

BALTISCH-DEUTSCHES HOCHSCHULKONTOR
Prof. Dr. Thomas Schmitz

Spring Semester 2010

PRACTICAL CASE-SOLVING IN EUROPEAN LAW

Case 7¹

(facts of the case)

In member state A-land, both commercial broadcasters and public service broadcasters provide TV. All broadcasters generate funds by showing advertising; for the commercial providers it is the main source of revenue. Public service broadcasters, however, receive in addition financial aids from the state or from autonomous regional communities in order to allow them to accomplish their statutory "public service mission to provide basic media services". Therefore, they can afford to show less advertising. The audience wildly approves; viewing figures in A-land are shifting considerably in favour of the public service broadcasters. This has also impact on the television sector in other member states as more and more TV viewers from other countries avoid the constant onslaught of advertisements on commercial TV, receiving public service broadcasts from A-land via cable or satellite instead.

The commercial broadcasting company "Easy TV" is registered in member state B-land but provides broadcasting all over Europe. It wants to take steps against the competitive advantages of its public service competitors. It regards the public funding of public service broadcasters as illegal state aids distorting competition and affecting the trade between the member states. A-land, for its part, has never qualified the funding as state aids and hence not notified it to the Commission.

In July 2006, "Easy TV" lodges a complaint, asking the European Commission to declare the funding of public service broadcasters in A-land by state resources incompatible with the common market (now: the internal market) according to art. 87 EC Treaty².

The Commission confirms receipt of the complaint, but fails to take any steps in the following years. It does not decide upon the initiation of the formal investigation procedure as provided for in the State Aids Regulation (Regulation 659/1999). It assumes that intervention against member state's financial support of public service broadcasting might hamper the ratification process of the Treaty of Lisbon. It also fears that such intervention might motivate the member states to exempt in a later reform of the Founding Treaties the whole sector of state funding aiming to support cultural and audio-visual policies from the restrictions of EU internal market law.

In August 2009, "Easy TV" eventually requests the Commission to answer its complaint and to decide upon the initiation of the formal investigation procedure within two months. "Easy TV" also threatens to take legal action. However, the Commission still does not respond to the complaint.

You are employed by a notable, international law firm in member state B-land. In December 2009, "Easy TV" - which happens to be the most important client of your employer - is seeking legal advice about the prospects of a legal action before a European Court. What will be your (correct) answer?

¹ Translated from German by *Irene Kesper* and *Thomas Schmitz*.

² Now (after the Treaty of Lisbon has come into force) art. 107 FEU Treaty.

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(discussion of the case)

SUBJECTS: action for failure to act; legal interest in bringing proceedings; limits of legal interpretation - even in European Union law; monitoring of state aids by the Commission; particularities of expertises of lawyers for their clients; examples for a comprehensible line of thoughts and for appropriate introductory and closing sentences in legal case-solving.

OUTLINE OF THE CASE SOLUTION:

My (correct) answer will be that a possible legal action before a European Court would be successful if it was admissible and well-founded. "Easy-TV" demands intervention by the European Commission but the Commission so far did not take any steps to investigate the state aid concerned. Thus, an action for failure to act under art. 265 FEU Treaty³ comes into consideration.

A. Admissibility of an action for failure to act

I. Jurisdiction of a European Court: (+)

The access to the Courts of the European Union is granted by art. 265 sub-sect. 1, 3 FEU Treaty (as in the case under consideration, an alleged "infringement of the Treaties" by the Commission's failure to act is in question). Within the system of the courts of the European Union, according to art. 256(1) FEU Treaty⁴, the jurisdiction is conferred to the *General Court* [formerly the Court of First Instance]. For legal actions taken by individuals, there is no reservation of jurisdiction for the ECJ under art. 256(1) sub-sect. 1 phrase 1 FEU Treaty read together with art. 51 of the Statute of the Court of Justice. Thus, "Easy TV" would have to lodge the application with the General Court.

II. Capacity to sue and to be sued

There are no doubts concerning the capacity of the possible parties to sue respectively to be sued in the proceedings following a possible action for failure to act. "Easy TV" is entitled to act as applicant party in the possible proceedings under art. 265 sub-sect. 3 FEU Treaty, whereas the Commission's capacity to be sued and to act as defendant party follows from art. 265 sub-sect. 1 FEU Treaty.

