision and, furthermore, not disputed by the applicants.

103 As regards the applicants' argument (see paragraph 35 above) that the Commission, since it did not acknowledge that the fall in advertising revenue was essentially the result of an alleged mistake made by France Télévisions when defining its commercial policy in 2008, was not in a position to establish the existence of a serious difficulty

relating to the fact that the funding in fact concealed operating aid intended to free France Télévisions from the costs which it would normally have had to bear in the course of its everyday management or its normal activities, aid which could be authorised only in exceptional circumstances, the argument should be rejected.

104 France Télévisions' activity of selling its advertising slots constitutes a commercial activity which, although it is supported by the public service programmes broadcast by France Télévisions as part of its public service mandate, nonetheless is by no means a public service activity. The Broadcasting Communication points out that, 'whilst public service broadcasters may perform commercial activities such as the sale of advertising space in order to obtain revenue, such activities cannot normally be viewed as part of the public service remit (paragraph 36, final sentence, of the Broadcasting Communication).

105 The public broadcaster's performance of this commercial activity is the consequence of a choice, made by the Member State concerned in accordance with the power accorded to it in that regard by the Amsterdam Protocol, to sell advertising slots on the public television channels in order to reduce the burden, for the State, of financing the public broadcasting service.

106 However, the funding notified by the French Republic and approved by the Commission is not intended to finance that commercial activity of selling advertising slots. Accordingly, contrary to what M6 suggests, that aid is not an operating aid for that activity. Its aim is not to finance advertising campaigns with potential advertisers, market studies concerning France Télévisions' commercial activity or any other expense relating to France Télévisions' commercial activity.

107 That aid is, on the contrary, expressly and exclusively intended to cover the costs of the public broadcasting service assumed by that public broadcaster. Those costs — an amount estimated by the Commission at EUR 300 million, a figure which was not disputed — comprised, first, that part of France Télévisions' public service costs in 2008 which the fall in advertising revenue for that year leaves unfinanced and, second, the costs of additional programmes brought about, in 2008, by the forthcoming abolition of televised advertising on France Télévisions.

108 The fact that part of those costs remaining payable by the State in 2008 is the consequence of lower advertising revenue takes nothing from the fact that these are unquestionably public service costs, incurred for the needs of that service. In view of the nature of the costs, the Member State concerned cannot be prevented from financing them, except by depriving it of the power conferred by Article 16 EC and the Amsterdam Protocol on the Member States to define and finance public service broadcasting.

109 Consequently, the applicants' position, which consists in claiming that an alleged low level of economic efficiency of the public service broadcaster in the exercise of a commercial activity of selling advertising space should be penalised by inadequate cover — which is therefore incompatible with 'the fulfilment of the public service remit as conferred, defined and organised by each Member State' (see the Amsterdam Protocol) — of the net service costs, is directly contrary to the provisions of the Treaty and, more particularly, of the Amsterdam Protocol.

110 It should be pointed out that the situation would have been very different if the applicants had adduced evidence that serious doubts existed as regards the actual use to which the funding notified would be put and, in particular, had it been feared that that funding would be diverted from its intended purpose in order to subsidise France Télévisions' commercial activity.

111 Indeed, in such a situation and as pointed out in the Broadcasting Communication, there would have been the risk that 'such practice would indicate the presence of overcompensation of public service obligations and would in any event "affect trading conditions and competition in the Community to an extent which would be contrary to the common interest" and thus infringe the [Amsterdam] Protocol' (paragraph 58, in fine, of the Broadcasting Communication).

112 It would then not have been possible for the Commission to take, as in the present case, a decision not to raise objections pursuant to Article 4(3) of Regulation No 659/1999. The Commission would have had to initiate the formal investigation procedure.

113 However, it is not established that the Commission should have entertained such doubts. At the very most it is asserted that it did not find the means to ascertain the final use to which the funding notified would be put (see paragraph 39 above), which is allegedly reflected in its statement that the funding notified would 'replenish the group's cash flow without being formally allocated' (paragraph 11 of the contested decision).

114 However, it should be pointed out that it is clear from the contested decision that, whatever the precise rules for allocating the funding notified in France Télévisions' accounts, that funding, provided in the form of an increase in France Télévisions' capital, was not notified by the French Republic and was to be used by that public broadcaster only for the exclusive purposes of the public service.

