Case C-226/11 Expedia Inc. v Autorité de la concurrence and Others, ECLI:EU:C:2012:795

The dispute in the main proceedings and the questions referred for a preliminary ruling

7 In order to expand the sale of train tickets and travel over the internet, SNCF concluded, in September 2001, a number of agreements with Expedia, a company incorporated under US law and specialised in the sale of travel over the internet, and created with it a joint subsidiary called GL Expedia. The website voyages-SNCF.com, which until then specialised in information on the reservation and sale of train tickets over the internet, hosted the activities of GL Expedia and expanded to offer, in addition to its initial services, the services of an online travel agency. In 2004, the joint subsidiary changed its name to Agence de voyages SNCF.com ('Agence VSC').

8 By decision of 5 February 2009, the French Competition Authority found that the partnership between SNCF and Expedia creating Agence VSC constituted an agreement contrary to Article 81 EC and Article L. 420-1 of the Commercial Code, the object and effect of which is to promote that joint subsidiary in the market for travel agency services provided for leisure travel to the detriment of competitors. It imposed financial penalties on Expedia and on SNCF.

9 The Competition Authority found, inter alia, that Expedia and SNCF were competitors in the market for on-line travel agency services, that their market shares were more than 10% and that, consequently, the 'de minimis' rule, as set out in paragraph 7 of the 'de minimis' notice and Article L. 464-2-1 of the Commercial Code, were not applicable.

10 Before the Cour d'appel, Paris, Expedia submitted that the Competition Authority had overestimated the market shares held by Agence VSC. That court did not rule directly on that plea. In its judgment of 23 February 2010, it held, inter alia, in the light of the wording of Article L. 464-6-1 of the Commercial Code and, in particular, the use of the word 'may', that it is possible for the Competition Authority, in any event, to bring proceedings against practices implemented by undertakings whose market share is below the thresholds specified by that article and by the de minimis notice.

11 Ruling on the appeal brought by Expedia against that judgment, the Cour de cassation notes

that it is not disputed that, as the Competition Authority concluded, the agreement at issue in the main proceedings has an anti-competitive object. It considers that, in view of the relevant case-law of the Court, it is not established that the Commission would bring proceedings against such an agreement where the market shares concerned do not exceed the thresholds specified in the de minimis notice.

12 The national court is of the opinion, moreover, that the assertions set out in paragraphs 4 and 6 of the de minimis notice, to the effect that that notice is not binding on the courts and authorities of the Member States and is without prejudice to any interpretation of Article 101 TFEU that may be given by the courts of the European Union, give rise to uncertainty as to whether the market share thresholds established by that notice amount to a non-rebuttable presumption of there being no appreciable effect on competition as provided for in that article.

13 In those circumstances, the Cour de cassation decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must Article 101(1) TFEU and Article 3(2) of Regulation (EC) No 1/2003 be interpreted as precluding the bringing of proceedings and the imposition of penalties by a national competition authority, on the grounds of both Article 101(1) TFEU and the national law of competition, in respect of a practice under agreements, decisions of associations of undertakings or concerted action that may affect trade between Member States, but that does not reach the thresholds specified by the European Commission in its [de minimis] notice?’

The question referred for a preliminary ruling

14 By its question, the referring court seeks to know, essentially, whether Article 101(1) TFEU and Article 3(2) of Regulation No 1/2003 must be interpreted as precluding a national competition authority from applying Article 101(1) TFEU to an agreement between undertakings that may affect trade between Member States, but that does not reach the thresholds specified by the Commission in its de minimis notice.

15 It should be noted that Article 101(1) TFEU prohibits as incompatible with the internal market all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal

market.

16 It is settled case-law that an agreement of undertakings falls outside the prohibition in that provision, however, if it has only an insignificant effect on the market (Case 5/69 Völk v Vervaecke [1969] ECR 295, paragraph 7; Case C-7/95 P John Deere v Commission [1998] ECR I-3111, paragraph 77; Joined Cases C-215/96 and C-216/96 Bagnasco and Others [1999] ECR I-135, paragraph 34; and Case C-238/05 Asnef-Equifax and Administración del Estado [2006] ECR I-11125, paragraph 50).

17 Accordingly, if it is to fall within the scope of the prohibition under Article 101(1) TFEU, an agreement of undertakings must have the object or effect of perceptibly restricting competition within the common market and be capable of affecting trade between Member States (Case C-70/93 BMW v ALD [1995] ECR I-3439, paragraph 18; Case C-306/96 Javico [1998] ECR I-1983, paragraph 12; and Case C-260/07 Pedro IV Servicios [2009] ECR I-2437, paragraph 68).

18 With regard to the role of Member State authorities in the enforcement of Union competition law, the first sentence of Article 3(1) of Regulation No 1/2003 establishes a close link between the prohibition of the agreements set out in Article 101 TFEU and the corresponding provisions of national competition law. Where the national competition authority applies provisions of national law prohibiting cartels to an agreement of undertakings which is capable of affecting trade between Member States within the meaning of Article 101 TFEU, the first sentence of Article 3(1) requires Article 101 TFEU also to be applied to it in parallel (Case C-17/10 Toshiba Corporation [2012] ECR, paragraph 77).

19 Under Article 3(2) of Regulation No 1/2003, the application of national competition law may not lead to the prohibition of such agreements if they do not restrict competition within the meaning of Article 101(1) TFEU.

20 It follows that the competition authorities of the Member States can apply the provisions of national law prohibiting cartels to an agreement of undertakings which is capable of affecting trade between Member States within the meaning of Article 101 TFEU only where that agreement perceptibly restricts competition within the common market.

21 The Court has held that the existence of such a restriction must be assessed by reference to the actual circumstances of such an agreement (Case 1/71 Cadillon [1971] ECR 351, paragraph 8). Regard must be had, inter alia, to the content of its provisions, the objectives it seeks to attain and the economic and legal context of which it forms a part (Joined Cases C-501/06 P, C-513/06 P, C-516/06 P and C-519/06 P GlaxoSmithKline Services and Others v Commission and Others [2009] ECR I-9291, paragraph 58). It is also appropriate to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and the structure of the market or markets in question (see, to that effect, Asnef-Equifax and Administración del Estado, paragraph 49).

22 In its examination, the Court found, inter alia, that an exclusive dealing agreement, even with absolute territorial protection, has only an insignificant effect on the market in question, taking into account the weak position which the persons concerned have in that market, (Völk, paragraph 7, and Cadillon, paragraph 9). In other cases, however, it did not base its decision on the position of the persons concerned in the market in question. Accordingly, in paragraph 35 of Bagnasco and Others, it found that an agreement between the members of a banking association which excludes the right, with regard to the opening of current-account credit facilities, to adopt a fixed interest rate cannot have an appreciable restrictive effect on competition, since any variation of the interest rate depends on objective factors, such as changes occurring in the money market.

23 It is apparent from paragraphs 1 and 2 of the de minimis notice that the Commission intends to quantify therein, with the help of market share thresholds, what is not an appreciable restriction of competition within the meaning of Article 101 TFEU and the case-law cited in paragraphs 16 and 17 of the present judgment.

24 With regard to the wording of the de minimis notice, its non-binding nature, for both the competition authorities and the courts of the Member States, is emphasised in the third sentence of paragraph 4 thereof.

25 Furthermore, in the second and third sentences of paragraph 2 of that notice, the Commission states that market share thresholds used quantify what is not an appreciable restriction of competition within the meaning of Article 101 TFEU, but that the negative definition of the appreciability of such restriction does not imply that agreements of

undertakings which exceed those thresholds appreciably restrict competition.

26 Moreover, contrary to the Commission notice on cooperation within the network of competition authorities (OH 2004 C 101, p. 43), the de minimis notice does not contain any reference to declarations by the competition authorities of the Member States that they acknowledge the principles set out therein and that they will abide by them.

27 It also follows from the objectives pursued by the de minimis notice, as mentioned in paragraph 4 thereof, that it is not intended to be binding on the competition authorities and the courts of the Member States.

28 It is apparent from that paragraph, first, that the purpose of that notice is to make transparent the manner in which the Commission, acting as the competition authority of the European Union, will itself apply Article 101 TFEU. Consequently, by the de minimis notice, the Commission imposes a limit on the exercise of its discretion and must not depart from the content of that notice without being in breach of the general principles of law, in particular the principles of equal treatment and the protection of legitimate expectations (see, to that effect, Joined Cases C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P Dansk Rørindustri and Others v Commission [2005] ECR I-5425, paragraph 211). Furthermore, it intends to give guidance to the courts and authorities of the Member States in their application of that article.

29 Consequently, and as the Court has already had occasion to point out, a Commission notice, such as the de minimis notice, is not binding in relation to the Member States (see, to that effect, Case C-360/09 Pfleiderer [2011] ECR I-5161, paragraph 21).

30Accordingly, that notice was published in 2001 in the ‘C’ series of the Official Journal of the European Union, which, by contrast with the ‘L’ series of the Official Journal, is not intended for the publication of legally binding measures, but only of information, recommendations and opinions concerning the European Union (see, by analogy, Case C-410/09 Polska Telefonia Cyfrowa [2011] ECR I-3853, paragraph 35).

31Consequently, in order to determine whether or not a restriction of competition is appreciable, the competition authority of a Member State may take into account the thresholds

established in paragraph 7 of the de minimis notice but is not required to do so. Such thresholds are no more than factors among others that may enable that authority to determine whether or not a restriction is appreciable by reference to the actual circumstances of the agreement.

32Contrary to what Expedia argued during the hearing, the proceedings brought and penalties imposed by the competition authority of a Member State, on undertakings that enter into an agreement that has not reached the thresholds defined in the de minimis notice, cannot infringe, as such, the principles of legitimate expectations and legal certainty, having regard to the wording of paragraph 4 of that notice.

33 Furthermore, as the Advocate General pointed out in point 33 of her Opinion, the principle of the lawfulness of penalties does not require the de minimis notice to be regarded as a legal measure binding on the national authorities. Cartels are already prohibited by the primary law of the European Union, that is, by Article 101(1) TFEU.