III. Suitable subject-matter for an application

A possible action would only be admissible if the accusation made to the commission about illegal refraining from review of the financial aid in question would represent a suitable subject-matter for the action. In case of an action for failure to act brought by a member state or by a Union institution, the application must maintain the allegation that a Union institution, body, office or agency, by not adopting a certain decision, has violated Union law (primary or secondary law). In the case under consideration, however, a private (individual) legal person would bring the action for failure to act. According to art. 265 sub-sect. 3 FEU Treaty, complaints of individuals must contain the accusation

³ Formerly (until the Treaty of Lisbon came into force) art. 232 EC Treaty.

⁴ Formerly art. 225(1) EC Treaty.

that Union law has been violated by an institution, body, office or agency that failed to address a decisive, legally binding act to a specified person. This requirement would be met, as "Easy TV" requests the Commission to *decide upon the initiation of the formal investigation procedure* as provided for in the State Aids Regulation (Regulation 659/1999) as result of a preliminary examination of notified - and unnotified - state aids. This decision will be addressed individually to the member state that plans to grant - or has already granted - the aid in question. Should the Commission decide to initiate the formal investigation procedure, the latter might result in a declaration under art. 108(2) FEU Treaty⁵ that the aid in question is incompatible with the internal market (and therefore is to be abolished or altered).

IV. *Legal interest in bringing proceedings*

Furthermore, admissibility of the action for failure to act would require the applicant's legal interest in bringing proceedings. If the action for failure to act is brought by a member state or by a Union institution, there are no particular requirements to be met; in these cases, the applicant's conviction that the disputed inactiveness of the respondent party leads to a violation of Union law is sufficient (to substantiate the legal interest in bringing proceedings). In contrast, according to art. 265 sub-sect. 3 FEU Treaty, natural and legal persons can only complain that a Union institution, body, office or agency had wrongfully failed to address an act "*to that person*"⁶. This is to make sure that private persons only have access to the Court if their own rights are directly concerned. Proceedings initiated by private persons are not supposed to perform a general function of objective control of legality of the conduct of business by the Union's institutions, bodies, offices and agencies. The broadcasting company "Easy TV", however, does not seek an act or decision that would be addressed to this company, but a decision that would be directed to the member state A-land that is granting the disputed aids. This means that "Easy TV" seeks an act addressed to a third party. This leads to the problem if art. 265 sub-sect. 3 FEU Treaty also allows actions of natural or legal persons for failure to address an act to a third party. The question is discussed controversially.⁷ It mainly concerns legal actions of private persons that seek to compel a Union institution to intervene directly against a competitor [*"positive Konkurrentenklage"*] but also has bearing for actions against unlawful state aids granted by member states to competitors.

- 1) According to the broad concept of the action for failure to act supported by some scholars and in jurisprudence

Some scholars hold that actions for failure to act are also admissible if the act in question would be addressed to a third party but would be of *direct and individual concern* to the applicant. These scholars refer to aspects of an alleged "teleological interpretation". They admit that this solution is incompatible with the wording of art. 265 FEU Treaty. They reason that the stretching "beyond the wording"⁸ is deemed necessary to avoid deficits in legal protection. They also argue that the parallelism between the action for annulment and the action for failure to act would suggest this solution (which explains why the prerequisites of direct and individual concern mentioned in art. 263 sub-sect. 4 FEU Treaty⁹ are applied). The ECJ at first appeared to follow another line¹⁰ but later adopted the same position.¹¹ It reasons that the possibility for individuals to assert their rights should not depend upon whether the institution concerned has acted or failed to act.¹²

⁵ Formerly art. 88(2) EC Treaty.

⁶ French wording of art. 265 sub-sect. 3 FEU Treaty: "*manqué de lui adresser*"; German wording: "*unterlassen hat, ... an sie zu richten*".

⁷ See the outline of the discussion and the references at *Ehricke*, in: Streinz (editor), EUV/EGV, 2003, art. 232 no. 19; *Cremer*, in: Calliess/Ruffert (editors), EUV/EGV, 2nd edition 2002, art. 232 no. 7 (see in particular the references to negative opinions of Advocates-general).

