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## Competition - Portugal

### Media State Aid Saga is Fought Out in Europe

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#### Background

Sociedade Independente de Comunicação, SA (SIC) is a commercial television company incorporated under Portuguese law, which has run one of Portugal's leading private television channels since October 1992.

Today, television activity is developed in Portugal by three operators in open access. Public operator Radiotelevisão Portuguesa, SA (RTP) broadcasts Channels 1 and 2, and holds the state concession for the Portuguese public television service. There are also two private operators which were issued licences through a public procurement procedure: SIC, which holds the licence for Channel 3, and Televisão Independente, SA, holder of the licence for Channel 4.

RTP was formerly a public corporation called Empresa Pública; but since 1992, when the state's audiovisual monopoly ended, it has been a limited liability company with state capital. While private Portuguese television channels are financed exclusively by advertising revenue, RTP additionally receives public financing granted annually in several forms by the Portuguese government.

RTP was incorporated in 1955 by a government initiative. It commenced regular broadcasting in 1957 and develops its activities on an exclusive basis.

The constitutional amendment of 1989 and the approval of the Television Act (58/1990) ended the state's monopoly in the television sector. Through these amendments, the state guaranteed public service broadcasting while at the same time conceding to private undertakings the exploitation of commercial channels.

Within this context a concession contract was signed in 1993, defining RTP's public service obligations and the method for calculating the annual indemnities intended to compensate for the cost of public service.

A new service contract was subsequently signed on December 31 1996, expressly obliging the state to compensate RTP for its general public service obligations (and not merely for its specific public service obligations). The effective result of this change to the structure set out in the initial concession contract was that all costs incurred by RTP could be considered as public service and financed by the Portuguese government.

Since commencing transmission, SIC has presented several complaints to the directorate general of competition of the European Commission and has commenced judicial procedures in the European Court of First Instance.

### **First Complaint**

In July 1993 SIC referred a complaint to the commission concerning the methods by which RTP was financed and seeking a declaration: (i) that a series of measures taken by the Portuguese state in favour of RTP was incompatible with the common market within the meaning of Article 87 of the EC Treaty; and (ii) that there had been an infringement of Article 88(3) of the EC Treaty for failure to give prior notification of the measures complained of.

In this complaint SIC estimated that state grants to RTP in 1992 and 1993 by way of compensation for its public service obligations amounted to Esc6.2 billion and Esc7.1 billion respectively. SIC further complained of registration fee exemptions enjoyed by RTP and the system of investment aid laid down in the terms of its concession contract. SIC therefore requested the European Commission to initiate the formal procedure under Article 88(2) of the EC Treaty and order the Portuguese state to suspend payment of these unnotified aid measures pending the adoption of a final decision.

SIC subsequently presented new data, alerting the commission to: (i) the government's authorization for the rescheduling of a debt owed to the social security authority, estimated at Ecs2 billion, together with exemption from interest on a late payment; and (ii) the state's purchase of the television broadcasting network owned by RTP at an inflated price and the grant of payment facilities to RTP by the public body charged with managing the network.

Additionally, in 1994 SIC provided the commission with new information on the viewing figures for the various channels in Portugal and informed it of a new compensatory payment by the Portuguese government to RTP for 1994, of over Esc7 billion.

### ***Proceedings***

In 1995 SIC formally called on the commission, pursuant to Article 232 of the EC Treaty, to adopt a position on the complaint, and in particular on its request that the procedure under Article 88(2) be initiated.

By application lodged at the registry of the European Court of First Instance in December 1995, SIC brought an action for failure to act under Article 232, as the commission did not adopt the measures pursuant to SIC's first complaint.