34In so far as Expedia, the French Government and the Commission have, in their written observations or during the hearing, questioned the finding made by the national court that it is not disputed that the agreement at issue in the main proceedings had an anti-competitive object, it should be remembered that, in proceedings under Article 267 TFEU, which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the main proceedings is a matter for the national court (Case C-409/06 Winner Wetten [2010] ECR I-8015, paragraph 49 and the case-law cited).

35Moreover, it should be noted that, according to settled case-law, for the purpose of applying Article 101(1) TFEU, there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition (see, to that effect, Joined Cases 56/64 and 58/64 Consten and Grundig v Commission [1966] ECR 299; Case C-272/09 P KME Germany and Others v Commission [2011] ECR I-12789, paragraph 65; and Case C-389/10 P KME Germany and Others v Commission [2011] ECR I-13125, paragraph 75).

36In that regard, the Court has emphasised that the distinction between ‘infringements by object’ and ‘infringements by effect’ arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper

functioning of normal competition (Case C-209/07 Beef Industry Development Society and Barry Brothers ('BIDS') [2008] ECR I-8637, paragraph 17, and Case C-8/08 T-Mobile Netherlands and Others [2009] ECR I-4529, paragraph 29).

37 It must therefore be held that an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition.

38 In light of the above, the answer to the question referred is that Article 101(1) TFEU and Article 3(2) of Regulation No 1/2003 must be interpreted as not precluding a national competition authority from applying Article 101(1) TFEU to an agreement between undertakings that may affect trade between Member States, but that does not reach the thresholds specified by the Commission in its de minimis notice, provided that that agreement constitutes an appreciable restriction of competition within the meaning of that provision.

Articles 101(1) TFUE and 3(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] must be interpreted as not precluding a national competition authority from applying Article 101(1) TFEU to an agreement between undertakings that may affect trade between Member States, but that does not reach the thresholds specified by the European Commission in its notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1), [EC] (de minimis), provided that that agreement constitutes an appreciable restriction of competition within the meaning of that provision.

Case C-234/89 Stergios Delimitis v Henninger Bräu AG, ECLI:EU:C:1991:91 [excerpt]

NOTE: Article 85 EEC = Article 101 TFEU

1 By an order of 13 July 1989, which was received at the Court on 27 July 1989, the Oberlandesgericht Frankfurt am Main referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty several questions on the interpretation of Article 85 of the EEC Treaty and of Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article 85(3) of the Treaty to categories of exclusive purchasing agreements (Official Journal 1983 L 173, p. 5, corrected by the Corrigendum in Official Journal 1983 L 281, p. 24).

2 Those questions were raised in proceedings between Mr Stergios Delimitis, formerly the licensee of premises for the sale and consumption of drinks in Frankfurt am Main (hereinafter referred to as "the publican") and the brewery Henninger Braeu AG, established in Frankfurt (hereinafter referred to as "the brewery"). The dispute relates to an amount claimed from the publican by the brewery following the termination at the publican's request of the contract entered into between them on 14 May 1985.

3 Under Clause 1 of that contract the brewery let to the publican a public house. Clause 6 of the contract required the publican to obtain supplies of draft, bottled and canned beer from the brewery, and soft drinks from the brewery's subsidiaries. The range of products in question was determined on the basis of the current price lists of the brewery and its subsidiaries. However, the publican was permitted to purchase beers and soft drinks offered by undertakings established in other Member States.

4 Under Clause 6 the publican had to purchase a minimum quantity of 132 hectolitres of beer a year. If he bought less, he was required to pay a penalty for non-performance.

5 The contract was terminated by the publican on 31 December 1986. The brewery considered that he still owed it the sum of DM 6 032,15, comprising rent, a lump sum penalty for failure to observe the minimum purchasing requirement and miscellaneous costs. The brewery deducted that amount from the tenant's deposit which had been paid by the publican.

6 The publican challenged the deduction made by the brewery and brought proceedings against it before the Landgericht (Regional Court) Frankfurt am Main in order to recover the sum

deducted. In support of his claim, he contended, inter alia, that the contract was automatically void by virtue of Article 85(2) of the EEC Treaty. By a judgment of 10 February 1988, the Landgericht dismissed the action. It considered that the contract did not affect trade between the Member States within the meaning of Article 85(1) on the ground, in particular, that it left the publican free to obtain supplies in other Member States; in the Landgericht's view, it was therefore immaterial that the contract in question did not observe the conditions for block exemption provided for in the abovementioned Regulation No 1984/83.

7 The publican lodged an appeal against the Landgericht' s judgment with the Oberlandesgericht Frankfurt am Main which considered that it was necessary to ask the Court of Justice for a preliminary ruling on the compatibility of the beer supply agreements with Community competition rules and accordingly referred the following questions to it:

"A - 1) Can an individual beer supply agreement containing an exclusive purchasing clause, such as the agreement between the parties, be such as to affect, to an appreciable degree, trade between Member States within the meaning of Article 85(1) of the EEC Treaty because it forms part of a 'bundle' of similar beer supply agreements in that Member State - no matter which brewery is involved - and the capacity to produce adverse effects on trade between States is to be assessed according to the effects on the market of that 'bundle of agreements' ?

2) If Question 1 is answered in the affirmative:
How high must the proportion of tied outlets in a Member State be for there to exist an appreciable effect on international trade; would the figure of some 60% accepted by the Commission of the European Communities for the proportion of tied outlets in the Federal Republic of Germany be sufficient for that purpose?

3. If Question 1 is answered in the negative:
Are the cumulative effects on the market of the totality of the beer supply agreements in the Federal Republic of Germany involving exclusive ties and/or the contributory role of the extant network of agreements to be ascertained by a comprehensive examination of the respective circumstances; if so, what are the criteria for such an examination and does special importance attach to any of the following factors:
- the size of the brewery making the tied-outlet agreement,
- the volume of trade affected by a single agreement,

- the volume of trade covered by the whole 'bundle' of agreements,
- the number of existing agreements, their duration, the volume of goods affected and their importance in comparison with the trade of sellers not subject to such ties,
- the contractual commitment imposed on the publican by the brewery, the drinks supplier or the landlord in the tenancy agreement,
- the volume of supplies to premises used for the sale and consumption of drinks, by independent wholesalers not subject to ties,
- the extent of ties to foreign producers,
- the density of tied outlets in particular geographical areas
- a comparison with sales outside premises for the sale and consumption of drinks, and sales trends in this field,
- the possibility of setting up or purchasing new outlets?

4) If Question 1 or Question 3 is answered in the affirmative:

Is a beer-purchasing agreement which explicitly leaves the publican at liberty to purchase beer from other Member States (an 'access clause') in principle incapable of affecting trade between Member States or does the answer depend partly on whether - and to what extent - a minimum supply is agreed and on the rights (as to damages, notice of termination, etc.) accruing to the brewery in the event of insufficient purchases?

B - 1) Are the conditions laid down in Articles 1 and 6(1) of Regulation (EEC) No 1984/83 on block exemptions satisfied if the drinks covered by the purchase commitment are not listed in the text of the contract, but it is agreed that the range will be as set out in the brewery' s price list as amended from time to time?

2) Does a beer-supply agreement as a whole cease to be exempted by Regulation No 1984/83 from the prohibition in Article 85(1) of the EEC Treaty if it contains a commitment to buy soft drinks without including a 'more-favourable-conditions' clause as envisaged by Article 8(2)(b) of Regulation No 1984/83, as might be inferred from Article 2(1) thereof, read in conjunction with paragraph 17 of the Commission Notice concerning Commission Regulations (EEC) No 1983/83 and No 1984/83 of 22 June 1983, or does this mean that only this particular commitment under the purchasing agreement is void by virtue of Article 85(2) of the EEC Treaty because it is in itself permissible under Article 2(1) of Regulation No 1984/83?

C - Does a beer-purchasing agreement which falls under Article 85 of the EEC Treaty and does not meet the conditions under Regulation No 1984/83 on block exemptions always require a

specific exemption or does the national court have power to treat the agreement as valid where there is a minor divergence from the aforesaid regulation?"

8 Reference is made to the Report for the Hearing for a fuller account of the facts and the background to the main proceedings, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

9 In Questions A(1), (2) and (3), the national court seeks to ascertain the criteria to be applied in examining whether a beer supply agreement is compatible with Article 85(1) of the EEC Treaty. In Question A(4), the national court is essentially asking whether those criteria differ where the beer supply agreement contains an access clause which expressly allows the publican to obtain supplies in other Member States. Questions B(1) and (2) relate to the interpretation of Regulation No 1984/83, and in particular Articles 6 and 8 thereof. Question C concerns the jurisdiction of a national court to apply Article 85 of the EEC Treaty to a beer supply agreement which does not fulfil the conditions for exemption laid down in Regulation No 1984/83.

The compatibility of beer supply agreements with Article 85(1) of the Treaty

10 Under the terms of beer supply agreements, the supplier generally affords the reseller certain economic and financial benefits, such as the grant of loans on favourable terms, the letting of premises for the operation of a public house and the provision of technical installations, furniture and other equipment necessary for its operation. In consideration for those benefits, the reseller normally undertakes, for a predetermined period, to obtain supplies of the products covered by the contract only from the supplier. That exclusive purchasing obligation is generally backed by a prohibition on selling competing products in the public house let by the supplier.

11 Such contracts entail for the supplier the advantage of guaranteed outlets, since, as a result of his exclusive purchasing obligation and the prohibition on competition, the reseller concentrates his sales efforts on the distribution of the contract goods. The supply agreements, moreover, lead to cooperation with the reseller, allowing the supplier to plan his sales over the duration of the agreement and to organize production and distribution effectively.

12 Beer supply agreements also have advantages for the reseller, inasmuch as they enable him

to gain access under favourable conditions and with the guarantee of supplies to the beer distribution market. The reseller's and supplier's shared interest in promoting sales of the contract goods likewise secures for the reseller the benefit of the supplier's assistance in guaranteeing product quality and customer service.