⁸ See, for example, *Epiney*, in: Bieber/Epiney/Haag, Die Europäische Union. Europarecht und Politik, 8th edition 2009, § 9 no. 57 ("*über den Wortlaut des Art. 232 EGV hinaus*").

⁹ Formerly art. 230 sub-sect. 4 EC Treaty.

¹⁰ Cf. ECJ, case 246/91, Lord Bethell, no. 16.

¹¹ ECJ, case C-68/95, T-Port, no. 59. The position of the Court of First Instance was ambiguous, see the references at *Cremer*, in: Calliess/Ruffert (editors), EUV/EGV, 2nd edition 2002, art. 232 no. 7. Later the Court of First Instance has adopted this position, in particular with regard to the monitoring of state aids by the Commission, cf. case T-95/96, *Gestelevision Telecinco*, no. 59.

¹² ECJ, case C-68/95, T-Port, no. 59; see also *Haratsch/Koenig/Pechstein*, Europarecht, 6th edition 2009, no. 476.

Concerning interventions of the Commission against unlawful state aids, the Court of First Instance [now: the General Court] has meanwhile concretized the criteria of "direct" and "individual" concern in the sense that they are definitely met if the disputed aid has already been granted and is affecting the applicant as a competitor of the aid's beneficiary.¹³

According to this broad concept of the action for failure to act, in the case under consideration, the company "Easy TV" has the necessary legal interest in bringing proceedings against the Commission.

- 2) According to an interpretation of art. 265 sub-sect. 3 that respects the generally accepted principles of legal methodology

The extension of the action for failure to act brought by natural or legal persons to third party cases (i.e. case where the applicant would not be the addressee of the sought-after legal act but would be directly and individually concerned by it) is desirable. The words "to address to that person" in art. 265 sub-sect. 3 FEU Treaty are causing *deficits in legal protection* that are worrying in respect of the rule of law. However, this is a consideration of legal politics and not of legal interpretation. The *jurisprudent is not entitled to defy the positive law in favour of considerations of legal politics. This is also true - although often ignored - for European Union law.* The worrying deficit in legal protection apparently goes conform with the will of the member states, which have created art. 265 sub-sect. 3 FEU Treaty with the given wording, acting as the supreme "masters of the treaties" ["Herren der Verträge"]. This already follows from *contextual interpretation*: Formulating the conditions for actions brought by natural or legal persons more restrictively for the action for failure to act than for the action for annulment, the member states made clear that they do not approve of drawing parallels between these two forms of legal actions and that they wish a stronger legal interest in bringing proceedings for an action for failure to act than for an action for annulment - notwithstanding any concerns from legal politics. To avoid any doubts, they have chosen a *precise and distinct special wording* that neither needs nor allows interpretation. The *explicit wording* "to address to *that* person" pointedly defies any attempt to slip in the meaning of "to address to a third person".¹⁴ Those who apply the law have to respect this political decision - even if it is deemed wrong - until the member states remediate it by rewording art. 265 sub-sect. 3 FEU Treaty on the occasion of a future reform of the Treaty. By the way, they have not done this in the Treaty of Lisbon, although the problem was well-known. This indicates that the member states as the "masters of the treaties" do not support the idea of a competitor's complaint under art. 265.

According to the generally accepted principles of legal methodology, the *wording* of a legal norm does not only represent a criterion but also a *limit for legal interpretation*. If the wording distinctly and undoubtedly does not allow a certain reading, this fact cannot be neutralized by having recourse to other methods of interpretation. *Any "interpretation" disregarding the limit drawn by the wording of a norm is no longer legal interpretation but arbitrariness.* This applies in particular for any "teleological" interpretation; the alleged "telos" would be nothing else than the political opinion of the interpreter. Therefore, the "interpretation" of art. 265 sub-sect. 3 FEU Treaty in the sense, that it allows actions for failure to act also if the legal act in question would have to be addressed to a third party but would be of concern to the applicant, is not only unsound but also *indefensible*. It ignores the *border between Treaty interpretation and Treaty extension*, which is essential for the process of European integration and whose significance has been emphasized - with good reasons - by the constitutional courts of several member states,¹⁵ most recently by the German Federal Constitutional Court in its Lisbon judgement from 2009¹⁶. Even the *General Court* and the *European Court of Justice* must not trespass this border, since

¹³ Cf. Court of First Instance, case T-95/96, Gestelevision Telecinco, summary, 2.