After the application was presented to the European Court of First Instance, and as required in the first complaint and in the judicial process by SIC, the commission adopted a decision in 1996 which was later reversed by the European Court of First Instance.<sup>(1)</sup> SIC thus halted its action for failure to act.<sup>(2)</sup>

### **Second Complaint**

In October 1996 SIC lodged a fresh complaint, seeking a declaration that the state grants issued to RTP between 1994 and 1996 were incompatible with the common market on the same grounds as those set out in the first complaint. SIC also complained about new aid which was granted to RTP in 1994, without notification by the Portuguese state, resulting from an increase in capital and from a guarantee given by the state in connection with a bond issue by RTP. SIC therefore requested the European Commission to initiate the formal procedure under Article 88(2) and to order the Portuguese state to desist from granting that aid pending the adoption of a final decision.

In January 1997 the applicant received a copy of a commission decision, dated November 7 1996 and addressed to the Portuguese state, on the financing of RTP. The decision considered that no

state aid had been granted to RTP.

### **Proceedings**

By application filled with the registry of the European Court of First Instance in March 1997, SIC brought an action seeking annulment under Article 230 of the EC Treaty of: (i) the commission's November 7 1996 decision on the proceedings brought under Article 88 of the EC Treaty on the financing of RTP, and (ii) the decision set out in a December 20 1996 letter from the commission on SIC's complaint against RTP.

The court determined that, after the conclusion of an initial examination, the commission was not in a position to resolve all the difficulties raised by the question of whether the disputed measures submitted for its assessment constituted state aid within the meaning of Article 87(1) of the EC Treaty. Since the compatibility of those measures with the common market was not established in the decision, the commission was under a duty to initiate the procedure under Article 88(2) so that, having obtained all the necessary information, it could check the validity of its assessment. As this procedure did not take place before the decision was adopted, and there was no need to rule on SIC's other pleas and claims, the decision was annulled insofar as it related to measures by the Portuguese state in favour of RTP.<sup>(3)</sup>

The European Court of First Instance thus:

- annulled the commission's decision, as requested by SIC;
- stated that the measures adopted by the Portuguese state in favour of RTP were state aid; and
- pointed out that the commission was obliged to initiate the procedure under Article 88(2).

### **Third Complaint**

In June 1997 SIC lodged a third complaint regarding incompatible state aid elements in the new service contract concluded between RTP and the Portuguese government on December 31 1996. In September 2001 SIC further informed the commission that RTP received compensatory indemnities from the Portuguese government between 1998 and 2000.

### **Proceedings**

However, as the European Commission did not open the procedure under Article 88(2) regarding complaints presented by SIC, in July 2001 SIC formally called upon the commission, pursuant to Article 232 of the EC Treaty, to open the Article 88(2) procedure in execution of the European Court of First Instance judgment and to adopt a position on the second and third complaints by initiating the Article 88(2) procedure. As the commission did not adopt the required measures, SIC was again forced to present two actions for failure to act before the European Court of First Instance.

Subsequent to the presentation of these actions, the commission took the following steps:

- On April 9 2002 the commission published in the EU *Official Journal* its decision to open an Article 88(2) procedure in relation to all *ad hoc* measures taken by the Portuguese government in relation to RTP (excluding the annual indemnities), as requested by SIC.
- On April 23 2002 the commission published in the EU *Official Journal* its decision on the compensation payments granted to RTP between 1992 and 2000. In its decision the commission required further information from the Portuguese state and did not open an Article 88(2) procedure, as requested by SIC, on the basis that it had doubts as to whether the annual compensation indemnities in favour of RTP could be regarded as existing aid or new aid.

- In September 2003 the commission also informed SIC of its preliminary conclusion regarding the annual indemnities received by RTP.

Despite these actions, a recent Court of First Instance ruling<sup>(4)</sup> has condemned the European Commission for only adopting the necessary measures after the actions for failure to act were presented before the court.

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## Endnotes

- (1) Case T-46/97, *SIC/Commission*.
- (2) Brought in Case T-231/95.
- (3) Judgment of the Court of First Instance, May 10 2000, Case T-46/97, points 44 to 109.
- (4) January 19 2004, in joined Cases T-297/01 and T-298/01.

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