115 The Commission consequently expressly recalled the existence of the undertakings given by the French Republic in connection with the procedure leading to the adoption of the decision of 20 April 2005 and reflected in French legislation and regulations in order to avoid any over-compensation of the net public service costs (paragraph 48 of the contested decision). The Commission noted that the French authorities stated that those provisions apply in the present case and that they undertook to apply them for the purpose of allocating the capital injection to costs arising under of France Télévisions' public service obligations (paragraph 49 of the contested decision).

116 Finally, the Commission expressly decided that the French Republic would report to it regarding the actual allocation of the funding notified to finance France Télévisions' public service obligations within three months of the closing of the accounts for the financial year 2008 (paragraph 49 and the explanation under the heading '5. Decision', second paragraph, of the contested decision).

117 In those circumstances and having regard to the precautions thus taken by the Commission, with regard both to the specific use which the financial injection would be put and the *a posteriori* monitoring of that use, the Commission had no reason, when it adopted the contested decision, to fear that that funding — which, furthermore, was much lower than the estimated amount of the additional net cost to be offset — would be used for purposes other than financing the public broadcasting service.

118 In conclusion, the applicants are wrong to object, on the basis of France Télévisions' alleged economic inefficiency in the exercise of a commercial activity which does not fall within the scope of the public service, to the financial endowment in question, since there was no reason to fear any cross-subsidisation of that commercial activity by that funding.

119 The foregoing considerations also mean ruling out the reference made by M6 to the judgment in Case T-157/01 *Danske Busvognmænd* v *Commission* [2004] ECR II-917, 'the judgment in *Danske*'), which concerned, among other measures, aid in the form of funding granted to a transport undertaking holding public service contracts within the meaning of Article 1(4) and Article 14 of Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ, English Special Edition 1969 (I), p. 276), as amended.

120 Indeed, although, in the present case, the funding of EUR 150 million notified by the French Republic was intended specifically and exclusively to offset public service costs (of an amount, moreover, far higher than that funding), in *Danske*, paragraph 119 above, the contested aid was added to the contractual remuneration which the undertaking in question had freely accepted for performing the public service contracts it had won from the Danish awarding bodies (*Danske*, paragraph 119 above, paragraph 88). In other words, the aid at issue in *Danske*, paragraph 119 above, constituted, in the context of the contractual system introduced by Regulation No 1191/69, as amended, an over-compensation.

121 Moreover, whereas, in the present case, the Commission, in the light of the precautions and guarantees taken in the contested decision, was reasonably justified in ruling out any risk that the financial endowment would be used for the purposes of a cross-subsidisation of France Télévisions' commercial activity, in *Danske*, paragraph 119 above, on the other hand, the contested aid subsidised the transport undertaking in question in its commercial activity. Indeed, that aid was specifically intended to enable that undertaking to pursue its commercial activity in spite of the deficits caused by the public service contracts which it had been awarded over its competitors by accepting unprofitable fare conditions (see, in that regard, *Danske*, paragraph 119 above, paragraphs 80, 87 and 88).

122 Accordingly, and unlike the funding in the present case, which is designed only to compensate the net cost of the public broadcasting service to the exclusion of any use for commercial purposes, and therefore does not affect competition and trade on the market for the sale of televised advertising slots to an extent contrary to the general interest, the aid at issue in *Danske*, paragraph 119 above, directly affected competition on the transport market.

123 Finally, it should be pointed out that the transport activity cannot be compared with the public broadcasting activity. Indeed, although the transport activity is, as such, unquestionably an economic and competitive activity and the public transport service is a service of general economic interest ('SGEI'), in contrast, as regards public broadcasting, classification as an SGEI, and not as a service of general non-economic interest, is explained more by the de facto impact of public service broadcasting on the otherwise competitive and commercial broadcasting sector, than by an alleged commercial dimension to broadcasting (Case T-442/03 *SIC* v *Commission* [2008] ECR II-1161, paragraph 153).