¹⁴ Therefore, the remarks of *Epping/Lenz*, Fallrepetitorium Europarecht, 2005, p. 12 about a so-called "strict literal interpretation" ["strenge Wortlautauslegung"] are misleading: The wording is so precise and distinct that a "strict" literal interpretation is not necessary.

¹⁵ Cf. the Maastricht judgement of the German Federal Constitutional Court (BVerfGE 89, 155, headnote 6 and p. 209); see also the judgement of the Polish Constitutional Court of 2005 on the EU Accession Treaty (no. K18/04; English translation at www.trybunal.gov.pl/eng/summaries/wstep_gb.htm). These decisions particularly concern the border between Treaty interpretation and Treaty extension with regard to the application of the provisions on competences. However, the arguments also apply to the application of other Treaty provisions.

¹⁶ Federal Constitutional Court, judgement of June 30, 2009, 2 BvE 2/08 and others, www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208en.html (English translation), no. 238 ff.

they are, like all courts, *judicial and not legislating bodies*. Stretching the meaning of art. 265 sub-sect. 3 FEU Treaty beyond the limit set by its wording,¹⁷ they have violated it.

Other legal methods than legal interpretation do neither lead to the assumption of a legal interest in bringing proceedings of a person who would not be the addressee of the sought-after legal act. Based on these methods, the assumption might not be indefensible but would stir up serious scientific objections and therefore be unfounded. For example, a judicial development of law (in order to introduce new forms of legal action) is not possible because it would be an - illegitimate - *judicial development of law contra legem*. As mentioned above, the wording "to address to that person" in art. 265 sub-sect. 3 FEU Treaty literally aims to restrict and not to extend legal protection against inactivity of Union institutions. For the same reason, access to the European Courts cannot be opened by the way of *analogy*. There is indeed a *regulatory gap* but it is *not*, as required by legal methodology for any analogy, *unintended*; the member states, while drafting and reforming the primary Union law, deliberately left this gap. Applying the law accurately and diligently, employing the generally accepted principles of legal methodology, will not allow to overcome the existing - unsatisfying - legal situation.

Therefore it must be stated that, following a correct application of art. 265 sub-sect. 3 FEU Treaty, "Easy TV" does not have the necessary legal interest in bringing proceedings and an action against the Commission for failure to act would not be admissible.

3) According to the case solution in a lawyer's expertise for his client

It is however questionable if this result of a correct application of art. 265 sub-sect. 3 FEU Treaty should determine a lawyer's expertise. The lawyer must indeed describe the legal situation correctly and point out for his client where the jurisprudence of the courts is faulty. This is part of professional legal advice because it is always possible that the judges dealing with the client's case will recognize their or their colleagues' errors in the past and correct them. In particular, under the pressure of the impact of the appeal "Stop the European Court of Justice" by ROMAN HERZOG and LÜDER GERKEN in 2008¹⁸ that inter alia shows up in the Lisbon judgement of the German Federal Constitutional Court, the European Court of Justice might proceed to a more restraint judicial practice that observes more strictly the generally accepted principles of legal methodology and the essential limit between the interpretation and the making of law. Nevertheless, there is no reason to act on this possibility as long as there are no indications of a change of mind regarding the specific problem. This is particularly true in view of the jurisprudence of the European Courts, which tends to be less capricious than the jurisprudence of national courts. So the lawyer has to proceed on the assumption that the court - in our case: the General Court [formerly the Court of First Instance] - will maintain its former position. It is also relevant that many scholars support the faulty interpretation of art. 265 sub-sect. 3 FEU Treaty, since it serves the purpose of eliminating a deficit in legal protection that is alarming in respect of the rule of law. Moreover, the faulty interpretation does not place any worrying burden on anyone except the European Courts themselves that in consequence will have a higher workload. The Union institutions, bodies, offices and agencies, which illegally fail to act, might be sued more often, but there is no reason to protect them against that risk.