13 If such agreements do not have the object of restricting competition within the meaning of Article 85(1), it is nevertheless necessary to ascertain whether they have the effect of preventing, restricting or distorting competition.

14 In its judgment in Case 23/67 Brasserie De Haecht v Wilkin [1967] ECR 407, the Court held that the effects of such an agreement had to be assessed in the context in which they occur and where they might combine with others to have a cumulative effect on competition. It also follows from that judgment that the cumulative effect of several similar agreements constitutes one factor amongst others in ascertaining whether, by way of a possible alteration of competition, trade between Member States is capable of being affected.

15 Consequently, in the present case it is necessary to analyse the effects of a beer supply agreement, taken together with other contracts of the same type, on the opportunities of national competitors or those from other Member States, to gain access to the market for beer consumption or to increase their market share and, accordingly, the effects on the range of products offered to consumers.

16 In making that analysis, the relevant market must first be determined. The relevant market is primarily defined on the basis of the nature of the economic activity in question, in this case the sale of beer. Beer is sold through both retail channels and premises for the sale and consumption of drinks. From the consumer's point of view, the latter sector, comprising in particular public houses and restaurants, may be distinguished from the retail sector on the grounds that the sale of beer in public houses does not solely consist of the purchase of a product but is also linked with the provision of services, and that beer consumption in public houses is not essentially dependent on economic considerations. The specific nature of the public house trade is borne out by the fact that the breweries organize specific distribution systems for this sector which require special installations, and that the prices charged in that sector are generally higher than retail prices.

17 It follows that in the present case the reference market is that for the distribution of beer in premises for the sale and consumption of drinks. That finding is not affected by the fact that there is a certain overlap between the two distribution networks, namely inasmuch as retail sales allow new competitors to make their brands known and to use their reputation in order to gain access to the market constituted by premises for the sale and consumption of drinks.

18 Secondly, the relevant market is delimited from a geographical point of view. It should be noted that most beer supply agreements are still entered into at a national level. It follows that, in applying the Community competition rules, account is to be taken of the national market for beer distribution in premises for the sale and consumption of drinks.

19 In order to assess whether the existence of several beer supply agreements impedes access to the market as so defined, it is further necessary to examine the nature and extent of those agreements in their totality, comprising all similar contracts tying a large number of points of sale to several national producers (judgment in Case 43/69 Bilger v Jehle [1970] ECR 127). The effect of those networks of contracts on access to the market depends specifically on the number of outlets thus tied to national producers in relation to the number of public houses which are not so tied, the duration of the commitments entered into, the quantities of beer to which those commitments relate, and on the proportion between those quantities and the quantities sold by free distributors.

20 The existence of a bundle of similar contracts, even if it has a considerable effect on the opportunities for gaining access to the market, is not, however, sufficient in itself to support a finding that the relevant market is inaccessible, inasmuch as it is only one factor, amongst others, pertaining to the economic and legal context in which an agreement must be appraised (Case 23/67 Brasserie De Haecht, cited above). The other factors to be taken into account are, in the first instance, those also relating to opportunities for access.

21 In that connection it is necessary to examine whether there are real concrete possibilities for a new competitor to penetrate the bundle of contracts by acquiring a brewery already established on the market together with its network of sales outlets, or to circumvent the bundle of contracts by opening new public houses. For that purpose it is necessary to have regard to the legal rules and agreements on the acquisition of companies and the establishment of outlets, and to the minimum number of outlets necessary for the economic operation of a distribution

system. The presence of beer wholesalers not tied to producers who are active on the market is also a factor capable of facilitating a new producer's access to that market since he can make use of those wholesalers' sales networks to distribute his own beer.

22 Secondly, account must be taken of the conditions under which competitive forces operate on the relevant market. In that connection it is necessary to know not only the number and the size of producers present on the market, but also the degree of saturation of that market and customer fidelity to existing brands, for it is generally more difficult to penetrate a saturated market in which customers are loyal to a small number of large producers than a market in full expansion in which a large number of small producers are operating without any strong brand names. The trend in beer sales in the retail trade provides useful information on the development of demand and thus an indication of the degree of saturation of the beer market as a whole. The analysis of that trend is, moreover, of interest in evaluating brand loyalty. A steady increase in sales of beer under new brand names may confer on the owners of those brand names a reputation which they may turn to account in gaining access to the public-house market.

23 If an examination of all similar contracts entered into on the relevant market and the other factors relevant to the economic and legal context in which the contract must be examined shows that those agreements do not have the cumulative effect of denying access to that market to new national and foreign competitors, the individual agreements comprising the bundle of agreements cannot be held to restrict competition within the meaning of Article 85(1) of the Treaty. They do not, therefore, fall under the prohibition laid down in that provision.

24 If, on the other hand, such examination reveals that it is difficult to gain access to the relevant market, it is necessary to assess the extent to which the agreements entered into by the brewery in question contribute to the cumulative effect produced in that respect by the totality of the similar contracts found on that market. Under the Community rules on competition, responsibility for such an effect of closing off the market must be attributed to the breweries which make an appreciable contribution thereto. Beer supply agreements entered into by breweries whose contribution to the cumulative effect is insignificant do not therefore fall under the prohibition under Article 85(1).

25 In order to assess the extent of the contribution of the beer supply agreements entered into

by a brewery to the cumulative sealing-off effect mentioned above, the market position of the contracting parties must be taken into consideration. That position is not determined solely by the market share held by the brewery and any group to which it may belong, but also by the number of outlets tied to it or to its group, in relation to the total number of premises for the sale and consumption of drinks found in the relevant market.

26 The contribution of the individual contracts entered into by a brewery to the sealing-off of that market also depends on their duration. If the duration is manifestly excessive in relation to the average duration of beer supply agreements generally entered into on the relevant market, the individual contract falls under the prohibition under Article 85(1). A brewery with a relatively small market share which ties its sales outlets for many years may make as significant a contribution to a sealing-off of the market as a brewery in a relatively strong market position which regularly releases sales outlets at shorter intervals.

27 The reply to be given to the first three questions is therefore that a beer supply agreement is prohibited by Article 85(1) of the EEC Treaty, if two cumulative conditions are met. The first is that, having regard to the economic and legal context of the agreement at issue, it is difficult for competitors who could enter the market or increase their market share to gain access to the national market for the distribution of beer in premises for the sale and consumption of drinks. The fact that, in that market, the agreement in issue is one of a number of similar agreements having a cumulative effect on competition constitutes only one factor amongst others in assessing whether access to that market is indeed difficult. The second condition is that the agreement in question must make a significant contribution to the sealing-off effect brought about by the totality of those agreements in their economic and legal context. The extent of the contribution made by the individual agreement depends on the position of the contracting parties in the relevant market and on the duration of the agreement.

The compatibility with Article 85(1) of a beer supply agreement containing an access clause

28 A beer supply agreement containing an access clause differs from the other beer supply agreements normally entered into inasmuch as it authorizes the reseller to purchase beer from other Member States. Such access mitigates, in favour of the beers of other Member States, the scope of the prohibition on competition which in a classic beer supply agreement is coupled with the exclusive purchasing obligation. The scope of the access clause must be assessed in the light of its wording and its economic and legal context.

29 As far as its wording is concerned, it should be noted that the clause affords only very limited access if it is regarded as solely authorizing the reseller himself to purchase competing beers in other Member States. However, the degree of access is greater if it also permits the reseller to sell beers imported from other Member States by other undertakings.

30 As far as its economic and legal context is concerned, it should be pointed out that where, as in this case, one of the other clauses stipulates that a minimum quantity of the beers envisaged in the agreement must be purchased, it is necessary to examine what that quantity represents in relation to the sales of beer normally achieved in the public house in question. If it appears that the stipulated quantity is relatively large, the access clause ceases to have any economic significance and the prohibition on selling competing beers regains its full force, particularly when under the agreement the obligation to purchase minimum quantities is backed by penalties.

31 If the interpretation of the wording of the access clause or an examination of the specific effect of the contractual clauses as a whole in their economic and legal context shows that the limitation on the scope of the prohibition on competition is merely hypothetical or without economic significance, the agreement in question must be treated in the same way as a classic beer supply agreement. Accordingly, it must be assessed under Article 85(1) of the Treaty in the same way as beer supply agreements in general.

32 The position is different where the access clause gives a national or foreign supplier of beers from other Member States a real possibility of supplying the sales outlet in question. An agreement containing such a clause is not in principle capable of affecting trade between Member States within the meaning of Article 85(1), with the result that it escapes the prohibition laid down in that provision.

33 The reply to the Oberlandesgericht's fourth question should therefore be that a beer supply agreement which permits the reseller to buy beer from other Member States is not such as to affect trade between States provided that the permission corresponds to a real possibility for a national or foreign supplier to supply the reseller with beers from other Member States.

Case C-439/09 Pierre Fabre Dermo-Cosmétique SAS v Président de l'Autorité de la concurrence and Ministre de l'Économie, de l'Industrie et de l'Emploi, ECLI:EU:C:2011:649

The dispute in the main proceedings and the question referred for a preliminary ruling

9 Pierre Fabre Dermo-Cosmétique is one of the companies in the Pierre Fabre group. It manufactures and markets cosmetics and personal care products and has several subsidiaries, including, inter alia, the Klorane, Ducray, Galénic and Avène laboratories, whose cosmetic and personal care products are sold, under those brands, mainly through pharmacists, on both the French and the European markets.

10 The products at issue are cosmetics and personal care products which are not classified as medicines and are, therefore, not covered by the pharmacists' monopoly laid down by the code de la santé publique (Public Health Code).

11 In 2007, the Pierre Fabre group had 20% of the French market for those products.

12 Distribution contracts for those products in respect of the Klorane, Ducray, Galénic and Avène brands stipulate that such sales must be made exclusively in a physical space, in which a qualified pharmacist must be present.