124 In fact, and as is clear from the Amsterdam Protocol, public service broadcasting is 'directly related to the democratic, social and cultural needs of each society'. To the same effect, the Resolution of the Council and of the Member States of 25 January 1999 concerning public service broadcasting (OJ 1999 C 30, p. 1) points out that that public service, 'in view of its cultural, social and democratic functions which it discharges for the common good, has a vital significance for ensuring democracy, pluralism, social cohesion, cultural and linguistic diversity' (recital B of the resolution) (*SIC* v *Commission*, paragraph 23 above, paragraph 153).

125 These considerations explain and justify the Member States agreeing, by the Amsterdam Protocol, that '[t]he provisions of the [EC] Treaty shall be without prejudice to

the competence of Member States to provide for the funding of public service broadcasting in so far as such funding is granted to broadcasting organisations for the fulfilment of the public service remit as conferred, defined and organised by each Member State, and in so far as such funding does not affect trading conditions and competition in the Community to an extent which would be contrary to the common interest, while the realisation of the remit of that public service shall be taken into account'.

126 However, in the present case it is by no means established that the Commission should have entertained doubts as to the purpose and effects of the funding in question. There was no doubt that that funding was granted to France Télévisions for the sole purpose of 'the fulfilment of the public service remit as conferred, defined and organised by [the French Republic]'. Furthermore, there was no doubt, in the light of the precautions taken in the contested decision to avoid any cross-subsidisation, that that financing was not such as to 'affect trading conditions and competition in the Community to an extent which would be contrary to the common interest'.

127 With regard, next, to the reference, made by M6 at the hearing, to paragraph 249 of the judgment in *BUPA and Others* v *Commission*, paragraph 72 above, which concerns the fourth of the four conditions defined in paragraphs 88 to 93 of the judgment in Case C-280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I-7747, 'the judgment in Altmark' and, as regards the aforementioned conditions, 'the Altmark conditions'), it should be pointed out, following the Commission's example, that that reference is incorrectly made by M6.

128 In fact, that reference, made by M6 in support of the argument that fulfilment of the fourth Altmark condition is a requirement for application of the derogation provided for Article 86(2) EC, is based on a confusion between the conditions which establish

the classification as State aid within the meaning of Article 87(1) EC, and those which are used to assess the compatibility of aid pursuant to Article 86(2) EC.

129 It should be pointed out, in that regard, that the sole purpose of the Altmark conditions is the classification of the measure in question as State aid, for the purpose of establishing the existence of an obligation to notify the measure to the Commission in the case of a new aid or to cooperate with the Commission in the case of an existing aid (judgment in Case T-354/05 *TF1* v *Commission* [2009] ECR II-471, paragraphs 130 and 131, and order of 25 November 2007 in Case T-87/09 *Andersen* v *Commission*, not published in the ECR, paragraph 57).

130 Moreover, paragraph 249 of the judgment in *BUPA and Others* v *Commission*, paragraph 72 above, relating to the fourth Altmark condition, is specifically part of the Court's assessment of the classification of the measure at issue as State aid (assessment contained in paragraphs 161 to 258 of the judgment in *BUPA and Others* v *Commission*, paragraph 72 above), and not of the Court's assessment of the application of the derogation provided for in Article 86(2) EC (assessment contained in paragraphs 259 to 310 of the judgment in *BUPA and Others* v *Commission*, cited above).

131 It is apparent from the foregoing considerations that the reference made by M6 to the judgment in *BUPA and Others* v *Commission*, paragraph 72 above, is based on a confusion between the Altmark test, which seeks to determine the existence of State aid within the meaning of Article 87(1) EC, and the Article 86(2) EC test, which is used to determine whether a measure constituting State aid may be regarded as compatible with the common market (*TF1* v *Commission*, paragraph 129 above, paragraph 140).

132 As for claiming, as M6 did, in essence, at the hearing, that Article 86(2) EC contains a condition of economic efficiency in the supply of the public service, it should be pointed out, first, that that claim is irrelevant in the present case and, secondly, that it is, in any event, inaccurate.

133 As regards, first, the irrelevance of that claim in the present case, suffice it to point out that the economic efficiency of France Télévisions in the supply of the broadcasting SGEI is not called in question or even referred to in these actions. Indeed, it is by no means claimed that France Télévisions could fulfil its public service obligations at lower cost.

134 All that is called in question in these actions is France Télévisions' economic efficiency in the performance of a commercial activity — the sale of televised advertising slots — which, although it contributes to the financing of the broadcasting SGEI, is not for that reason part of the SGEI.