Concluding, the lawyer has to assume that the General Court will hold actions of private persons like "Easy TV" for failure to address a legal act to a third party admissible, provided that the legal act sought-after would be of direct and individual concern for them. He also has to assume that, following former decisions, it will consider that this requirement is met if a state aid in question has already been granted to a competitor of the applicant.

Thus, with regard to the purpose of this expertise, it is to be stated that "Easy TV" has the necessary legal interest in bringing proceedings against the Commission under art. 265 sub-sect. 3 FEU Treaty.

¹⁷ In the case C-68/95 (no. 59), the European Court of Justice explicitly stresses that art. 175 sub-sect. 3 EC Treaty [now 265 sub-sect. 3 FEU Treaty] "must be *interpreted* as also entitling them to bring an action for failure to act against an institution which they claim has failed to adopt a measure which would have concerned them in the same way". In the case T-95/96, Gestelevision Telecinco (no. 59), the Court of First Instance has adopted this position.

¹⁸ Herzog/Gerken, Stop the European Court of Justice, EU Observer, 10.09.2008, <http://euobserver.com/9/26714/?rk=1> [English version] = Stoppt den Europäischen Gerichtshof, Frankfurter Allgemeine Zeitung, 08.09.2008, p. 8, www.cep.eu/fileadmin/user_upload/Pressemappe/CEP_in_den_Medien/Herzog-EuGH-Webseite.pdf [German version].

V. *Preliminary proceedings*

An action for failure to act is only admissible after the preliminary proceedings prescribed in art. 265 sub-sect. 2, 3 FEU Treaty have been carried out fully and duly. In the case under consideration, "Easy TV", after having waited three years for the Commission's response to its complaint, has eventually requested the Commission in August 2009 to answer its complaint and to decide upon the initiation of a formal investigation procedure within two months. Thus, "Easy TV" has specified what kind of obligation to act it deems violated. Furthermore, it has announced that it is prepared to take legal action in case of the Commission's further failure to act; this is also a necessary component of the preliminary proceedings. Yet, the Commission has not taken any measures within the two following months and has not issued any opinion defining its position. Consequently, the preliminary proceedings were completed by October 2009.

VI. *Suitable respondent*

The action would need to be directed against the European Commission as the responsible Union institution that is requested to decide upon the initiation of a formal investigation procedure. (Note that the action must not be directed against the member state A, which is granting the state aids in question.)

VII. *No expiry of the time limit*

The application must be lodged within the time limit of two months set by art. 265 sub-sect. 2 phrase 2 FEU Treaty. In December 2009, this is still possible, as the time period did not begin until the completion of the preliminary proceedings in October 2009. Only then, an action against the Commission for failure to act could be brought to the court - after "Easy TV" had sent its reminding complaint in August 2009 to the Commission and the latter had not defined its position within two months, as required in art. 265 sub-sect. 2 phrase 2 FEU Treaty. Thus, this precondition of admissibility is also fulfilled.

Conclusion: Proceeding on the assumption that "Easy TV" has legal interest in bringing proceedings (see above), an action for failure to act brought by "Easy TV" against the Commission under art. 265 sub-sect. 3 FEU Treaty would be admissible.

B. Well-foundedness of an action for failure to act (substance/merits of the case)

An action for failure to act would be well-founded, if the Commission has violated Union law by not taking the *decision upon the initiation of a formal investigation* of the financial aids to the public service broadcasters in A-land. This is the case if the Commission was obliged to take this decision in August 2009, when "Easy TV" formally called upon it to act. There are no specific characteristics of the case under consideration indicating any special obligation in this case. Therefore, the answer depends on the question if art. 108 FEU Treaty, by conferring to the Commission the mission to monitor state aids, constitutes a *general obligation to review state aids* that - within the procedural framework of a preliminary examination and a formal investigation procedure, as provided by the State Aids Regulation (Regulation 659/1999) - obligates in the individual case to complete the preliminary examination and to decide upon the initiation of the formal investigation procedure. It also depends on the question if the Commission is bound to a certain *time frame* in the individual case and if it has *exceeded* this time frame in the case under consideration in August 2009.

I. *General obligation of the Commission to review state aids*

Literal interpretation of art. 108 FEU Treaty does not lead to a definite conclusion regarding a general obligation of the Commission to review state aids. The wording of art. 108 FEU Treaty neither is opposed to the conjecture of such an obligation neither provides any specific reason for it.

