JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
19 February 1998 *

In Joined Cases T-369/94 and T-85/95,

DIR International Film Srl, a company incorporated under Italian law, established in Rome,

Nostradamus Enterprises Ltd, a company incorporated under English law, established in London,

Union PN Srl, a company incorporated under Italian law, established in Rome,

United International Pictures BV, a company incorporated under Netherlands law, established in Amsterdam,

United International Pictures AB, a company incorporated under Swedish law, established in Stockholm,

United International Pictures APS, a company incorporated under Danish law, established in Copenhagen,

* Language of the case: English.

United International Pictures A/S, a company incorporated under Norwegian law, established in Oslo,

United International Pictures EPE, a company incorporated under Greek law, established in Athens,

United International Pictures OY, a company incorporated under Finnish law, established in Helsinki, and

United International Pictures y Cía SRC, a company incorporated under Spanish law, established in Madrid,

represented by Michel Waelbroeck, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 8-10 Rue Mathias Hardt,

applicants,

v

Commission of the European Communities, represented by Berend Jan Drijber and Peter Oliver, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, also of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATIONS for the annulment of, first, the letters from the European Film Distribution Office (EFDO) to the applicants of 12 September 1994 adjourning the procedure in relation to applications for loans under the action programme to promote the development of the European audiovisual industry (MEDIA) for the distribution of two films and/or of the measure whereby the Commission instructed EFDO to take those decisions; and, secondly, the measure of 5 December 1994 whereby EFDO rejected the applications for loans and/or the measure whereby the Commission instructed EFDO to adopt that measure,

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

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

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 1 October 1997,

gives the following

Judgment

Legal background and facts of the case

1 On 21 December 1990, the Council adopted Decision 90/685/EEC of 21 December 1990 concerning the implementation of an action programme to promote

the development of the European audiovisual industry (MEDIA) (1991 to 1995) (OJ 1990 L 380, p. 37), the name MEDIA being an acronym for 'mesures pour encourager le développement de l'industrie audiovisuelle'. The decision began by stating that the European Council regarded it as extremely important to strengthen Europe's audiovisual capacity (first recital in the preamble). The Council then stated that it had taken note of the Commission communication accompanied by two proposals for Council decisions relating to an action programme to promote the development of the European audiovisual industry 'MEDIA' 1991-1995 [Com(90) 132 final, of 4 May 1990, not published in the *Official Journal of the European Communities*, hereinafter referred to as 'the communication on audiovisual policy'] (eighth recital). It stressed the need for the European audiovisual industry to overcome fragmentation of the markets and overhaul its excessively narrow and insufficiently profitable production and distribution structures (fourteenth recital), stating that special attention needed to be given in that context to small and medium-sized undertakings (fifteenth recital).

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

— to help create a favourable environment within which Community undertakings will act as a driving force alongside those from other European countries,

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

— to step up intra-European exchanges of films and audiovisual programmes and to make maximum use of the various means of distribution which either exist or are still to be set up in Europe, with a view to securing a better return on investment, wider dissemination and greater public impact,

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

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

— to encourage an overall approach to the audiovisual industry which allows for the interdependence of its various sectors,

— to ensure that action taken at European level complements that taken at national level,

— to contribute, in particular by improving the economic and commercial management abilities of professionals in the audiovisual industry in the Community, and in conjunction with existing institutions in the Member States, to creating conditions which will enable undertakings in that sector to take full advantage of the single market dimension.

3 The Commission stated in its communication on audiovisual policy (p. 9) that the European Film Distribution Office — Europäisches Filmbüro e. V. (hereinafter 'EFDO'), an association registered in Hamburg (Germany), 'is helping to set up co-distribution networks by fostering cooperation between companies which were previously operating in isolation on their national territory'.

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

5 Against that background, the Commission concluded agreements with EFDO concerning the financial implementation of the MEDIA programme. A copy of the agreement for 1994 ('the 1994 Agreement'), which is relevant in this case, has been placed with the documents before the Court.

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

7 The functioning of EFDO is also subject to guidelines adopted by itself and approved, in a manner which has not been defined, by the Commission. The version of those guidelines of 15 February 1994 has also been placed before the Court. Under those guidelines, EFDO administers a fund which grants loans to film distributors of up to 50% of anticipated distribution costs, without interest, and repayable only if the film recoups the anticipated costs in the country for which the loan is granted. The loan serves to reduce the risk in distributing films

and helps to ensure the release of films which, without such financing, would have little chance of being shown in cinemas. Decisions on loan applications are taken by the EFDO Selection Committee.

8 Point VI.2 of the guidelines provides that the EFDO Selection Committee is to examine applications after the expiry of a deadline announced in professional publications, and to grant loans to eligible projects until the funds are exhausted.

9 In its replies to the written questions of the Court, the Commission explained that, shortly before each meeting of the EFDO Selection Committee, the Commission's services were informed by EFDO of all the applications lodged and, after examining the compatibility of those applications with 'the requirements laid down (e. g. as to the budgetary aspects or the eligibility of distributors from East European countries)', the Commission officials responsible generally 'communicated their views orally to EFDO rather than in writing'.