135 However, even if France Télévisions were, as the applicants claim, but that company formally disputes, economically inefficient in its commercial activity of selling advertising slots, that fact is not such as to deprive the French Republic of its power and its right to finance the broadcasting SGEI (see paragraphs 104 to 109 above), since adequate precautions had been taken to make it reasonable to rule out any risk of cross-subsidisation of the commercial activity (see paragraphs 110 to 117 above).

136 As regards, secondly, the matter of whether Article 86(2) EC contains a condition that the operator responsible for the public service must be economically efficient in providing that service, it should be pointed out that, under that provision, undertakings entrusted with the operation of services of general economic interest are to be subject to the rules on competition in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them, subject to

the proviso, however, that the development of trade must not be affected to such an extent as would be contrary to the interests of the Community (Case C-202/88 *France* v *Commission* [1991] ECR I-1223, paragraph 11; Case C-157/94 *Commission* v *Netherlands* [1997] ECR I-5699, paragraph 28; Case C-67/96 *Albany* [1999] ECR I-5751, paragraph 102, and Case C-340/99 *TNT Traco* [2001] ECR I-4109, paragraph 52).

137 In allowing, in certain circumstances, derogations from the general rules of the Treaty, Article 86(2) EC seeks to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or fiscal policy with the Community's interest in ensuring compliance with the rules on competition and preservation of the unity of the common market (*France* v *Commission*, paragraph 136 above, paragraph 12; *Commission* v *Netherlands*, paragraph 136 above, paragraph 39, and *Albany*, paragraph 136 above, paragraph 103).

138 It should also be pointed out that it is not necessary, in order for the conditions for the application of Article 86(2) EC to be fulfilled, that the financial balance or economic viability of the undertaking entrusted with the operation of a SGEI should be threatened. It is sufficient that, in the absence of the rights at issue, it would not be possible for the undertaking to perform the particular tasks entrusted to it, defined by reference to the obligations and constraints to which it is subject or that maintenance of those rights is necessary to enable the holder of them to perform tasks of general economic interest which have been assigned to it under economically acceptable conditions (*Commission* v *Netherlands*, paragraph 136 above, paragraphs 52 and 53; *Albany*, paragraph 136 above, paragraph 107; *TNT Traco*, paragraph 136 above, paragraph 54, and Case C-162/06 *International Mail Spain* [2007] ECR I-9911, paragraph 35; see also to this effect Case C-320/91 *Corbeau* [1993] ECR I-2533, paragraphs 14 to 16).

139 Furthermore, in the absence — as in this case — of Community rules governing the matter, the Commission is not entitled to rule on the basis of public service tasks

assigned to the public operator, such as the level of costs linked to that service, or the expediency of the political choices made in this regard by the national authorities, or the economic efficiency of the public operator (see to this effect the Opinions of Advocate General Tesauro in *Corbeau*, paragraph 138 above, ECR I-2548, point 16, and of Advocate General Tizzano in Case C-53/00 *Ferring* [2001] ECR I-9069, point 51; and the judgment in Case T-106/95 *FFSA and Others* v *Commission* [1997] ECR II-229, paragraph 108).

140 It follows that the question of either an undertaking responsible for a broadcasting SGEI may it fulfils its public service obligations at lower cost it is irrelevant for assessing the compatibility of the State funding of that service in the light of the Community State aid rules. What Article 86(2) EC seeks to prevent, though the assessment of the proportionality of the aid, is that the operator responsible for the SGEI benefits from funding which exceeds the net costs of the public service.

141 It is apparent from the foregoing considerations that not only is France Télévisions' economic efficiency in supplying the broadcasting SGEI not at issue in the present case (see paragraphs 133 to 135 above), but that economic efficiency is in any event irrelevant to the assessment of the compatibility of the funding with the common market pursuant to Article 86(2) EC.

142 As regards, finally, the applicants' criticisms based on the duration of the preliminary investigation procedure and the fact that the Commission made contact only once with the French authorities (see paragraph 41 above), those factors do not constitute any indication that there was a serious difficulty, but rather reflect, as the Commission points out, the fact that the examination of the compatibility with the common market of the measure notified in the present case did not raise any particular difficulty.