However, a teleological interpretation paying regard to the role of this article in the general context of the Treaties leads to a definite conclusion: According to the distribution of competences by the FEU Treaty, the *Commission* is *exclusively responsible* for the examination and decision upon the compatibility of state aids with the internal market. Solely this institution has been assigned the task to shelter the internal market from illegal state aids, which jeopardize its functioning by distorting competition. If the Commission was not bound to completely accomplish this mission, the uniform

application of the provisions on state aids in all member states and consequently the functioning of the market would not be ensured. This could challenge the very idea of the European internal market. Besides, art. 17(1) phrases 2 and 3 EU Treaty entrust the Commission with the general mission of a "guardian of the Treaties", thereby generally obliging it to make sure that the provisions of the Treaties are respected in the member states. All this supports the suggestion that the task of monitoring state aids implies a *general duty to review and to intervene* without any political discretion of the Commission.

Whenever a third party complains to the Commission, questioning an alleged state aid that has been granted to a competitor but not notified to the Commission, the Commission has to act in the following way: In order to ensure the respect of the Treaty provisions on state aids, the Commission must consider the complaint thoroughly and impartially in a preliminary examination. Then it has to take a decision that will be formally addressed to the member state granting the support in question. The Commission must either initiate the formal investigation procedure as prescribed in art. 108(2) FEU Treaty and the State Aids Regulation (Regulation 659/1999),¹⁹ either find that the measure does not constitute a state aid in the sense of art. 107(1) FEU Treaty²⁰ or does constitute a state aid but is compatible with the internal market under art. 107(2) FEU Treaty (and that for these reasons a formal investigation procedure will not be initiated).²¹

II. Reasonable period of time for the review of the individual state aid

There is the question whether the Commission's preliminary examination is subject to a time limit. The State Aids Regulation sets a time limit only for state aids notified by the member states. Art. 4(5) aims to ensure that the member states quickly get certainty regarding the lawfulness of their planned aids; therefore, the preliminary examination is limited to two months. However, in these cases, the member states themselves provide the relevant information and the Commission does not need to or only needs to collect few information itself. This situation essentially differs from those cases, where the Commission gets otherwise notice of a planned or granted state aid and needs a certain time for bringing together all relevant facts and aspects. Thus, the time limit set in art. 4(5) of the Regulation 659/1999 is not suitable and cannot be applied in these cases (not even by the way of judicial developing of law or analogy).

Nevertheless, whenever there is distortion or risk of distortion of competition, the interests of the competitors and the possible malfunctioning of the internal market must be taken into account. Thus, general principles of Union law deriving from the rule of law oblige in any case to complete the preliminary examination and to decide *within a reasonable (appropriate) period of time*. The Commission cannot prolong indefinitely its preliminary examination of state measures in relation to which there has been a complaint of a third party. The reasonable period of time must be determined in relation to the particular circumstances of the individual case and, especially, its context, the complexity of the case and its importance for the various parties involved.²²

III. Failure to fulfil the obligation to review the financial aids for the public service broadcasters in member state A-land within a reasonable period of time

In the case under consideration, the preliminary examination of the state aid, which has the only purpose to enable the Commission to decide upon the initiation of a formal investigation procedure, had already stretched over more than three years when "Easy TV" sent its reminder in August 2009. The facts of the case do not give any clue as to why the Commission should not have been able to collect the necessary information, do the necessary assessments and subsumptions and take the decision within that very long period, regarding that the decision is of a preliminary character and does not yet imply a definite statement on the lawfulness of the state aid in question. Apparently, there are no exceptional circumstances that could explain or justify the long duration of the preliminary examination. Instead, there have been political reasons prompting the Commission to refrain for the moment from acting. Taking into account the Commission's general duty to review and to intervene (see above, B.I.), these reasons are not acceptable. Thus, the reasonable period of time for the

¹⁹ See for the details art. 6 of the Regulation 659/1999.

²⁰ Formerly art. 87(1) EC Treaty.

²¹ Cf. Court of First Instance, case T-95/96, Gestelevision Telecinco, summary, 1 f., and no. 53 ff.