13 Articles 1.1 and 1.2 of the general conditions of distribution and sale of the brands stpulate: 'The authorised distributor must supply evidence that there will be physically present at its outlet at all times during the hours it is open at least one person specially trained to:
acquire a thorough knowledge of the technical and scientific characteristics of the products…, necessary for the proper fulfilment of the obligations of professional practice…
regularly and consistently give the consumer all information concerning the correct use of the products... give on-the-spot advice concerning sale of the…product that is best suited to the specific health or care matters raised with him or her, in particular those concerning the skin, hair and nails. In order to do this, the person in question must have a degree in pharmacy awarded or recognised in France… The authorised distributor must undertake to dispense the products…only at a marked, specially allocated outlet…'

14 Those requirements exclude de facto all forms of selling by internet.

15 By decision of 27 June 2006, the Competition Authority opened an ex officio investigation of practices in the distribution sector for cosmetics and personal care products.

16 By decision No 07-D-07 of 8 March 2007, the Competition Authority approved and made binding the commitments proposed by the group of undertakings concerned, with the exception of Pierre Fabre Dermo-Cosmétique, to amend their selective distribution contracts in order to enable the members of their networks to sell their products via the internet, subject to certain conditions. The proceedings opened against Pierre Fabre Dermo-Cosmétique followed their ordinary course.

17 During the administrative proceedings, Pierre Fabre Dermo-Cosmétique explained that the products at issue, by their nature, require the physical presence of a qualified pharmacist at the point of sale during all opening hours, in order that the customer may, in all circumstances, request and obtain the personalised advice of a specialist, based on the direct observation of the customer's skin, hair and scalp.

18 In view of the fact that there might be an effect on trade between the Member States, the Competition Authority analysed the practice in question in the light of the provisions of French competition law and European Union law.

19 In the contested decision, the Competition Authority first of all noted that the ban on internet sales amounted to a limitation on the commercial freedom of Pierre Fabre Dermo-Cosmétique's distributors by excluding a means of marketing its products. Moreover, that prohibition restricted the choice of consumers wishing to purchase online and ultimately prevented sales to final purchasers who are not located in the 'physical' trading area of the authorised distributor. According to the Authority, that limitation necessarily has the object of restricting competition, in addition to the limitation inherent in the manufacturer's very choice of a selective distribution system, which limits the number of distributors authorised to distribute the product and prevents distributors from selling the goods to non-authorised distributors.

20 Since Pierre Fabre Dermo-Cosmétique's market share is less than 30%, the Competition Authority examined whether the restrictive practice could benefit from the block exemption provided for in Regulation No 2790/1999. Although the practice of prohibiting internet selling

is not expressly referred to in that regulation, it is equivalent to a ban on active and passive sales. Consequently, the practice falls within Article 4(c) of the regulation, which excludes restrictions on active or passive sales by members of a selective distribution system from the automatic block exemption.

21 According to the Competition Authority, the ban on internet sales does not meet the conditions for exception provided for in Article 4(c) of Regulation No 2790/1999, according to which those restrictions on sales are without prejudice to the possibility of prohibiting a member of the system from operating 'out of an unauthorised place of establishment'. The Authority held that the internet is not a place where goods are marketed, but an alternative means of selling which is used in the same way as direct selling in a shop or mail-order selling by distributors in a network which have physical outlets.

22 Moreover, the Competition Authority noted that Pierre Fabre Dermo-Cosmétique failed to demonstrate that it could benefit from an individual exemption pursuant to Article 81(3) EC and to Article L. 420-4, paragraph 1, of the Commercial Code.

23 In that regard, the Authority rejected Pierre Fabre Dermo-Cosmétique's argument that the ban on internet sales at issue contributes to improving the distribution of dermo-cosmetic products whilst avoiding the risks of counterfeiting and of free-riding between authorised pharmacies. Pierre Fabre Dermo-Cosmétique's choice of a selective distribution system, with the presence of a pharmacist at the place of sale, guaranteed that an advisory service is provided at all authorised pharmacies and that each of them bears the cost.

24 In response to Pierre Fabre Dermo-Cosmétique's argument on the need for a pharmacist to be physically present when the products at issue are purchased, in order to ensure the consumer's well-being, the Competition Authority first of all noted that the products concerned were not medicines. In this respect, the specific legislation by which they are governed concerns rules which apply to their manufacture and not to their distribution which is free, and, moreover, a pharmacist does not have the power to make a diagnosis, only a doctor being authorised to do so. The Competition Authority then applied Case C-322/01 Deutscher Apothekerverband [2003] ECR I-14887, concerning restrictions on the distribution of non-prescription medicines via the internet, to the products at issue.

25 According to the Competition Authority, Pierre Fabre Dermo-Cosmétique also failed to demonstrate in what way visual contact between the pharmacist and the users of the product ensures 'cosmetovigilance', which requires health-care professionals to record and communicate any adverse reactions to cosmetic products. Indeed, any negative effects of the products at issue will become apparent only after the product has been used and not when it is purchased. In the event of problems linked to its use, the patient will tend to consult a doctor.

26 In response to Pierre Fabre Dermo-Cosmétique's final argument, the Competition Authority did not find the fact that internet distribution does not lead to a reduction in prices to be relevant. The benefit for the consumer lies not only in the reduction of prices, but also in the improvement of the service offered by the distributors including, inter alia, the possibility of ordering the products at a distance, without time restrictions, with easy access to information about the products and allowing prices to be compared.

27 The Competition Authority thus concluded that the ban imposed by Pierre Fabre Dermo-Cosmétique on its authorised distributors on selling via the internet amounts to a restriction on competition contrary to Article 81 EC and Article L. 420-1 of the Commercial Code, and ordered it to remove from its selective distribution contracts all terms that are equivalent to a ban on internet sales of its cosmetics and personal care products and to make express provision in its contracts for an option for its distributors to use that method of distribution. Pierre Fabre Dermo-Cosmétique was ordered to pay a fine of EUR 17 000.

28 On 24 December 2008, Pierre Fabre Dermo-Cosmétique brought an action for annulment and, in the alternative, for amendment of the contested decision before the cour d'appel de Paris. At the same time Pierre Fabre Dermo-Cosmétique requested the first president of the court to stay execution of the contested decision. In support of its action, Pierre Fabre Dermo-Cosmétique claimed, primarily, that the contested decision was vitiated by an error of law in that it denied the contested practice the benefit of both the block exemption provided for in Regulation No 2790/1999 and the individual exemption provided for in Article 81(3) EC.

29 On 18 February 2009, the first president of the cour d'appel de Paris ordered a stay of execution of the orders made by the Competition Authority against Pierre Fabre Dermo-Cosmétique until the referring court had ruled on the merits of the action.

30 In its order for reference, the cour d'appel de Paris, after recalling the reasons behind the contested decision, and the content of the written observations that the European Commission presented pursuant to Article 15(3) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p.1), nevertheless noted that neither the Commission's guidelines nor its observations were binding on the national courts.

31 In those circumstances, the cour d'appel de Paris decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Does a general and absolute ban on selling contract goods to end-users via the internet, imposed on authorised distributors in the context of a selective distribution network, in fact constitute a "hardcore" restriction of competition by object for the purposes of Article 81(1) EC [Article 101(1) TFEU] which is not covered by the block exemption provided for by Regulation No 2790/1999 but which is potentially eligible for an individual exemption under Article 81(3) EC [Article 101(3) TFEU][?]'

Consideration of the question referred

32 It is to be observed at the outset that neither Article 101 TFEU nor Regulation No 2790/1999 refer to the concept of 'hardcore' restriction of competition.

33 In those circumstances, the question referred for a preliminary ruling must be understood as seeking to ascertain, firstly, whether the contractual clause at issue in the main proceedings amounts to a restriction of competition 'by object' within the meaning of Article 101(1) TFEU, secondly, whether a selective distribution contract containing such a clause – where it falls within the scope of Article 101(1) TFEU – may benefit from the block exemption established by Regulation No 2790/1999 and, thirdly, whether, where the block exemption is inapplicable, the contract could nevertheless benefit from the exception provided for in Article 101(3) TFEU.

The classification of the restriction in the contested contractual clause as a restriction of competition by object

34 It must first of all be recalled that, to come within the prohibition laid down in Article 101(1) TFEU, an agreement must have 'as [its] object or effect the prevention, restriction or distortion of competition within the internal market'. It has, since the judgment in Case 56/65

LTM [1966] ECR 235 been settled case-law that the alternative nature of that requirement, indicated by the conjunction 'or', leads, first, to the need to consider the precise purpose of the agreement, in the economic context in which it is to be applied. Where the anticompetitive object of the agreement is established it is not necessary to examine its effects on competition (see Joined Cases C-501/06 P, C-513/06 P, C-516/06 P and C-519/06 P GlaxoSmithKline Services and Others v Commission and Others [2009] ECR I-9291, paragraph 55 and the case-law cited).

35 For the purposes of assessing whether the contractual clause at issue involves a restriction of competition 'by object', regard must be had to the content of the clause, the objectives it seeks to attain and the economic and legal context of which it forms a part (see GlaxoSmithKline and Others v Commission and Others, paragraph 58 and the case law cited).

36 The selective distribution contracts at issue stipulate that sales of cosmetics and personal care products by the Avène, Klorane, Galénic and Ducray brands must be made in a physical space, the requirements for which are set out in detail, and that a qualified pharmacist must be present.

37 According to the referring court, the requirement that a qualified pharmacist must be present at a physical sales point de facto prohibits the authorised distributors from any form of internet selling.

38 As the Commission points out, by excluding de facto a method of marketing products that does not require the physical movement of the customer, the contractual clause considerably reduces the ability of an authorised distributor to sell the contractual products to customers outside its contractual territory or area of activity. It is therefore liable to restrict competition in that sector.

39 As regards agreements constituting a selective distribution system, the Court has already stated that such agreements necessarily affect competition in the common market (Case 107/82 AEG-Telefunken v Commission [1983] ECR 3151, paragraph 33). Such agreements are to be considered, in the absence of objective justification, as 'restrictions by object'.