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

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

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

'1st Priority

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

2nd Priority

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

3rd Priority

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

4th Priority

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

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

13 The first and third applicants, DIR International Film S. r. l. and Union PN S. r. l., are producers of the Italian film *Maniaci Sentimentali*, and the second applicant, Nostradamus Enterprises Ltd, is the producer of the film *Nostradamus*, an Anglo-German co-production. The fourth applicant, United International Pictures BV ('UIP'), a joint subsidiary of the American company Paramount Communications Inc., the Japanese company MCA Inc. and the French company Metro-Goldwyn-Mayer Inc., which were equal shareholders at the time the actions were brought, is involved primarily in the distribution of full-length films around the world, with the exception of the United States, Puerto Rico and Canada. The fifth, sixth, seventh, eighth, ninth and tenth applicants, United International Pictures AB (Sweden), United International Pictures APS (Denmark), United International Pictures A/S (Norway), United International Pictures EPE (Greece), United International Pictures OY (Finland), and United International Pictures y Cía SRC (Spain), are subsidiaries of UIP and act as local distributors in the respective countries (and are hereinafter referred to as 'the subsidiaries').

14 On 28 July 1994, at the request of the producers of the film *Maniaci Sentimentali*, UIP sent EFDO funding applications for the distribution of that film by its respective subsidiaries in Norway, Finland, Sweden, Denmark, Greece and Spain (and on behalf of Filmes Lusomundo SARL, a company unconnected with UIP, in Portugal).

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

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

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

18 Following receipt of the disputed letters, the first four applicants contacted EFDO and Commission representatives in order to signify their disagreement and obtain certain information and documents, and to have the applications re-examined.

UIP's representatives also contacted the Member of the Commission with responsibility for (*inter alia*) cultural affairs, João de Deus Pinheiro, requesting him to intervene so that the applications could be reconsidered. Having been informed that the file had been transferred to the Directorate-General for Competition, UIP's counsel also wrote to the Member of the Commission with responsibility for competition matters, Karel Van Miert, asking him for certain information. The latter emphasised in his reply that there was no link between the procedure concerning UIP's application for the renewal of its exemption under Article 85(3) of the Treaty and the procedure concerning the grant of subsidies by EFDO. The Commission explained at the hearing that all that statement by Mr Van Miert meant was that UIP could in no circumstances rely on an EFDO decision granting it a loan in support of its application for renewal of its exemption.

19 Those contacts having failed to produce the desired result, the applicants brought an action on 16 November 1994 challenging the disputed letters.

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

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

22 According to the contested decision, drafted by EFDO staff, the applications were rejected because 'it has not yet been decided by the Commission of the European Union what UIP's status will be in Europe in the future. Since EFDO's loan

contracts are based on a five-year period of theatrical release for the supported films, no other decision could be made in order not to interfere with the legal proceedings instituted by UIP against the Commission of the European Union. In addition to that, the Committee of EFDO thinks that UIP does not fully fulfil the aims of the MEDIA programme as described below: "[...] to set up co-distribution networks by fostering cooperation between companies which were previously operating in isolation on their national territory" (Action programme to promote the development of the European audiovisual industry "MEDIA" 1991-1995)'.

Procedure and forms of order sought by the parties

In Case T-369/94

23 It was in those circumstances that, by application lodged at the Registry of the Court of First Instance on 16 November 1994, the applicants brought an action seeking primarily the annulment of the disputed letters and/or the measure whereby the Commission instructed EFDO to take those decisions. The action was registered under case number T-369/94.

24 The Commission raised a plea of inadmissibility by a document lodged at the Registry of the Court of First Instance on 30 January 1995.

25 The applicants submitted their observations on the plea of inadmissibility on 5 April 1995.

26 They also made a number of requests that the Court adopt measures of organisation of procedure.

27 On 3 May 1995 the applicants, not yet having had the opportunity to comment on Annex 3 to the 1994 Agreement (see paragraph 6 above), which was lodged by the Commission after they lodged their observations on the plea of inadmissibility, applied for leave to lodge a memorandum of additional observations, attached to the application. The President of the Court of First Instance decided that the memorandum should be added to the file and notified to the opposing party.

28 By order of the Court of First Instance of 7 November 1995, the decision on the plea of inadmissibility was reserved for the final judgment.

29 The written procedure followed the usual course, and was completed when the rejoinder was lodged, on 12 July 1996.

30 The applicants claim in their application that the Court should:

— annul the disputed letters and/or the act by which the Commission instructed EFDO to take those decisions;

— order the Commission to pay the costs.

31 In their replies to the Court's written questions, the applicants abandoned their claim for the annulment of the instructions given to EFDO by the Commission.

32 The Commission contends that the Court should:

— dismiss the application as inadmissible;

— in the alternative, reject the application as unfounded;

— in either event, order the applicants to pay the costs.

33 Finally, the Commission asks the Court to take account in its decision on costs of the applicants' conduct in pursuing their action even though it has been devoid of subject-matter since June 1995.

In Case T-85/95

34 By application lodged at the Registry of the Court of First Instance on 16 March 1995, the applicants brought an action challenging the contested decision and/or the act by which the Commission instructed EFDO to adopt that decision. That action was registered under case number T-85/95.

35 They also requested that the Court prescribe measures of organisation of procedure.

36 The written procedure followed the usual course, and was completed when the rejoinder was lodged, on 21 December 1995.

37 The applicants claim in their application that the Court should:

— annul the contested decision and/or the measure by which the Commission instructed EFDO to adopt that act;

— order the Commission to pay the costs.