143 If there were no serious difficulty in assessing the compatibility of the aid with the common market, no provision of the Treaty or other rule of law required the Commission to proceed otherwise than it did in the context of the preliminary investigation procedure of Article 88(3) EC or, in particular, to hear the parties concerned as it would have had to do if it had opened the formal investigation procedure under Article 88(2) EC (see to this effect *Thermenhotel Stoiser Franz and Others* v *Commission*, paragraph 72 above, paragraph 90). The applicants were therefore wrong to claim that, by not consulting the parties concerned, the Commission failed to observe the *inter partes* rule.

144 Having regard to the foregoing considerations, from which it appears that the assessment of the measure notified did not raise, in the light of the sufficient information available to the Commission, any serious difficulty, these pleas must be rejected.

The third plea of M6 and the second plea of TF1, alleging infringement of the obligation to state grounds

Arguments of the parties

145 TF1, supported by Canal +, maintains that, is the Commission failed to gather the information necessary and to consider the information it already had, the reasoning of the contested decision is bound to be incomplete.

146 Also, the reasoning of the contested decision with regard to the substitution of public funds for France Télévisions' commercial resources for all of the losses in advertising revenue is inadequate and insufficient. It is apparent from the views previously expressed by the Commission that only net profit directly or indirectly linked to the performance of the public service may be deducted from the gross public service costs [see paragraph 57 of the Broadcasting Communication and paragraph 123 of Commission Decision 2004/339/EC of 15 October 2003 on the measures implemented by Italy for RAI SpA (OJ 2004 L 119, p. 1, 'the RAI decision'). Commercial revenue which is not connected with the public service must be reserved to commercial activities and cannot be deducted from the gross public service costs. However, the statement that the fall in private resources 'automatically and proportionately' increases the net cost of the public service activity disregards this distinction.

147 In the reply, TF1 states that, since the term commercial revenue referred to turnover and not to net profit from commercial costs, the Commission, by the view recalled in the previous paragraph, seems to acknowledge, which differs from its previous views, that the funding at issue may compensate not only the increase in the net cost of the public service but, in fact, also commercial costs.

148 The contested decision is therefore not sufficiently reasoned as regards this apparent change in the Commission's of method in relation to its previous practice, and it is also not sufficiently reasoned as regards the absence of risk of cross-subsidy. This infringement of the obligation to state grounds is an indication of a serious difficulty.

149 M6, supported by Canal +, maintains that the contested decision contains nothing which establishes the accuracy of the statement that 'the announcement of 8 January 2008 and the confirmation of the abolition in due course of advertising [have] had an immediate impact or on the finances of France Télévisions'. Apart from a description

of the 'announcement effect' and of the fall in advertising revenue, the contested decision contains no economic explanation of the direct causal link between the announcement of 8 January 2008 and France Télévisions' poor advertising results.

150 To the same effect, the statement in paragraph 27 of the contested decision, according to which the 'funding [notified] resembles compensation for the effect of the regulating State's announcement of withdrawal from the advertising market rather than an investment opportunity seized by the shareholder State', a statement which is unsubstantiated and far from the reality of the advertising market in France, confirms the lack, in the contested decision, of a detailed assessment of the true causes of France Télévisions' loss of advertising revenue.

151 As for the statement contained in paragraph 9 of the contested decision relating to the reaction of the competitors who adjusted their commercial offer to attract France Télévisions' advertisers, it is not only incorrect but also unjustified and is evidence of the Commission's wrong information and the superficial nature of its analysis.

152 The Commission therefore failed to comply with its obligation to state grounds. The infringement of that obligation reveals the existence of serious difficulties which required the Commission to initiate the formal investigation procedure.

153 The Commission, supported by the French Republic and by France Télévisions, points out that the contested decision was adopted at the end of the preliminary investigation of the State aid, the sole aim of which is to enable the Commission to form an initial opinion concerning the partial or complete compatibility of the aid concerned, without initiating the formal investigation procedure. However, according to the Commission, such a decision, which is taken within a short period of time,

must simply set out the reasons for which the Commission takes the view that it is not faced with serious difficulties in assessing the compatibility of the aid at issue with the common market. That decision requires only brief reasons.