40 However, it has always been recognised in the case-law of the Court that there are

legitimate requirements, such as the maintenance of a specialist trade capable of providing specific services as regards high-quality and high-technology products, which may justify a reduction of price competition in favour of competition relating to factors other than price. Systems of selective distribution, in so far as they aim at the attainment of a legitimate goal capable of improving competition in relation to factors other than price, therefore constitute an element of competition which is in conformity with Article 101(1) TFEU (AEG-Telefunken v Commission, paragraph 33).

41 In that regard, the Court has already pointed out that the organisation of such a network is not prohibited by Article 101(1) TFEU, to the extent that resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion, that the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use and, finally, that the criteria laid down do not go beyond what is necessary (Case 26/76 Metro SB-Großmärkte v Commission [1977] ECR 1875, paragraph 20, and Case 31/80 L'Oréal [1980] ECR 3775, paragraphs 15 and 16).

42 Although it is for the referring court to examine whether the contractual clause at issue prohibiting de facto all forms of internet selling can be justified by a legitimate aim, it is for the Court of Justice to provide it for this purpose with the points of interpretation of European Union law which enable it to reach a decision (see L'Oréal, paragraph 14).

43 It is undisputed that, under Pierre Fabre Dermo-Cosmétique's selective distribution system, resellers are chosen on the basis of objective criteria of a qualitative nature, which are laid down uniformly for all potential resellers. However, it must still be determined whether the restrictions of competition pursue legitimate aims in a proportionate manner in accordance with the considerations set out at paragraph 41 of the present judgment.

44 In that regard, it should be noted that the Court, in the light of the freedoms of movement, has not accepted arguments relating to the need to provide individual advice to the customer and to ensure his protection against the incorrect use of products, in the context of non-prescription medicines and contact lenses, to justify a ban on internet sales (see, to that effect, Deutscher Apothekerverband, paragraphs 106, 107 and 112, and Case C-108/09 Ker-Optika [2010] ECR I-0000, paragraph 76).

45 Pierre Fabre Dermo-Cosmétique also refers to the need to maintain the prestigious image of the products at issue.

46 The aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU.

47 In the light of the foregoing considerations, the answer to the first part of the question referred for a preliminary ruling is that Article 101(1) TFEU must be interpreted as meaning that, in the context of a selective distribution system, a contractual clause requiring sales of cosmetics and personal care products to be made in a physical space where a qualified pharmacist must be present, resulting in a ban on the use of the internet for those sales, amounts to a restriction by object within the meaning of that provision where, following an individual and specific examination of the content and objective of that contractual clause and the legal and economic context of which it forms a part, it is apparent that, having regard to the properties of the products at issue, that clause is not objectively justified.

T-112/99 Métropole télévision (M6), Suez-Lyonnaise des eaux, France Télécom and Télévision française 1 SA (TF1) v Commission of the European Communities, ECLI:EU:T:2001:215

NOTE: Article 85 EEC, 81 EC = Article 101 TFEU

General background to the case

A - Description of the operation

1 This case relates to Commission Decision 1999/242/EC of 3 March 1999 relating to a proceeding pursuant to Article 85 of the EC Treaty (Case No IV/36.237 - TPS) (OJ 1999 L 90, p. 6) (`the contested decision') concerning the creation of Télévision par satellite (hereinafter `TPS'), whose object is to devise, develop and broadcast, in digital mode by satellite, a range of television programmes and services, against payment, to French-speaking television viewers in Europe (point 76 of the contested decision).

2 TPS, which was set up in the form of a partnership (société en nom collectif) under French law by six major companies active in the television sectors (Metropole television (M6), Télévision française 1 SA (TF1), France 2 and France 3) or in the telecommunication and cable distribution sectors (France Telecom and Suez-Lyonnaise des Eaux) is a new entrant on markets that are very much dominated by a long-standing operator, namely Canal+ and its subsidiary CanalSatellite.

B - The relevant markets and their structure

3 According to the contested decision, the main product market affected by the creation of TPS is the pay-TV market (points 23 and 24 of the contested decision). The operation also affects the market in the acquisition of broadcasting rights and the marketing of special-interest channels

4 As regards the relevant geographic market, the Commission stated in the contested decision that at the time when the decision was adopted, those various markets had to be assessed on a national basis, so that in the present case the markets were confined to France (points 40 to 43 of the contested decision).

1. The pay-TV market in France

5 According to point 25 of the contested decision, this market constitutes a product market that is separate from free-access television (also referred to as `television in clear'). Unlike in the latter market, in which the trade relationship is between the broadcaster and the advertiser, in

the case of pay-TV there is a trade relationship between the broadcaster and the viewer as subscriber. The conditions of competition are therefore different on those two markets.

6 The contested decision also states that, when the decision was adopted, the pay-TV market comprised three methods of transmission (terrestrial, satellite and cable) and that those three different transmission methods did not constitute separate markets (point 30 of the contested decision).

7 The longest-established competitor on the French pay-TV market is Canal+, which enjoys a strong brand image and highly developed know-how in the management of pay-TV (point 44 of the contested decision). The Canal+ group also operates in the cable distribution sector through its control of the NumériCâble network. Moreover, through its subsidiary CanalSatellite, Canal+ offers a bouquet of digital pay-TV satellite channels (hereinafter `the digital bouquet') (point 46 of the contested decision). According to the contested decision, `in terms of numbers of subscribers, the Canal+ group, including the premium channel Canal+, CanalSatellite and the NumériCâble network, accounted for approximately 70% of the French pay-TV market by 30 June 1998'.

8 Another operator on the pay-TV market, AB-Sat, was launched in April 1996 by the French AB group, whose main activity is programme production and the distribution of television rights. AB-Sat had 100 000 subscribers at the end of June 1998 (point 49 of the contested decision).

9 Finally, TPS had 457 000 subscribers at the end of July 1998 and estimated that it would have 600 000 by the end of that year (point 50 of the contested decision).

2. The market for the acquisition of broadcasting rights, in particular with regard to films and sport

10 Since films and sport are the two most popular pay-TV products, the acquisition of broadcasting rights for such programmes is necessary in order to put together a sufficiently attractive range of programmes to convince potential subscribers to pay for receiving television services (point 34 of the contested decision).

11 According to the contested decision, the main competitors of TPS on that market, in particular in the purchase of rights to broadcast French and American films and sporting events, are Canal+ and the special-interest channels in which Canal+ has a stake (point 58 of the contested decision). The Commission also explains in the contested decision that `the Canal+ group enjoys a particularly strong position on this market' and that AB-Sat and the general channels are also present on it (ibidem).

3. The market in the distribution and operation of special-interest channels

12 According to the contested decision, special-interest channels are essential for putting together attractive pay-TV services and the market in the distribution and operation of special-interest channels is enjoying rapid growth in France, particularly with the appearance of digital technology (points 37 to 39 and 65 to 69 of the contested decision).

13 As regards the market structure, the contested decision states: `since the emergence of satellite platforms, the companies involved in pay-TV all have holdings in special-interest channels operating on the market. The stakes held in special-interest channels are fairly evenly distributed among the main players on this market. Canal+ is a major player, however, since it has holdings in the longest-standing channels which have achieved the best penetration of the cable market and have the largest number of subscribers' (points 67 and 68 of the contested decision).

C - The notification and the notified agreements

14 The parties first contacted the Commission in connection with this operation in the summer of 1996, with a view to notification under Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1990 L 257, p. 13, as last amended by Council Regulation (EC) No l310/97 of 30 June 1997 (OJ 1997 L 180, p. 1)) (point 1 of the contested decision). However, having been informed by the Commission that TPS was not a joint venture in the sense of an undertaking under the joint control of its members, on 18 October 1996 they notified the operation to the Commission and requested negative clearance and/or exemption pursuant to Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles 85 and 86 of the Treaty (English Special Edition, Series I (1959-1962) p. 87) (ibidem).

15 Four agreements were notified. The basic principles governing the operation of TPS are set out in the Agreement of 11 and 18 April 1996 (hereinafter `the Agreement'); they were expressed in more concrete and structured terms in the subsequent Associates' Pact signed on 19 June 1996 and in the TPS and TPS Gestion Statutes of the same date (point 70 of the contested decision). The agreements were concluded for a period of 10 years (point 71 of the contested decision).

16 Three clauses contained in those agreements were the subject of the Commission's attention in the contested decision. They are, first, the non-competition clause, second, the clause relating to special-interest channels and, third, the exclusivity clause.

1. The non-competition clause

17 This clause is included in Article 11 of the Agreement and Article 5.3 of the Associates' Pact and, at the Commission's request, its scope was defined by a supplementary agreement of 17 September 1998. It specifies as follows:

`Except for ongoing cases as at the date of conclusion of the agreements, and except for the sale of new programmes and services that are not under contract to TPS, the parties undertake not to become in any way involved, even indirectly, and for as long as they remain TPS shareholders, in companies engaged in or whose object is the distribution and marketing of a range of television programmes and services for payment which are broadcast in digital mode by satellite to French-speaking homes in Europe' (point 77 of the contested decision).

2. The clause relating to special-interest channels

18 Article 6 of the Agreement (under the heading `Digital programmes and services') and Article 5.4 of the Associates' Pact cited above, provide that TPS has a right of priority and a right of final refusal with regard to the production of special-interest channels and television services by its shareholders. The clause is worded as follows:

`In order to supply TPS with the programmes it requires, the parties have agreed to give TPS first refusal in respect of the programmes or services which they themselves operate or over which they have effective control within the producing company, and in respect of the programmes and services which they produce. TPS is also entitled to final refusal or acceptance on the best terms proposed by competitors with regard to any programmes or services which its shareholders offer to third parties. If it accepts them, whether on exclusive terms or not, TPS will apply financial and contractual terms which are at least equivalent to those which the programmes and services could receive elsewhere.

As regards the acquisition of these channels and services, TPS will freely decide, on the basis of its own assessment, whether or not to agree to integrate them into its digital bouquet, either exclusively or non-exclusively; however, the parties underline their objective of having programmes and services in TPS's digital bouquet on an exclusive basis' (points 78 and 79 of the contested decision).