38 In their replies to the Court's written questions, the applicants abandoned their claim for the annulment of the instructions given to EFDO by the Commission.

39 The Commission contends that the Court should:

— reject the application as ill-founded;

— order the applicants to pay the costs.

Joinder of the cases

40 By letter of 22 June 1995, the Commission informed the Court that it acknowledged the admissibility of the action in Case T-85/95 but that it still challenged the admissibility of the action in Case T-369/94, and suggested that the applicants abandon it.

41 On 13 July 1995, the applicants wrote to the Court stating their position on that letter. Rather than withdrawing their first action, they applied for the two cases to be joined.

42 By letter of 25 July 1995, the Commission replied that it saw no useful purpose in the applicants maintaining their first action, but it did not expressly oppose the application for joinder.

43 By order of 13 May 1997, the President of the Court of First Instance decided that Cases T-369/94 and T-85/95 should be joined for the purposes of the oral procedure and the judgment.

Hearing

44 The parties presented oral argument and replied to the Court's questions at the hearing in open court on 1 October 1997.

Admissibility

Summary of the parties' arguments

45 The Commission acknowledges that decisions taken by EFDO in the context of the financial implementation of the MEDIA programme are imputable to it. It considers that relations with private organisations assisting it, on a contractual basis, in implementing the MEDIA programme should be such as to ensure that the power to decide on applications for financial assistance remains with the

Commission. It also considers that a decentralised system of decision-making and judicial control could be regarded as detracting from the Community character of the MEDIA programme.

46 Nevertheless, it maintains that the action in Case T-369/94 is inadmissible since the disputed letters were only provisional. Their very wording showed clearly that the decision had merely been postponed. In those circumstances, the letters were not measures capable of being annulled pursuant to Article 173 of the Treaty.

47 The Commission adds that, in the absence of rules fixing a time-limit for a decision to be taken, the announcement that the decision had been postponed could not be construed as an implicit rejection.

48 The applicants argue, first, that the disputed letters were either addressed to them, or directly and individually concerned them.

49 Secondly, they consider that the letters effectively constituted a rejection by EFDO of the funding applications, given that a considerable period of time might elapse before a decision on UIP's application for the renewal of its exemption under Article 85(3) of the Treaty could be taken by the Commission, and that postponement of the release of the two films concerned until that date would deprive them of practically all commercial value. The indefinite postponement of plans to release films, and of the attendant publicity and marketing, was in no way a realistic commercial option.

50 At the hearing, the applicants maintained once again that the disputed letters were measures capable of being challenged in an action, and that the contested decision adopted subsequently was no more than a confirmatory measure.

51 The Commission does not challenge the admissibility of the action in Case T-85/95.

Findings of the Court

52 Under Article 7(1) of Decision 90/685, the Commission is responsible for the implementation of the MEDIA programme. Moreover, the judgment in Case 9/56 *Meroni* v *High Authority* [1957 and 1958] ECR 133 shows that delegation of powers coupled with a freedom to make assessments implying a wide discretionary power is not permissible. In accordance with those principles, the relevant agreement between the Commission and EFDO on the financial implementation of the MEDIA programme (see paragraphs 5 and 6 above) makes any decision in that area subject in practice to the prior agreement of the Commission's representatives. In that respect, the Commission has explained that, before each meeting of the EFDO Selection Committee, the Commission's services were informed by the latter of all the applications lodged and, after examining the applications, the Commission officials responsible made their views known (see above, paragraph 9).

53 The Court therefore considers that EFDO's decisions on funding applications submitted under the MEDIA programme are imputable to the Commission, and that the latter is therefore responsible for their content and may be called upon to defend them in court.

54 In this case, the Commission essentially determined the content of the disputed letters and decision, even if the statement of reasons in the latter does not exactly follow the wording proposed by the Commission.

55 The Court finds, therefore, that the disputed letters and decision may in principle form the subject-matter of an action against the Commission before the Community judicature.

56 The Court also needs to examine whether, in the circumstances of the case, the applicants have, first, an interest in bringing an action and, secondly, the capacity to do so.

57 The first point to be made is that the application in Case T-369/94 is directed primarily at the disputed letters and that, if those letters were annulled, the only measures capable of being adopted in implementation of the judgment, pursuant to Article 176 of the Treaty, would be final decisions on the funding applications lodged by the applicants. However, those decisions were taken after that action was brought and form the subject-matter of the action in Case T-85/95. A judgment of the Court of First Instance annulling the disputed letters could not therefore give rise to the implementation measures envisaged by Article 176 of the Treaty, with the result that the applicants have no further interest in obtaining the annulment of the letters.

58 The action in Case T-369/94 has therefore become devoid of purpose, so that there is no longer any need to adjudicate thereon.

59 In addition, the Court finds that the decision contested in Case T-85/95 was addressed to the UIP subsidiaries on whose behalf the funding applications had been lodged, namely the fifth, sixth, seventh, eighth, ninth and tenth applicants. The latter therefore have the capacity to bring an action as addressees of the contested decision.