154 The Commission point out that, as regards the context of the contested decision, it followed two other favourable decisions by which the Commission considered that investment grants and capital injections granted to France Télévisions channels constituted State aid that was compatible with the common market. Even though the funding examined in the present case is different from both previous measures, it is nevertheless part of the general context of the public funding of France Télévisions examined in those decisions. Therefore, the Commission states that it was fully justified in giving more succinct reasoning in the present case than it would have given if there had been no previous decisions.

155 In any event, the contested decision contains all the information necessary about the Commission's reasoning and fully satisfies the requirements of Article 253 EC.

156 As regards TF1's argument that, since the Commission allegedly failed to gather the information necessary and to consider the information that it already had, the reasoning of the contested tradition is bound to be incomplete, the Commission states that that argument confuses a matter of substance and a procedural matter. The Commission clearly set out its reasoning in the contested decision, which TF1 does not dispute, considering only that that reasoning is based on insufficient information and is unconvincing. However, that is a matter of substance and not of reasoning, to which the Commission already responded in connection with the first plea.

157 As regards the argument by which TF1 criticises the Commission for having considered that any loss of advertising revenue (including hypothetical revenue unconnected with the public service) resulted in an increase in the net cost of the public service, although only the losses in advertising revenue connected with the public service can result in such an increase, the Commission points out that it is obvious that the fall observed was indeed that of the commercial income connected with performance of the public service. Indeed, it is apparent from the contested decision that the aid examined was intended to compensate a fall in France Télévisions' advertising revenue (and the increase the public service costs). That revenue comes from the broadcasting of advertisements between France Télévisions' programmes, as is clear from paragraph 36 of the contested decision. The explanation allegedly missing is therefore evident and the Commission does not see in what respect it was necessary to state further reasons for the contested decision.

158 As regards TF1's complaint that the Commission confused commercial revenue and net commercial profit, so that it was not sufficiently on guard against the risk of cross-subsidisation and departed from its previous practice, the Commission points out that there was nothing to suggest that France Télévisions' commercial costs could fall significantly in 2008, and that even if France Télévisions let go some of its staff assigned to commercial activities, that would, in the short term, have represented an additional cost. The fact that the Commission did not speculate, when adopting the contested decision, on possible downward turns in advertising management costs in the future, cannot affect the legality of the contested decision and does not contradict the approach taken by the Commission in its previous decisions.

159 Finally, it should be pointed out that the need to finance France Télévisions for 2008 arose both from a fall in advertising revenue, estimated at EUR 150 million, and from an increase in programme costs, estimated at more than EUR 145 million, that is, a total of EUR 300 million, whereas the funding notified was EUR 150 million. Having

regard to those amounts, that it was therefore planned to compensate only half the increase in France Télévisions' net public service costs. In the light of those amounts, the costs connected with France Télévisions' commercial activities were, in any event, limited and their short-term variation was quite negligible.

160 As regards M6' s argument that it did not accurately assess the specific conditions which led to the loss of France Télévisions' advertising revenue, the Commission points out that it was not necessary, for the purposes of the contested decision, to investigate the exact causes of those losses.

161 As regards the reasoning in paragraph 9 of the contested decision, relating to the causes of the fall in France Télévisions' advertising revenue, the reasons disputed by M6 are incidental to the broad logic of the contested decision.

162 As regards M6's criticism of the reasoning in paragraph 27 of the contested decision, relating to the private investor in a market economy test, the Commission states that it is unsure of the exact meaning of that criticism and points out that that paragraph of the contested decision contains only correct arguments, which M6 has not shown to be incorrect.

Findings of the Court

163 It should be pointed out that, according to settled case-law, the statement of reasons required by Article 253 EC Treaty must be appropriate to the measure at issue and

must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent Court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Case C-17/99 *France* v *Commission* [2001] ECR I-2481, paragraphs 35 and 36; Case C-333/07 *Regie Networks* [2008] ECR I-10807, paragraph 63; and Case T-266/94 *Skibsvaerftsforenigen and Others* v *Commission* [1996] ECR II-1399, paragraph 230).

164 As regards TF1's argument (see paragraph 145 above) that the reasoning of the contested decision is bound to be incomplete since the Commission failed to gather the information necessary and to consider the information it already had, this argument must be rejected, since it is, in fact, confused with the criticisms of substance complaining of the alleged inadequacy of the information and of the Commission's examination, which have already been ruled out in the examination of the previous pleas in law.