3. The exclusivity clause

19 Lastly, Article 6 of the Agreement provides that the general-interest channels (M6, TF1, France 2 and France 3, are to be broadcast exclusively by TPS (point 81 of the contested decision). TPS is to meet the technical costs of transporting and broadcasting the programmes

but will not pay any remuneration for them (ibidem).

D - The contested decision

20 On 3 March 1999, the Commission adopted the contested decision

21 As is apparent from Article 1 of that decision, the Commission considered that on the basis of the facts in its possession it had no grounds for action pursuant to Article 85(1) of the EC Treaty (now Article 81(1) EC) in respect of the creation of TPS.

22 On the other hand, with regard to the contractual clauses described in paragraphs 17 to 19 above, the Commission concluded that:

- with regard to the non-competition clause, there were no grounds for action in respect of that clause for the period of three years, namely until 15 December 1999 (Article 2 of the contested decision);
- with regard to the exclusivity clause and the clause relating to special-interest channels, those provisions could benefit from an exemption under Article 85(3) of the Treaty for a period of three years, namely until 15 December 1999 (Article 3 of the contested decision).

Procedure and forms of order sought

23 By application lodged at the Registry of the Court of First Instance on 10 May 1999, the applicants brought the present action.

24 By document lodged at the Registry of the Court on 5 November 1999, CanalSatellite sought leave to intervene in these proceedings in support of the form of order sought by the Commission.

25 By order of 31 January 2000 the President of the Third Chamber of the Court granted leave to intervene and agreed in part to the request, lodged by the applicants, for confidential treatment of some information in the application and the annexes thereto.

26 The intervener lodged its statement in intervention on 24 March 2000. The Commission, TF1 and M6 lodged their observations on that statement on 4, 5 and 8 May 2000 respectively

27 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure. As measures of organisation of procedure pursuant to Article 64 of its Rules of Procedure, the Court requested the parties to reply to certain written questions. They complied with that request within the prescribed period.

28 The parties presented oral argument and replied to the Court's questions at the hearing on 18 January 2001.

29 The applicants claim that the Court should:

- annul Articles 2 and 3 of the contested decision;
- order the Commission and the intervener jointly and severally to pay the costs.
30 The Commission and the intervener contend that the Court should: - dismiss the action;
- order the applicants to pay the costs.

- *Misapplication of Article 85(1) of the Treaty (failure to apply a rule of reason)*
Arguments of the parties
68 The applicants submit that the Commission should have applied Article 85(1) of the Treaty in the light of a rule of reason rather than as an abstract rule. Under a rule of reason, an anti-competitive practice falls outside the scope of the prohibition in Article 85(1) of the Treaty if it has more positive than negative effects on competition on a given market. They submit that the existence of a rule of reason in Community competition law has already been confirmed by the Court of Justice (Case 258/78 Nungesser and Eisele v Commission [1982] ECR 2015 and Case 262/81 Coditel and Others [1982] ECR 3381, paragraph 20). They also assert that, contrary to the Commission's submission, those two judgments are relevant in the present case because the creation of TPS also took place in conditions and on a market that are wholly peculiar.

69 The applicants submit that the application of a rule of reason would have shown that Article 85(1) of the Treaty did not apply to the exclusivity clause and to the clause relating to the special-interest channels. They observe that, as follows implicitly from the reasoning adopted by the Commission in regard to Article 85(3) of the Treaty, those clauses, rather than restricting competition on the pay-TV market in France, in fact favour such competition as they allow a new operator to gain access to a market which was dominated until then by a single operator, CanalSatellite and its parent company Canal+ (the service offered by AB-Sat not really being a competitor, but rather complementary to that of Canal+).

70 According to the applicants, the line of reasoning that Article 85(1) of the Treaty does not apply to the exclusivity clause and the clause relating to the special-interest channels is all the more compelling in the light of the case-law of the Court of Justice. It is apparent from that case-law that, first, a clause granting exclusive sales rights must be the subject of an economic assessment and is not necessarily caught by Article 85(1) of the Treaty (Case 56/65 Société technique minière [1966] ECR 235) and that, second, an exclusive right granted with a view to penetrating a new market is not caught by the prohibition laid down in that article (Nungesser

and Eisele v Commission, cited in paragraph 68 above, and Société technique minière, cited above; more generally, on the scope of Article 85(1) and (3) of the Treaty, Case C-399/93 Oude Luttikhuis and Others [1995] ECR I-4515, paragraph 10, and Case T-77/94 VGB and Others v Commission [1997] ECR II-759, paragraph 140, and European Night Services and Others v Commission, cited in paragraph 34 above, paragraph 136).

71 The Commission disputes that it infringed Article 85(1) of the Treaty by not applying a rule of reason, as suggested by the applicants, when examining the compatibility with that provision of the exclusivity clause and of the clause relating to the special-interest channels.

Findings of the Court

72 According to the applicants, as a consequence of the existence of a rule of reason in Community competition law, when Article 85(1) of the Treaty is applied it is necessary to weigh the pro and anti-competitive effects of an agreement in order to determine whether it is caught by the prohibition laid down in that article. It should, however, be observed, first of all, that contrary to the applicants' assertions the existence of such a rule has not, as such, been confirmed by the Community courts. Quite to the contrary, in various judgments the Court of Justice and the Court of First Instance have been at pains to indicate that the existence of a rule of reason in Community competition law is doubtful (see Case C-235/92 P Montecatini v Commission [1999] ECR I-4539, paragraph 133 (`... even if the rule of reason did have a place in the context of Article 85(1) of the Treaty'), and Case T-14/89 Montedipe v Commission [1992] ECR II-1155, paragraph 265, and in Case T-148/89 Tréfilunion v Commission [1995] ECR II-1063, paragraph 109).

73 Next, it must be observed that an interpretation of Article 85(1) of the Treaty, in the form suggested by the applicants, is difficult to reconcile with the rules prescribed by that provision.

74 Article 85 of the Treaty expressly provides, in its third paragraph, for the possibility of exempting agreements that restrict competition where they satisfy a number of conditions, in particular where they are indispensable to the attainment of certain objectives and do not afford undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. It is only in the precise framework of that provision that the pro and anti-competitive aspects of a restriction may be weighed (see, to that effect, Case 161/84 Pronuptia [1986] ECR 353, paragraph 24, and Case T-17/93 Matra Hachette v Commission [1994] ECR

II-595, paragraph 48, and European Night Services and Others v Commission, cited in paragraph 34 above, paragraph 136). Article 85(3) of the Treaty would lose much of its effectiveness if such an examination had to be carried out already under Article 85(1) of the Treaty.

75 It is true that in a number of judgments the Court of Justice and the Court of First Instance have favoured a more flexible interpretation of the prohibition laid down in Article 85(1) of the Treaty (see, in particular, Société technique minière and Oude Luttikhuis and Others, cited in paragraph 70 above, Nungesser and Eisele v Commission and Coditel and Others, cited in paragraph 68 above, Pronuptia, cited in paragraph 74 above, and European Night Services and Others v Commission, cited in paragraph 34 above, as well as the judgment in Case C-250/92 DLG [1994] ECR I-5641, paragraphs 31 to 35).

76 Those judgments cannot, however, be interpreted as establishing the existence of a rule of reason in Community competition law. They are, rather, part of a broader trend in the case-law acording to which it is not necessary to hold, wholly abstractly and without drawing any distinction, that any agreement restricting the freedom of action of one or more of the parties is necessarily caught by the prohibition laid down in Article 85(1) of the Treaty. In assessing the applicability of Article 85(1) to an agreement, account should be taken of the actual conditions in which it functions, in particular the economic context in which the undertakings operate, the products or services covered by the agreement and the actual structure of the market concerned (see, in particular, European Night Services and Others v Commission, cited in paragraph 34 above, paragraph 136, Oude Luttikhuis, cited in paragraph 70 above, paragraph 10, and VGB and Others v Commission, cited in paragraph 70 above, paragraph 140, as well as the judgment in Case C-234/89 Delimitis [1991] ECR I-935, paragraph 31).

77 That interpretation, while observing the substantive scheme of Article 85 of the Treaty and, in particular, preserving the effectiveness of Article 85(3), makes it possible to prevent the prohibition in Article 85(1) from extending wholly abstractly and without distinction to all agreements whose effect is to restrict the freedom of action of one or more of the parties. It must, however, be emphasised that such an approach does not mean that it is necessary to weigh the pro and anti-competitive effects of an agreement when determining whether the prohibition laid down in Article 85(1) of the Treaty applies.

78 In the light of the foregoing, it must be held that, contrary to the applicants' submission, in the contested decision the Commission correctly applied Article 85(1) of the Treaty to the exclusivity clause and the clause relating to the special-interest channels inasmuch as it was not obliged to weigh the pro and anti-competitive aspects of those agreements outside the specific framework of Article 85(3) of the Treaty.

79 It did, however, assess the restrictive nature of those clauses in their economic and legal context in accordance with the case-law. Thus, it rightly found that the general-interest channels presented programmes that were attractive for subscribers to a pay-TV company and that the effect of the exclusivity clause was to deny TPS' competitors access to such programmes (points 102 to 107 of the contested decision). As regards the clause relating to the special-interest channels, the Commission found that it resulted in a limitation of the supply of such channels on that market for a period of 10 years (point 101 of the contested decision).

80 This objection must therefore be rejected.

(ii) The alternative claim, alleging that the exclusivity clause and the clause relating to the special-interest channels are ancillary restrictions

- *Arguments of the parties*

The concept of an ancillary restriction

81 As regards the concept of an ancillary restriction, the applicants refer to the Commission's XXIVth Report on competition policy, 1994 (page 120, paragraph 166), according to which `restrictions [of competition] in the context of joint ventures' are `restrictions only imposed on the parties or the joint venture (not on third-parties) which are objectively necessary for the successful functioning of the joint venture and thus by their very nature inherent in the operation concerned ...'.