60 Finally, the first, second and third applicants are the producers of films which are candidates for EFDO financing. They have argued, without the Commission disputing the point, that a loan from EFDO brings forward the date on which distribution costs are recovered and thus the date on which the producer receives a royalty. The fourth applicant, UIP, obtained exhibition rights for the films concerned, which it then transferred to its subsidiaries established in the respective countries where distribution was envisaged. It was UIP, moreover, which passed on its subsidiaries' funding applications to EFDO, on behalf of those subsidiaries and, according to UIP, at the request of the producer concerned. In those circumstances, both the producers of the films and UIP are directly and individually concerned, in the same way as addressees of the contested decision, by reason of certain characteristics which are particular to them or a factual situation which distinguishes them in relation to any other person.

61 The action in Case T-85/95 is therefore admissible.

Substance — Case T-85/95

62 In support of their action, the applicants rely on three pleas in law: infringement of the selection criteria laid down in the EFDO guidelines, incompatibility with the philosophy and aims of the MEDIA programme, and an insufficient statement of reasons.

63 The Court will examine the first and second pleas together.

The first and second pleas: infringement of the selection criteria laid down in the EFDO guidelines and incompatibility with the philosophy and aims of the MEDIA programme

Summary of the parties' arguments

64 In their first plea, the applicants begin by arguing that the funding applications fully satisfied all the conditions laid down in the EFDO guidelines, and in particular the requirement that at least three distributors representing at least three different EU countries agree to exhibit a film in cinemas in their countries. The applicants submit that the term 'three different distributors' means three legally distinct entities, whether connected with each other or not, and that there is no justification for regarding a group of connected companies as a single distributor.

65 In reply to the Commission's argument that one of the central aims of the MEDIA programme was to set up co-distribution networks by fostering cooperation between companies which were previously operating in isolation on their national territory, the applicants argue that that aim is not mentioned in the guidelines, which state, on the contrary, that the primary objective is to broaden the distribution of European films on a pan-European basis. Moreover, the guidelines of the initiative named Espace Vidéo Européen (hereinafter 'EVE'), which is one of the groups of European programmes established within the framework of the MEDIA programme and is very similar to EFDO in its aims and methods, explicitly encourage distribution by related companies by providing that 'special consideration will be given to companies operating in multiple territories'.

66 The applicants add that in practice EFDO has granted loans to related companies in the case of, *inter alia*, the films *De Flat*, *Jack and Sarah* and *Carrington*. The applicants have attached to their reply a list of 13 films in all, covering the period from 1992 to 1995, which they maintain have been distributed by related companies with the support of EFDO.

67 They also point out that the funding applications for the distribution of *Nostradamus* were made by four entities connected to UIP in conjunction with six other distributors which were not connected either to each other or to any company in the UIP group, making a total of seven applicants in accordance with the Commission's interpretation of the 'different distributors' rule. However, only the applications of the six distributors not connected to UIP were declared eligible. In the applicants' submission, that is irreconcilable with the Commission's position.

68 Secondly, the applicants argue that the extent of EFDO's discretion in selecting distribution projects is governed by the selection criteria published in the guidelines. The guidelines do not provide that applications fulfilling the stated conditions may be rejected, save for the reasons and criteria explicitly stated therein.

69 The applicants maintain that, since the Commission may not delegate discretionary powers to dependent bodies (see *Meroni*, cited above), EFDO may not — and could not lawfully have been given the power to — refuse loans on the basis of criteria not contained in the guidelines. In those circumstances, once an application meets the eligibility test, EFDO has no discretionary power as to whether to apply the selection criteria contained in the guidelines or not. The applicants add that, even if EFDO did enjoy a discretionary power to reject eligible applications, that power was exceeded in this case, with the result that the contested decision infringes the principles of equal treatment, legal certainty and the protection of legitimate expectations.

70 The applicants emphasise that EFDO's right under the guidelines to reject an application without stating reasons, even if the applicant fulfils the conditions for receiving aid, applies only in the closely-defined case where EFDO 'comes to know of any facts, directly or indirectly, from which it can be suspected that the loan will not or cannot be duly repaid'.

71 In that connection, the applicants point out, first, that the contested decision makes no reference to concern about UIP's solvency, and, secondly, that any concern would have been unjustified, given that the parent companies of UIP or its banks would have been in a position to provide security for the loans, and even proposed as much in a letter to the director of the MEDIA programme at the Directorate-General for Information, Communication, Culture and Audiovisual Media (DG X) of the Commission.

72 In their second plea, the applicants begin by maintaining that a measure which is contrary to the philosophy and aims of the MEDIA programme thereby infringes Decision 90/685.

73 They argue that the aim of the MEDIA programme is to step up intra-European exchanges of films and make maximum use of the various means of distribution, with a view to securing a better return on investment, wider dissemination and greater public impact. Allowing EFDO to reject funding applications for reasons such as those put forward in this case would make UIP ineligible for EFDO aid not only in respect of the two films at issue but also in respect of any other European films it might seek to distribute in the foreseeable future, for as long as the Commission has not decided whether or not to renew the exemption granted to UIP under Article 85(3) of the Treaty. Whether or not a distributor benefits from interest-free loans under the EFDO scheme may be material to the producer, since a loan brings forward the point at which distribution costs are recouped and

thus the point at which the producer receives a royalty. If, therefore, the Commission's view were to be accepted, film distribution in Europe would become less effective, as producers chose 'second best' distributors who happened to have EFDO funding.

74 Moreover, the Commission's position in this case also constitutes a blatant discrimination against UIP in favour of other distributors.