165 As regards TF1's argument (see paragraphs 146 and 147 above) that the Commission, without grounds, departed from its previous practice when it allowed a substitution of public funds for commercial resources for all of France Télévisions' losses in advertising revenue, it should be pointed out that compliance with the proportionality test requires that 'the State aid does not exceed the net costs of the public service mission, taking also into account other direct or indirect revenues derived from the public service mission' (paragraph 57 of the Broadcasting Communication), and the

Commission adds that '[f]or this reason, the net benefit that non-public service activities derive from the public service activity will be taken into account in assessing the proportionality of the aid' (paragraph 57 of the Broadcasting Communication).

166 To the same effect, the Commission, in the RAI decision, stated that '[c]ompensation is allowed only for the net costs of the public service task', that '[t]his means that account must be taken of direct and indirect revenues derived from the public service' and, therefore, that 'the net advertising revenues generated during the transmission of programmes falling within the scope of the public service task and the net revenues derived from the marketing of such programmes ... must be deducted from the total amount of public service costs ...' (paragraph 123 of the RAI decision).

167 In so far as, first, the aforementioned argument of TF1 is based on the view that commercial revenue unconnected with the public service is not deducted from the gross costs of the public service, with the corollary that a fall in income cannot have the effect of increasing the net costs of the public service (see paragraph 146 above), it need only be stated that the fall in commercial revenue established in this case concerned revenue connected with the public service, since it was revenue from the sale of advertising slots inserted in the public service programmes broadcast by France Télévisions. The Commission therefore did not depart from its previous practice by considering that the fall in France Télévisions' advertising revenue caused an increase in the net costs of the public service.

168 In so far as, secondly, by the aforementioned argument, as formulated in the reply (see paragraph 147 above), TF1 criticises the Commission for having confused the notion of commercial income and the notion of net profit and having therefore accepted, in a departure from its previous practice and with no explanation, that the funding notified could compensate commercial costs, it has already been stated (see paragraphs 90 and 91 above) that the Commission did not confuse the aforementioned notions but considered, in essence, that the fall in commercial revenue in 2008

would not be accompanied by any variation in the commercial costs of a degree likely to prevent the conclusion that there was a relationship of proportionality between the fall in that revenue and the fall in net profit and, accordingly, between the fall in revenue and the increase in the net costs of the public service. In the light of that assessment, the Commission did not depart from its previous practice.

169 It is apparent from the foregoing considerations that, since the Commission at no point departed from its previous practice, TF1's argument alleging a lack of reasoning in that regard must be rejected as founded on an incorrect premise.

170 As regards the arguments (see paragraphs 149 to 151 above) by which M6 complains, in essence, of the inadequate nature of the examination of the exact causes of the fall in advertising revenue and the incorrect and unjustified nature of the Commission's statement in paragraph 9 of the contested decision relating to the reactions of competitors to the announcement of 8 January 2008, it should be pointed out that those arguments are the same, in essence, as the complaints made in connection with the previous pleas for annulment and already ruled out.

171 It is apparent from the foregoing considerations that these pleas for annulment, alleging infringement of the obligation to state reasons, must be rejected.

172 Since the applicants have failed in all their plea, these actions must be dismissed.

Costs

173 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 87(4) of those Rules, the Member States which have intervened in the proceedings are to bear their own costs.

174 Since the applicants have been unsuccessful, they should be ordered to pay their own costs, as well as those of the Commission and France Télévisions, in accordance with the plea by the latter.

175 Canal +, intervener in support of the form of order sought by the applicants, and the French Republic, intervener in support of the form of order sought by the Commission, shall each bear their own costs.

On those grounds,

THE GENERAL COURT (Fifth Chamber)

hereby:

1. Dismisses the actions;

2. Orders Métropole télévision (M6) to bear its own costs in Case T-568/08 and pay those incurred by the European Commission and France Télévisions in that case;

3. Orders Télévision française 1 SA (TF1) to bear its own costs in Case T-573/08 and pay those incurred by the European Commission and France Télévisions in that case;

4. The French Republic and Canal + shall each bear their own costs in Cases T-568/08 and T-573/08.

Vilaras Prek Ciucă

Delivered in open court in Luxembourg on 1 July 2010.

[Signatures]