82 The applicants also refer to the Commission's Notice of 16 February 1993 concerning the assessment of cooperative joint ventures pursuant to Article 85 of the EEC Treaty (OJ 1993 C 43, p. 2, `the notice on cooperative joint ventures'), in which the Commission stated that agreements `which are directly related to the [joint venture] and necessary for its existence must be assessed together with the [joint venture]. They are treated under the rules of competition as ancillary restrictions if they remain subordinate in importance to the main object

of the [joint venture]' (point 66).

83 The applicants further observe that it is clear from the notice on cooperative joint ventures, first, that an exclusive operating license granted to the joint venture without time-limit was regarded as indispensable for its creation and operation and second, that the theory of ancillary restrictions will, in general, be applied in the case of a joint venture which undertakes new activities in respect of which the parent companies are neither actual nor potential competitors (point 76 of the notice on cooperative joint ventures).

84 According to the applicants, the Commission's actual decisions show that those principles have been faithfully applied.

85 The applicants state that in Commission Decision 94/895/EC of 15 December 1994 relating to a proceeding pursuant to Article 85 of the EC Treaty and Article 53 of the EEA Agreement (IV/34.768 - International Private Satellite Partners) (OJ 1994 L 354, p. 75, point 61) the Commission took the view that clauses restricting competition had to be regarded as ancillary where they are indispensable to the joint venture and do not exceed what the creation and operation of the joint venture requires (see also Commission Decision 97/39/EC of 18 December 1996 relating to a proceeding under Article 85 of the EC Treaty and Article 53 of the EEA Agreement (Case IV/35.518 - Iridium) (OJ 1997 L 16, p. 87, point 48 et seq.) and, with regard to concentrations, the Commission Decision of 6 April 1995 declaring a concentration compatible with the common market on the basis of Regulation No 4064/89 (IV/M.564 - Havas Voyages/American Express) (OJ 1995 L 117, p. 8)).

86 The applicants submit, moreover, that the decisions and judgments cited by the Commission are, in general, irrelevant to the present case.

87 They state that the judgment in Pronuptia (cited in paragraph 74 above) and the judgment in Case 42/84 Remia v Commission [1985] ECR 2545 relate to the criteria for the application of Article 85(1) and (3) of the Treaty but make no reference to the problem of ancillary restrictions. They observe, next, that Commission Decision 87/100/EEC of 17 December 1986 relating to a proceeding under Article 85 of the EEC Treaty (IV/31.340 - Mitchell/Cotts/Sofiltra) (OJ 1987 L 41, p. 31, paragraph 23) does not add anything new. As to Commission Decision 90/410/EEC of 13 July 1990 relating to a proceeding under Article 85

of the EEC Treaty (IV/32.009 - Elopak/Metal Box - Odin) (OJ 1990 L 209, p. 15, point 31) that decision, in the applicants' opinion, confirms rather than contradicts the principle prominent in the decisions to which they have referred.

88 Lastly, the applicants submit that, contrary to the submission of the Commission and the intervener, classification of a clause as an ancillary restriction should not be by way of abstract analysis of the restriction but requires in-depth analysis of the market.

89 The applicants submit, moreover, that the Commission carried out such an examination in the contested decision. They also state that all the decisions and judgments cited by the intervener illustrate the fact that the market context is taken into account when classifying `ancillary restrictions'. Thus, in the judgment in Remia v Commission, cited in paragraph 87 above, the Court of Justice refused, in the light of the circumstances of the case, to classify a non-competition clause for a period exceeding four years as an ancillary restriction. In Commission Decision 1999/329/EC of 12 April 1999 relating to a proceeding pursuant to Articles 85 and 86 of the EC Treaty and Articles 53 and 54 of the EEA Agreement (Cases No IV/D-1/30.373 - P & I Clubs, IGA and No IV/D-1/37.143 - P & I Clubs, Pooling Agreement (OJ L 125, p. 12) it was decided, after an examination of the prices and terms of sale on the reinsurance market, that the joint purchase of reinsurance was, in the case in point, an ancillary restriction. In Commission Decision 1999/574/EC of 27 July 1999 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case IV/36.581 - Télécom développement) (OJ L 218, p. 24, `the Télécom développement Decision') the Commission carried out an assessment of the economic and competitive position of Télécom développement on the market for voice telephony and concluded that the clauses notified were to be classified as ancillary restrictions. Lastly, in Decision 97/39 the Commission decided to classify the clauses notified to it as ancillary restrictions, again in the light of the specific conditions of that case.

90 The Commission, supported by the intervener, disputes that the concept of an ancillary restriction should be interpreted in the manner suggested by the applicant.

The consequences of classification as an ancillary restriction

91 The applicants submit that it is apparent from both the Commission's publications and its previous decisions that the commitments classified as ancillary restrictions must be treated in

the same way as the main operation.

92 The applicants point out that in its XXIVth Report on competition policy the Commission stated that ancillary restrictions are not `assessed separately under Article 85(1) of the Treaty if the joint venture itself does not infringe Article 85(1) or is exempted under Article 85(3). While ancillary restrictions are normally only accepted for a limited period of time, in the context of joint ventures they are usually allowed for the whole duration of the joint venture.' Likewise, they observe that in the notice on cooperative joint ventures the Commission stated that `if a [joint venture] does not fall within the scope of Article 85(1), then neither do any additional agreements which, while restricting competition on their own, are ancillary to the [joint venture] in the manner described above' (point 67) and that they `must be assessed together with the [joint venture]' (point 66).

93 The applicants also submit that the Commission has applied those principles in its previous decisions. Thus, in point 62 of Decision 94/895 the Commission took the view that, inasmuch as the joint venture did not fall within the scope of Article 85(1) of the Treaty, then neither did the clauses at issue (see also Decision 97/39, point 48).

94 The Commission states that, although it is true that the legal consequence of applying the concept of an ancillary restriction is to cause contractual clauses that are a priori restrictive of competition and capable of affecting trade between Member States to an appreciable extent to fall outside the scope of Article 85(1), that does not mean that those clauses necessarily benefit from negative clearance for the same period as the main operation. As is apparent from the judgment in Remia v Commission, cited in paragraph 87 above, and from the contested decision, the duration of a restriction may be an essential criterion for determining whether or not it is ancillary.

Classification of the exclusivity clause as an ancillary restriction

95 The applicants submit that there is no doubt that the Commission should have classified the exclusivity clause as an ancillary restriction.

96 They state that, in the light of the dominant position of Canal+, in particular in the market for broadcasting rights for French and American films, that exclusivity was the only means of entering the pay-TV market in France and of remaining on it by retaining an attractive range

of programmes. The wholly peculiar nature of that advantage is also clear from the fact that it was granted to TPS by its shareholders, without payment on either side, in order to ensure its success on the market.

97 According to the applicants, the Commission's main argument to show that the exclusivity clause is not ancillary, namely that the creation of a venture that is active in the digital satellite TV sector would be conceivable even if it did not have the exclusive right to broadcast the four general-interest channels, is incorrect. They state that they did not have - and still have only very few - exclusive rights to broadcast films and sporting events when they decided to create TPS, so that their only competitive weapon was (and still is) the exclusive right to broadcast the general-interest channels. That clause is therefore directly linked to the creation of TPS and is necessary for its proper functioning.

98 The Commission disputes that it committed an error of assessment in not classifying the exclusivity clause as an ancillary restriction.

Classification of the clause relating to the special-interest channels as an ancillary restriction

99 The applicants submit that the Commission committed an error of assessment in failing to classify the clause relating to the special-interest channels as an ancillary restriction.

100 They state that the Commission did not in fact take account of the fact that this clause was indispensable to the creation and operation of TPS, in as much as that privileged access to the channels and programmes of its shareholders and the right of last refusal was the only means by which TPS could secure its acquisition of special-interest channels, having regard in particular to the especially strong position of the Canal+ group on the market in those channels.

101 The applicants submit that it is appropriate to refer to Commission Decision 1999/573/EC of 20 May 1999 relating to a proceeding under Article 81 of the EC Treaty (Case IV/36.592 - Cégétel + 4) (OJ 1999 L 218, p. 14, `the Cégétel Decision') and to the Télécom Développement Decision. Those decisions relate to competitive situations that are quite similar to the present case (markets dominated by a long-standing operator) and in those decisions the Commission's analysis related to clauses comparable to the clause relating to the special-interest channels, the clause at issue in the Télécom développement Decision providing for preferential access to an infrastructure and, in the Cégétel Decision, the clause providing for preferential purchasing by

the joint venture from its shareholders. The applicants observe that, unlike in the present case, the Commission did not hesitate to classify those clauses as ancillary restrictions and to treat them in exactly the same way as the joint venture (see also Decision 1999/329).

102 The Commission disputes that it has committed an error of assessment in not classifying the clause relating to the special-interest channels as an ancillary restriction.

- *Findings of the Court*

103 It is necessary, first of all, to define what constitutes an `ancillary restriction' in Community competition law and point out the consequences which follow from classification of a restriction as `ancillary'. It is then necessary to apply the principles thereby established to the exclusivity clause and to the clause relating to the special-interest channels in order to determine whether, as the applicants' assert, the Commission committed an error of appraisal in not classifying those commitments as ancillary restrictions.

The concept of `ancillary restriction'

104 In Community competition law the concept of an `ancillary restriction' covers any restriction which is directly related and necessary to the implementation of a main operation (see, to that effect, the Commission Notice of 14 August 1990 regarding restrictions ancillary to concentrations (OJ 1990 C 203, p. 5, hereinafter `the notice on ancillary restrictions', point I.1), the notice on cooperative joint ventures (point 65), and Articles 6(1)(b) and 8(2), second paragraph, of Regulation No 4064/89).

105 In its notice on ancillary restrictions the Commission rightly stated that a restriction `directly related' to implementation of a main operation must be understood to be any restriction which is subordinate to the implementation of that operation and which has an evident link with it (point II.4).

106 The condition that a restriction be necessary implies a two-fold examination. It is necessary to establish, first, whether the restriction is objectively necessary for the implementation of the main operation and, second, whether it is proportionate to it (see, to that effect, Remia v Commission, cited in paragraph 87 above, paragraph 20; see also points II.5 and II.6 of the notice regarding ancillary restrictions).