75 In response to the first plea, the Commission denies that EFDO was under a legal duty to grant funds to eligible projects. EFDO did not have sufficient funds to grant all applications, so that a selection had to be made in accordance with the list of priorities mentioned above. In this case, however, since the applicants' applications were not even eligible, the question as to how to apply the list of priorities did not arise.

76 The Commission explains that the applications were not eligible because, in its view, the words 'different distributors' used in the EFDO guidelines must be understood as referring to independent or unconnected companies. If companies belonging to the same group were to be regarded as eligible for financial assistance, separate companies might be established for the sole purpose of making their applications eligible for assistance. Such practices could give rise to abuses which might seriously undermine the MEDIA programme's objective of fostering genuine transnational cooperation between distributors.

77 The Commission adds that the rules applicable in the context of the EVE initiative, cited by the applicants, are irrelevant in this case, since that system is wholly separate from EFDO.

78 In its rejoinder, the Commission explains that, even if EFDO may occasionally have granted loans to related companies, such companies have never been as numerous as in this case and have never constituted a majority. In reply to a question put by the Court at the hearing, concerning information contained in the list of funding applications approved by EFDO since its creation, the Commission acknowledges that twice, in 1992, EFDO granted a film distribution loan to three companies of which two were connected. That regrettable fact did not, however, diminish the importance attached by the Commission to the interpretation of the 'three different distributors' rule explained in paragraph 76 above.

79 Concerning the rejection of the applications on the ground that UIP's status was uncertain and there were doubts as to its ability to repay a loan, the Commission explains that since only UIP's subsidiaries, and not their parent companies, would have been the beneficiaries of EFDO loans, there was uncertainty as to the ability of those UIP subsidiaries to make the repayments if necessary. UIP's involvement in a proceeding for the renewal of an exemption under Article 85(3) of the Treaty did not in itself lead EFDO to reject the applications.

80 On those grounds, the Commission submits that the first plea is unfounded.

81 The Commission submits that the second plea must be rejected as being too vague. It was not until the reply stage that the applicants mentioned which rule of law had, in their submission, been infringed. Nor were their arguments supported by evidence. Furthermore, the decision complied with one of the essential aims of the MEDIA programme, namely that of encouraging cooperation between companies which had previously acted in isolation on their national territory. The plea should therefore be rejected in any event.

Findings of the Court

82 It is common ground that the EFDO guidelines were approved by the Commission as part of the implementation of the MEDIA programme governed by Decision 90/685. Having regard to their place in the system of the MEDIA programme, and to the fact that the Commission, which relies on their rules in order to justify the contested decision, regards them as having binding force and being a source of law in the implementation of that programme, the EFDO guidelines, like Decision 90/685, are rules of law that the Community judicature must enforce.

83 The provisions of the EFDO guidelines must, moreover, in compliance with the order of precedence of legal rules, be interpreted in the light of the purpose of Decision 90/685.

84 The first question to be decided in this case is whether the eligibility condition in the EFDO guidelines (point III.1(a)), whereby 'at least three different distributors from at least three different EU countries or from countries with which cooperation contracts exist must agree to exhibit a film theatrically in their countries' has been correctly interpreted and applied in this case.

85 The applicants submit that the term 'three different distributors' means three legally distinct entities, whether connected with each other or not. The Commission maintains that it must be interpreted as referring to independent companies that are not connected to each other. It submits that that interpretation is necessary in order to comply with the essential aim of the MEDIA programme, namely to 'set up co-distribution networks by fostering cooperation between companies which were previously operating in isolation on their national territory".

86 The Court agrees with the applicants that that objective does not, as such, appear among those listed in Article 2 of Decision 90/685. Nevertheless, that idea does appear in the communication on audiovisual policy to which the Council refers in the eighth recital in the preamble to that decision. More precisely, in that document the Commission stated that EFDO had been conducting an initial pilot experiment to promote cooperation between European distributors, enabling them to send films across frontiers and so attempt to create a single cinema-film market. In particular, the Commission states in the document that EFDO 'is helping to set up co-distribution networks by fostering cooperation between companies which were previously operating in isolation on their national territory'.

87 The Council clearly lent its support to the projects launched during the pilot phase of the MEDIA programme (ninth and tenth recitals in the preamble to Decision 90/685), including that undertaken by EFDO, to which the Council refers in Annex I to Decision 90/685, describing it as a distribution mechanism due for 'significant development'.

88 Moreover, the aim of encouraging contacts and cooperation between distributors established in different European countries is reflected in Decision 90/685 in numerous respects. The Council considers, for example, that fragmentation of the markets needs to be overcome (fourteenth recital), and that special attention needs to be given to small and medium-sized undertakings when adapting market structures (fifteenth recital). The third indent of Article 2 also states that maximum use must be made of the various means of distribution which either exist or are still to be set up in Europe.

89 The Council therefore undeniably took the view that the MEDIA programme was to contribute to new developments in the European cinematographic market and particularly to the creation of new forms of cooperation between European operators in order to strengthen Europe's audiovisual capacity.

90 The EFDO guidelines also demonstrate the consistent aim of fostering the creation of new cooperation networks by requiring that 'at least three different distributors from at least three different EU countries or from countries with which cooperation contracts exist must agree to exhibit a film theatrically'.