²² Cf. Court of First Instance, case T-95/96, Gestelevision Telecinco, summary, 3, and no. 73 ff.

decision upon the initiation of a formal investigation procedure had already expired when "Easy TV" sent its reminding note in August 2009.

Thus, by refraining from deciding upon the initiation of a formal investigation of the financial aids to the public service broadcasters in member state A-land, the Commission has not fulfilled its obligation under art. 108 FEU Treaty and therefore violated Union law.

Conclusion: My (correct) answer will be that a legal action of "Easy TV" before the General Court would not only be admissible but also well-founded and thus would have good prospects of success. The successful application would not seek the finding of the Court that the financial support granted to the public service broadcast providers in member state A-land is incompatible with the internal market under art. 107(1) FEU Treaty. It would seek the finding that the Commission has violated Union law by not deciding upon the initiation of a formal investigation procedure with regard to this issue.

However, providing comprehensive legal advice as it is the professional duty of a legal consultant, I will explain to the client that a possible legal action can only be considered admissible on the assumption that the General Court will follow the position that the European Courts have taken in previous decisions concerning the legal interest of third parties in bringing actions for failure to act. I will also explain to the client that this position is not only wrong but also indefensible with regard to the generally accepted rules of legal methodology. Therefore, I will point to the risk that the European Courts might re-adjust their position and that in this case, an action brought by "Easy TV" would be considered as inadmissible and hence not be successful.

NOTE / FURTHER READING:

This case has been modelled in some aspects on the case T-95/96, *Gestevisión Telecinco*, at the Court of First Instance [now the General Court]. See for a comparable case *Epping/Lenz*, *Fallrepetitorium Europarecht*, 2005, p. 9 ff.

The problem of the legal interest in bringing proceedings for an action for failure to act had to be presented from the *perspective of legal consulting*. The legal consultant must orientate himself by the Court practice, even if it meets strong objections from legal science. The case solution would have to be different if the case was about the *perspective of a judge* (for example: "How will the General Court [correctly] decide upon a legal action brought by 'Easy TV'?"). In this case, you must assume that the Court will be convinced by striking arguments and re-adjust its position, changing its jurisprudence. Then you must present and question the existing jurisprudence but in the end follow your own - scientifically well-founded - point of view. The same applies if the case question is formulated neutrally (for example: "Would an action of 'Easy TV' be admissible and well-founded?"). Even in the context of legal case-solving, you must not forget that in European Union law, following continental European legal tradition, *court decisions are expressions of opinions but no "case-law"*, and that for this reason the reference to a court decision cannot replace your own diligent reasoning.

More informations on this course at www.lanet.lv/~tschmit1. For any questions, suggestions and criticism please contact me via e-mail at tschmit1@gwdg.de.

A. Admissibility of an action for failure to act

I. Jurisdiction of a European Court

- 1) **Jurisdiction of the courts of the European Union: (+)**
- 2) **Jurisdiction within the system of the courts of the European Union: the *General Court* (art. 256(1) FEU Treaty)**

II. Capacity to sue and to be sued

- 1) **the capacity of "Easy TV" to sue: (+), art. 265 sub-sect. 3**
- 2) **the capacity of the Commission to be sued: (+), art. 265 sub-sect. 1**

III. Suitable subject-matter for an application: (+)

- **alleged of violation Union law by failure to adopt a legally binding decision under art. 108(2) FEU Treaty**

IV. Legal interest in bringing proceedings

- 1) **According to the broad concept of the action for failure to act supported by some scholars and in jurisprudence**
- 2) **According to an interpretation of art. 265 sub-sect. 3 that respects the generally accepted principles of legal methodology**
- 3) **According to the case solution in a lawyer's expertise for his client**

V. Preliminary proceedings

VI. Suitable respondent

VII. No expiry of the time limit

B. Well-foundedness of an action for failure to act (substance/merits of the case)

I. General obligation of the Commission to review state aids

- 1) **According to literal interpretation**
- 2) **According to teleological interpretation, taking into account the overall context of the Treaties**

II. Reasonable period of time for the review of the individual state aid

III. Failure to fulfil the obligation to review the financial aids for the public service broadcasters in member state A-land within a reasonable period of time