107 As regards the objective necessity of a restriction, it must be observed that inasmuch as, as has been shown in paragraph 72 et seq. above, the existence of a rule of reason in Community competition law cannot be upheld, it would be wrong, when classifying ancillary restrictions, to interpret the requirement for objective necessity as implying a need to weigh the pro and anti-competitive effects of an agreement. Such an analysis can take place only in the specific framework of Article 85(3) of the Treaty.

108 That approach is justified not merely so as to preserve the effectiveness of Article 85(3) of the Treaty, but also on grounds of consistency. As Article 85(1) of the Treaty does not require an analysis of the positive and negative effects on competition of a principal restriction, the same finding is necessary with regard to the analysis of accompanying restrictions.

109 Consequently, as the Commission has correctly asserted, examination of the objective necessity of a restriction in relation to the main operation cannot but be relatively abstract. It is not a question of analysing whether, in the light of the competitive situation on the relevant market, the restriction is indispensable to the commercial success of the main operation but of determining whether, in the specific context of the main operation, the restriction is necessary to implement that operation. If, without the restriction, the main operation is difficult or even impossible to implement, the restriction may be regarded as objectively necessary for its implementation.

110 Thus, in the judgment in Remia v Commission, cited in paragraph 87 above (paragraph 19), the Court of Justice held that a non-competition clause was objectively necessary for a successful transfer of undertakings, inasmuch as, without such a clause, `and should the vendor and the purchaser remain competitors after the transfer, it is clear that the agreement for the transfer of the undertaking could not be given effect. The vendor, with his particularly detailed knowledge of the transferred undertaking, would still be in a position to win back his former customers immediately after the transfer and thereby drive the undertaking out of business.'

111 Similarly, in its decisions, the Commission has found that a number of restrictions were objectively necessary to implementing certain operations. Failing such restrictions, the operation in question `could not be implemented or could only be implemented under more uncertain conditions, at substantially higher cost, over an appreciably longer period or with considerably less probability of success' (point II.5 of the notice regarding ancillary

restrictions; see also, for example, Decision 90/410, point 22 et seq.)

112 Contrary to the applicants' claim, none of the various decisions to which they refer show that the Commission carried out an analysis of competition in classifying the relevant clauses as ancillary restrictions. On the contrary, those decisions show that the Commission's analysis was relatively abstract. Thus point 77 of Decision 1999/329 states as follows:

`Actually, a claim-sharing arrangement cannot function properly without at least one level of cover to be offered being agreed by all its members. The reason is that no member would be willing to share claims brought to the pool by other clubs of a higher amount than the ones it can bring to the pool.'

113 Where a restriction is objectively necessary to implement a main operation, it is still necessary to verify whether its duration and its material and geographic scope do not exceed what is necessary to implement that operation. If the duration or the scope of the restriction exceed what is necessary in order to implement the operation, it must be assessed separately under Article 85(3) of the Treaty (see, to that effect, Case T-61/89 Dansk Pelsdyravlerforening v Commission [1992] ECR II-1931, paragraph 78).

114 Lastly, it must be observed that, inasmuch as the assessment of the ancillary nature of a particular agreement in relation to a main operation entails complex economic assessments by the Commission, judicial review of that assessment is limited to verifying whether the relevant procedural rules have been complied with, whether the statement of the reasons for the decision is adequate, whether the facts have been accurately stated and whether there has been a manifest error of appraisal or misuse of powers (see, to that effect, with regard to assessing the permissible duration of a non-competition clause, Remia v Commission, cited in paragraph 87 above, paragraph 34).

Consequences of classification as an ancillary restriction

115 If it is established that a restriction is directly related and necessary to achieving a main operation, the compatibility of that restriction with the competition rules must be examined with that of the main operation.

116 Thus, if the main operation does not fall within the scope of the prohibition laid down in

Article 85(1) of the Treaty, the same holds for the restrictions directly related and necessary for that operation (see, to that effect, Remia v Commission, cited in paragraph 87 above, paragraph 20). If, on the other hand, the main operation is a restriction within the meaning of Article 85(1) but benefits from an exemption under Article 85(3) of the Treaty, that exemption also covers those ancillary restrictions.

117 Moreover, where the restrictions are directly related and necessary to a concentration within the meaning of Regulation No 4064/89, it follows from both Article 6(1)(b) and Article 8(2), second subparagraph, of that regulation that those restrictions are covered by the Commission's decision declaring the operation compatible with the common market.

Classification of the exclusivity clause as an ancillary restriction

118 It is necessary to examine, in the light of the principles set out in paragraphs 103 to 114 above, whether in the present case the Commission committed a manifest error of assessment in not classifying the exclusivity clause as a restriction that was ancillary to the creation of TPS.

119 The applicants submit that the exclusivity clause is ancillary to the creation of TPS as the clause is indispensable to allow TPS to penetrate the pay-TV market in France because TPS does not enjoy any exclusive rights to films and sporting events of the first rank.

120 It must, however, be observed, first of all, that the fact that the exclusivity clause would be necessary to allow TPS to establish itself on a long-term basis on that market it is not relevant to the classification of that clause as an ancillary restriction.

121 As has been set out in paragraph 106 above, such considerations, relating to the indispensable nature of the restriction in the light of the competitive situation on the relevant market, are not part of an analysis of the ancillary nature of the restrictions. They can be taken into account only in the framework of Article 85(3) of the Treaty (see, in that regard, Pronuptia, cited in paragraph 74 above, paragraph 24, and Dansk Pelsdyravlerforening v Commission, cited in paragraph 113 above, paragraph 78).

122 Next, it must be observed that although, in the present case, the applicants have been able to establish to the requisite legal standard that the exclusivity clause was directly related to the

establishment of TPS, they have not, on the other hand, shown that the exclusive broadcasting of the general-interest channels was objectively necessary for that operation. As the Commission has rightly stated, a company in the pay-TV sector can be launched in France without having exclusive rights to the general-interest channels. That is the situation for CanalSatellite and AB-Sat, the two other operators on that market.

123 Even if the exclusivity clause was objectively necessary for the creation of TPS, the Commission did not commit a manifest error of assessment in taking the view that this restriction was not proportionate to that objective.

124 The exclusivity clause is for an initial period of 10 years. As the Commission finds in point 134 of the contested decision, such a period is deemed excessive as `TPS [has] to establish itself on the market before the end of that period'. It is quite probable that the competitive disadvantage of TPS (principally with regard to access to exclusive rights to films and sporting events) will diminish over time (see, to that effect, point 133 of the contested decision). It cannot, therefore, be ruled out that the exclusive broadcasting of the general-interest channels, although initially intended to strengthen the competitive position of TPS on the pay-TV market might ultimately allow it, after some years, to eliminate competition on that market.

125 Moreover, the exclusivity clause is also disproportionate in so far as its effect is to deprive TPS' actual and potential competitors of any access to the programmes that are considered attractive by a large number of French television viewers (see, to that effect, the judgment in Oude Luttikhuis and Others, cited in paragraph 70 above, paragraph 16). This excessiveness of the commitment is also reinforced by the existence of `shadow zones'. The television viewers living in those zones who wish to subscribe to a pay-TV company which also broadcasts the general-interest channels can turn only to TPS.

126 It must therefore be held that the Commission did not commit a manifest error of assessment in not classifying the exclusivity clause as a restriction that was ancillary to the creation of TPS.

127 That limb of the applicants' argument must, therefore, be rejected.

Classification of the clause relating to the special-interest channels as an ancillary restriction

128 It is also necessary to examine, in the light of the principles set out in paragraphs 103 to 114 above whether, in the present case, the Commission committed a manifest error of assessment in not classifying the clause relating to the special-interest channels as an ancillary restriction.

129 In that regard, it must be pointed out that in the contested decision (point 101) the Commission stated:

`The obligation on the members to give TPS first refusal over their special-interest channels might possibly be regarded as ancillary to the launch of the platform; this obligation, which is imposed for a period of 10 years, nevertheless results in a limitation of the supply of special-interest channels and television services. In this respect, the clause in question falls within the scope of Article 85(1).'

130 It is clear from point 101 of the contested decision that the main reason why the Commission refused to classify the clause as an ancillary restriction was that it had a negative impact on the situation of third parties over quite a long period.

131 The applicants, despite having the burden of proof in that regard, have not adduced any evidence to invalidate that assessment.

132 They merely assert that on account of the exclusivity policy operated by CanalSatellite, the special-interest channels operated or created by them are the only channels to which TPS has access, so that the clause at issue is indispensable for its survival. Even accepting that such an assertion is correct, a consideration of that kind relating to the competitive situation of TPS cannot be taken into account for the purpose of classifying that clause as an ancillary restriction. As explained in paragraphs 107 to 112 above, the objectively necessary nature of the clause is established without reference to the competitive situation.

133 Furthermore, as the market for the operation of special-interest channels is enjoying rapid growth (point 65 of the contested decision), the Commission did not commit a manifest error of assessment in taking the view that the obligation on the shareholders of TPS, for a period of 10 years, to offer their special-interest channels first to TPS exceeded what was necessary for

the creation of TPS.

134 Finally, as the Commission has correctly submitted, the applicants are wrong in referring to the decisions in Cégétel and Télécom développement inasmuch as those decisions relate to different factual situations. Thus, the situation of TPS cannot be compared to that of a new entrant on a market dominated by a company with a long-standing monopoly and which requires access to essential infrastructure. Canal+ does not enjoy a long-standing monopoly on the market for the operation of the special-interest channels and entry onto that market does not require access to essential infrastructure. Furthermore, in the Cégétel and Télécom développement decisions, the effect of the clauses considered was not to deprive third-parties of any possibility of access to the services of the shareholders. It was merely a question of preferential treatment.

135 It must therefore be held that the Commission did not commit a manifest error of assessment in not classifying the clause relating to the special-interest channels as a restriction that was ancillary to the creation of TPS.

136 That part of the applicants' alternative argument must therefore be rejected.