91 In this case, therefore, the Court does not consider that the Commission and EFDO exceeded their discretionary power in taking the view that the grant of Community funds for the distribution of films had to foster the creation in Europe of distribution networks which did not exist before. They were thus entitled to take the view that the grant of EFDO loans had to encourage new contacts and cooperation, in particular between small and medium-sized distributors established in various European countries which, without such a programme offering financial advantages, would probably have little motivation to establish contacts. They legitimately drew the conclusion that a loan could be granted only to a distribution project which contributed to that objective of the MEDIA programme.

92 If, moreover, any network of whatever structure could obtain loans under the MEDIA programme, there would undeniably be a temptation to establish separate companies solely for the purpose of obtaining financial aid.

93 As for the initiative known as EVE, carried out in the context of the MEDIA programme and which, the applicants claim, favours companies operating in multiple territories, the Court finds at the outset, without even having to examine the scope of that phrase appearing in the selection criteria, that the contested decision in this case falls within the context of an initiative distinct from EVE and, in particular, is governed by the EFDO guidelines interpreted in the light of the objectives of the MEDIA programme. In this legal context, moreover, the Commission, exercising its discretionary power, was entitled to consider it appropriate in the circumstances to support the creation of networks between independent distributors.

94 For the above reasons, the Commission and EFDO were entitled to require that, for funding applications in respect of film distribution under the MEDIA programme to be eligible, they be submitted by at least three distributors who had not previously cooperated in a substantial and permanent manner.

95 In this case, it is undisputed that UIP, whose registered office is in the Netherlands, was initially established by three American companies for the distribution in Europe of films produced and/or distributed by its parent companies or one of their parent companies, subsidiaries, related companies or concessionaries, franchisees or sub-licensees, as the Commission found in Decision 89/467 (seventh recital). As that decision shows (forty-first recital in particular), UIP's activity is tightly controlled by its parent companies. It has subsidiaries in the Community which act as local distributors (eighth recital) and which have little autonomy, as the documents in the file show. In those circumstances, the Court considers that, by reason of that structure and the limited independence of the UIP subsidiaries, the cooperation and the distribution network created by those subsidiaries alone, without the participation of other companies, does not correspond to the forms of cooperation envisaged by Decision 90/685.

96 In those circumstances, the Commission and EFDO were right to regard the UIP subsidiaries as a single distributor for the purposes of assessing the eligibility of the loan applications submitted to EFDO.

97 Concerning, first, the loan applications for the film *Maniaci Sentimentali*, it is significant that the UIP subsidiaries made no agreements with other, independent, distributors. Since, for the purposes of examining the eligibility of the applications, they are to be regarded as a single distributor, the requirement for three different distributors was not met. The loan applications by the UIP subsidiaries were not eligible because the project did not create a new cooperation network in the distribution of films.

98 That solution, which, as previously stated, is in accordance with the aims of the MEDIA programme, cannot be called into question by the fact that twice, in 1992, as the Commission acknowledged at the hearing, EFDO granted a film distribution loan to three companies of which two were connected, so that there were not three different distributors. In that regard, the applicants maintain that between 1992 and 1995 13 films were distributed by related companies with the support of EFDO. The Court finds, however, on the basis of the information contained in the list of distribution projects approved by EFDO since its creation, that, of the 13 films cited by the applicants, only two gave rise to a loan application submitted by less than three different distributors, as the Commission has acknowledged. Bearing in mind that a total of 196 distribution projects benefited from EFDO support between 1992 and 1995, the Court finds that there was in reality no practice of granting loans where the distribution project was not submitted by at least three different distributors as indicated above. In those circumstances, the application of the rule cannot be regarded as arbitrary.

99 Secondly, concerning the distribution of the film *Nostradamus*, it is not disputed that six distributors, who were not related either *inter se* or with a company of the UIP group, obtained funding from EFDO on the strength of their applications submitted to meet the same deadline as the applications of four UIP subsidiaries. The applicants concerned also mentioned in their applications — in the space requesting the names of other applicants if known — four of the six distributors which obtained funding and one company which was not among the successful candidates.

100 The Court must conclude that they had made an agreement to distribute that film, to the extent required by the guidelines. There was therefore no justification for rejecting the applications of the UIP subsidiaries concerned on the ground that no new network of at least three different distributors had been created. The Court therefore finds, as regards the distribution of the film *Nostradamus*, that the applications of the applicants concerned were in that respect eligible for a loan.

101 However, the main reason for the rejection of the applications was that the Commission had 'not yet [...] decided [...] what UIP's status [would] be in Europe in the future [and that] no other decision could be made in order not to interfere with the [exemption] procedure'. Even though the Commission stated in the course of the proceedings that UIP's involvement in an exemption renewal proceeding under Article 85(3) of the Treaty had not in itself led EFDO to reject the applications, and that it was uncertainty as to the ability of the UIP subsidiaries to make the necessary repayments, linked to UIP's uncertain status, which had justified the rejection, the Court finds that it was indeed the uncertain status of UIP and its subsidiaries that lay at the root of the rejection of the loan applications.

102 It is true that the Member of the Commission with responsibility for competition matters, Mr Van Miert, stated in his letter to UIP's counsel that there was no link between the procedure concerning UIP's application for the renewal of its exemption under Article 85(3) of the Treaty and the procedure concerning the grant of subsidies by EFDO. That reply may, however, be perfectly well interpreted, as the Commission suggested at the hearing, as meaning that, from the specific standpoint of Community competition law, the absence at that stage of any decision on UIP's exemption renewal application under Article 85(3) of the Treaty did not preclude the possible grant of the subsidy requested, given that the latter would, if granted, have no impact on the application of the competition rules.

103 The Court considers it appropriate at this stage of its reasoning to recall that the exemption of the basic agreement between UIP's three parent companies providing for its creation as a joint venture, and of the agreements concerning the cooperation of companies within the group, had expired on 26 July 1993. When EFDO made its decision in 1994, UIP was uncertain as to whether its exemption would be renewed or not. There can be no doubt that the future of UIP's subsidiaries depended on that of their parent company, which could not itself continue to exist without renewal of the exemption under Article 85(3) of the Treaty. In those circumstances, it was recognised that those subsidiaries would no longer be able to pursue their activity if the Commission did not renew UIP's exemption.

104 At that time, the situation of UIP and its subsidiaries was entirely uncertain and precarious, since an exemption was necessary in order to render permissible an agreement contrary to Article 85(1) of the Treaty.

105 It follows that the UIP subsidiaries' applications concerning the distribution of the film *Nostradamus*, although eligible, could be rejected on the ground that, for as long as the Commission had not decided whether or not it would renew the exemption granted to UIP under Article 85(3) of the Treaty, the legal position of that company and its subsidiaries remained uncertain. In particular, the Commission and EFDO were entitled to take the view, in the exercise of their discretionary power, that, by reason of that very precariousness, those companies could not be accepted as structures to be supported, even if they had offered every guarantee of repayment of the loans applied for, particularly in the event of a refusal to renew the exemption. Granting such loans to the applicants at a time when it was possible that the Commission might not approve their activity as it was constituted at the time of the relevant facts — thereby possibly precipitating their liquidation — would have been hard to reconcile, first, with the reasonable condition that the Commission could not support structures that were potentially incompatible with the competition rules and, secondly, with the essential aim of the MEDIA programme of encouraging the development of a powerful European audiovisual industry capable of meeting all challenges. Moreover, the grant of loans to the applicants in such circumstances would have had the result of denying all Community financing to other undertakings which, first, pursued an activity which was clearly compatible with the competition rules and, secondly, were willing and able to create or develop a distribution network.

106 It follows that the contested decision fulfilled the requirements of Decision 90/685 and fully complied with the objectives of the MEDIA programme, including in particular that of fostering the creation and development of codistribution networks on Community territory.

107 Furthermore, the aim of stepping up intra-European exchanges of films, making maximum use of the various means of distribution already in existence or to be set up, and of achieving wider dissemination of films in Europe (third indent of Article 2 of Decision 90/685) can be pursued only in so far as it is compatible with the objective which the Commission considered in this case to be essential, namely that of fostering the creation of new codistribution networks. In addition, the funds not allocated to the applicants could be placed at the disposal of other distributors, thereby promoting that objective.

108 Finally, the Court cannot accept the argument that the refusal to grant a loan to companies of the UIP group as long as the Commission had not decided whether or not to renew the exemption granted to UIP under Article 85(3) of the Treaty constituted blatant discrimination against UIP in favour of other distributors. There is no reason to suppose that EFDO and the Commission would have adopted a different position towards applications from another group of companies in the same situation.

109 The first two pleas, essentially alleging that the contested decision was incompatible with the EFDO guidelines and the aims of the MEDIA programme, are therefore unfounded and must be dismissed.

The third plea: insufficient statement of reasons

Summary of the parties' arguments

110 The applicants argue that the statement of reasons in the contested decision does not indicate the real reasons for it, and that the reasons stated are invalid.

111 They point first to the reply by Mr Van Miert, referred to above, to the effect that there was no link between the procedure relating to UIP's application for renewal of its exemption under Article 85(3) of the Treaty and the procedure for the grant of subsidies by EFDO. The statement that no other decision could be made in order not to 'interfere with the legal proceedings instituted by UIP against the Commission', since EFDO's loan contracts were based on a five-year period of cinema release for the supported films, is in their submission wholly incomprehensible.

112 As for the reference to the aim of creating co-distribution networks by fostering cooperation between companies which were previously operating in isolation on their national territory, that ground, the applicants submit, is false, since that was not an objective of the MEDIA programme but merely a description of one of the effects which it was hoped that EFDO's activities would have on the market.

113 Concerning the grounds put forward before the Court, the applicants begin by arguing that a failure to state reasons cannot be remedied by the fact that the person concerned learns the reasons for the decision during the Court proceedings (Case 195/80 *Michel* v *Parliament* [1981] ECR 2861). They go on to maintain that the Commission's interpretation of the 'three different distributors' rule is wrong. They also argue that there could not have been any genuine concerns as to UIP's ability to repay a loan, even if its exemption were not renewed, since, even if that concern were well-founded, it already existed at the time when EFDO decided to grant a loan to UIP's German subsidiary for the distribution of the film *Fuglekrigen i Kanofleskoven* (*War of the Birds*) without requiring any security whatever. The applicants therefore consider that the latter reason was not a genuine cause of concern.

114 They emphasise that the requirement of adequate, clear and relevant reasoning laid down by Article 190 of the Treaty applies just as much to the delegate, EFDO, as to the delegating authority, the Commission (*Meroni*, cited above; Case 24/62 *Germany* v *Commission* [1963] ECR 63). Where, moreover, the decision represents

a departure from previous practice, it is the responsibility of the institution to set out its reasoning explicitly (Case 73/74 *Groupe des Fabricants de Papiers Peints* v *Commission* [1975] ECR 1491). In this case, the applicants submit, the reasons given for rejecting the applications were completely inadequate. Even if, under the guidelines, EFDO had the right in a given situation to reject the applications without giving any reason, those guidelines were nevertheless subject to the Treaty.

115 The Commission argues that the third plea should also be dismissed. The reasoning put forward in the contested decision is correct. It indicates unambiguously the two categories of reasons for rejecting the applications, the first relating to the uncertainty as to UIP's status and its ability to repay a loan, and the second to the general condition providing for cooperation between companies which had previously operated in isolation, a principle underlying the 'three different distributors' rule.

Findings of the Court

116 It should be recalled at the outset that a plea that the statement of reasons is absent or defective is a plea alleging breach of essential procedural requirements, and that, as such, it is distinct from a plea alleging that the reasons given for the contested decision were inaccurate, the review of which, by contrast, forms part of the examination as to whether that decision was well founded.

117 The case-law shows clearly that the statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted the measure in question in such a way as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights and the Community judicature to exercise its power of review. It is

also settled case-law that the question whether the statement of reasons for a decision meets the requirements of Article 190 of the Treaty 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 T-95/94 *Sytraval and Brink's France* v *Commission* [1995] ECR II-2651, paragraph 52, and the cases cited therein).

118 The contested decision was worded as follows:

'On 5 December 1994, the Committee of EFDO turned down the applications of UIP for the films *Maniaci Sentimentali* and *Nostradamus* as it has not yet been decided by the Commission of the European Union what UIP's status will be in Europe in the future. Since EFDO's loan contracts are based on a five-year period of theatrical release for the supported films, no other decision could be made in order not to interfere with the legal proceedings instituted by UIP against the Commission of the European Union.

In addition to that, the Committee of EFDO thinks that UIP does not fully fulfil the aims of the MEDIA Programme as described below:

" ... to set up co-distribution networks by fostering cooperation between companies which were previously operating in isolation on their national territory." (Action Programme to Promote the Development of the European Audiovisual Industry "MEDIA" 1991-1995).'

119 The Court considers that the first part of the statement of reasons makes a sufficiently clear reference to the exemption procedure pending before the Commission as a ground for rejection. Even though the wording is imprecise, the applicants can

have had no doubt as to its import. It was undoubtedly known to the whole cinematographic industry, and certainly to the subsidiaries of UIP, that the latter had requested the renewal of its exemption under Article 85(3) of the Treaty. Moreover, when EFDO stated that it could not 'interfere' with that procedure, the applicants must reasonably have understood that an entity such as UIP, being a party to a proceeding under the competition rules, could not benefit directly, or indirectly through its subsidiaries, from a loan within the context of the MEDIA programme.

120 As for the second part of the statement of reasons, the statement that 'UIP does not fully fulfil the aims of the MEDIA Programme [... which is, in particular, to foster] cooperation between companies which were previously operating in isolation on their national territory' must reasonably be understood as a reference to the rule that at least three different distributors must agree to create a new cooperation network and to the fact that the network formed by the UIP subsidiaries, without the participation of other companies, did not satisfy that condition.

121 More particularly, concerning the fact that that objective does not appear expressly in Decision 90/685, the Court would point out first that the aim of fostering new contacts and cooperation between distributors established in various European countries is reflected in Decision 90/685 in several respects (see paragraphs 86 and 88 above). As for the fact that the Commission's communication on audiovisual policy was not published in the *Official Journal of the European Communities*, it should be noted that that communication was not confidential and could easily be obtained from the Commission. There can be no doubt that the applicants had a copy of that communication, since it was of particular interest to prudent operators in that clearly-defined sector and they themselves stated in their application that the sentence contained in the contested decision came from precisely that

document. The statement of reasons in the contested decision, read in the light of those official documents, is thus all the more clear and satisfies the requirements of the Treaty and the established case-law concerning the reasons stated for measures complained of.

122 In those circumstances, the statement of reasons for the contested decision must be regarded as sufficient.

123 It follows from the above that the third plea cannot be upheld, either.

124 In those circumstances, the application in Case T-85/95 must be dismissed in its entirety.

Costs

125 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. Since the applicants have been unsuccessful in Case T-85/95 and the Commission has applied for costs, they must be ordered to pay all the costs incurred in Case T-85/95.

126 Under Article 87(6) of the Rules of Procedure, where a case does not proceed to judgment, the costs are to be in the discretion of the Court of First Instance. In this case, the Court has ruled that there is no need to adjudicate on Case T-369/94. On the matter of costs, the Court considers that, in this case, that result is equivalent to dismissal of the action. It therefore decides that the applicants must also bear all the costs incurred in Case T-369/94.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. Rules that there is no need to adjudicate on the application in Case T-369/94;

2. Dismisses the application in Case T-85/95;

3. Orders the applicants to bear all the costs.

Saggio Tiili Moura Ramos

Delivered in open court in Luxembourg on 19 February 1998.

H. Jung A. Saggio

Registrar President