JUDGMENT OF THE COURT (Third Chamber)

28 July 2011 (*)

(Appeal – Subsidies granted by the Italian Republic to promote the purchase of digital decoders – Non-inclusion of decoders for the reception solely of television programmes broadcast by satellite – Decision declaring the aid to be incompatible with the common market)

In Case C-403/10 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 6 August 2010,

Mediaset SpA, established in Milan (Italy), represented by K. Adamantopoulos, dikigoros, G. Rossi, avvocato, and E. Petritsi, dikigoros,

appellant,

the other parties to the proceedings being:

European Commission, represented by B. Martenczuk and B. Stromsky, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

Sky Italia Srl, established in Rome (Italy), represented by F. González Díaz, abogado, and F. Salerno, avocat,

intervener at first instance,

THE COURT (Third Chamber),

composed of K. Lenaerts (Rapporteur), President of the Chamber, D. Šváby, R. Silva de Lapuerta, E. Juhász and T. von Danwitz, Judges,

Advocate General: Y. Bot,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 4 May 2011,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its appeal, Mediaset SpA ('Mediaset') seeks to have set aside the judgment of the General Court of the European Union of 15 June 2010 in Case T-177/07 *Mediaset* v *Commission* [2010] ECR II-0000 ('the judgment under appeal'), in which the General Court dismissed the application by Mediaset for annulment of Commission Decision 2007/374/EC of 24 January 2007 on State aid C 52/2005 (ex NN 88/2005, ex CP 101/2004) implemented by the Italian Republic for the subsidised purchase of digital decoders (OJ 2007 L 147, p. 1; the 'contested decision').

Facts

2 Article 4(1) of Law No 350 relating to the provisions for drawing up the annual and pluriannual budget of the [Italian] State (Finance Act 2004) (legge n. 350 – Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2004)) of 24 December 2003 (ordinary supplement to the GURI No 299 of 27 December 2003) ('the 2004 Finance Law') provided:

'[f]or the year 2004, every user of the broadcasting service who has fulfilled his obligations regarding payment of the relevant subscription fee for the year in progress and who purchases or rents equipment for the reception, free-to-air and at no cost to the user or to the content provider, of television signals transmitted using digital terrestrial technology (T-DVB/C-DVB) and the associated interactive services shall be entitled to a State subsidy of EUR 150. The subsidy shall be awarded within the spending limit of EUR 110 million.'

3 Article 1(211) of Law No 311 relating to the provisions for drawing up the annual and pluriannual budget of the State (Finance Act 2005) (legge n. 311 – Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2005)) of 30 December 2004 (ordinary supplement to the GURI No 306 of 31 December 2004) ('the 2005 Finance Law') refinanced the measure in question with the same spending limit of EUR 110 million, but reduced the subsidy per decoder to EUR 70.

4 That scheme ceased to apply on 1 December 2005.

5 In Italy the first step in the digitisation of television signals was the adoption of Law No 66 of 20 March 2001 converting into law, with amendments, Decree-Law No 5 of 23 January 2001 (legge n. 66 – Conversione in legge, con modificazioni, del decreto-legge 23 gennaio 2001, n. 5) (GURI No 70 of 24 March 2001, p. 3), under which digitisation was to have been accomplished and transmission in analogue mode to have ceased definitively by December 2006. In that regard, Article 2a(5) of that law provides as follows:

'By the end of the year 2006, digital technology shall be the sole means used to broadcast programmes and multimedia services on terrestrial frequencies.'

6 The deadline for the cessation of analogue broadcasting was subsequently postponed twice, initially until 2008, and then again until 30 November 2012.

7 On 11 May 2004, Centro Europa 7 Srl filed a complaint with the Commission of the European Communities in respect of the subsidy granted by the Italian Republic under Article 4(1) of the 2004 Finance Law for the purchase of certain digital terrestrial

decoders. By letter of 10 February 2005, Centro Europa 7 srl provided the Commission with further information and maintained that that Member State had provided for refinancing of that subsidy in Article 1(211) of the 2005 Finance Law.

8 On 3 May 2005, Sky Italia Srl ('Sky Italia) also filed a complaint in respect of the same provisions of the 2004 Finance Law and the 2005 Finance Law (taken together, 'the measure at issue').

9 By letter dated 21 December 2005, the Commission informed the Italian Republic of its decision to initiate the formal investigation procedure laid down in Article 88(2) EC (OJ 2006 C 118, p. 10) in respect of the measure at issue. In that decision, the Commission called on interested parties to submit their comments on that measure.

10 On 24 January 2007 the Commission adopted the contested decision.

11 In that decision, first of all, the Commission stated that, in so far as it provided for the grant by the Italian Republic of a subsidy for the purchase, in 2004 and 2005, of certain digital terrestrial decoders, the measure at issue constituted State aid, for the purposes of Article 87(1) EC, to digital terrestrial broadcasters offering pay-TV services, in particular pay-per-view services, and digital cable pay-TV operators.

12 Secondly, the Commission found that none of the derogations provided for in Article 87(3) EC was applicable to the measure at issue. In particular, the Commission decided that the derogation provided for in Article 87(3)(c) EC could not apply since the measure at issue was regarded as aid to digital terrestrial broadcasters and to cable pay-TV operators (the aid at issue). Even though the transition from analogue to digital television broadcasting was a common interest objective, the measure at issue was not proportionate to the pursuit of that objective and was not capable of preventing unnecessary distortions of competition. That finding was primarily based on the fact that the measure at issue was not technologically neutral, since it did not apply to digital satellite decoders. On the other hand, the Commission expressed the view that, in so far as the measure at issue could be regarded as aid to producers of decoders, it could be covered by the derogation provided for in Article 87(3)(c) EC, since (i) it promoted technological development in the form of higher-performance decoders with standards available to all producers; (ii) all producers offering that type of decoder, including those established in other Member States, were entitled to the funding; and (iii) stimulation of the demand for decoders following the measure at issue was the inevitable effect of any public policy in favour of digitisation, even the most technologically neutral.

13 Consequently, the Commission ordered the recovery of the aid paid pursuant to the measure at issue, which had been declared incompatible with the common market and granted unlawfully. For that purpose, the Commission offered guidance on methods for calculating the amount of aid.

14 By Decision C(2006) 6630 final of 24 January 2007 ('the decision concerning 2006'), the Commission declared compatible with the common market the aid implemented by the Italian Republic under Law No 266 relating to the provisions for drawing up the annual and pluriannual budget of the [Italian] State (Finance Act 2006) (legge n. 266 – Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge

finanziaria 2006)) of 23 December 2005 (ordinary supplement to the GURI No 302 of 29 December 2005) for the purchase, in 2006, of digital decoders with an open application programme interface. In contrast to the contested decision, the subsidies at issue in the decision concerning 2006 were found to be 'technologically neutral' inasmuch as they could be granted for decoders of all digital platforms (terrestrial, cable and satellite), provided that they were interactive and interoperable, that is to say, on condition that they were 'open' decoders as opposed to 'proprietary' decoders.

Procedure before the General Court and the judgment under appeal

15 By application lodged at the Registry of the General Court on 23 May 2007, Mediaset, a digital terrestrial programmes broadcaster, brought an action seeking annulment of the contested decision.

16 By document lodged at the Registry of the General Court on 5 September 2007, Sky Italia applied for leave to intervene in support of the Commission. By order of 10 January 2008, the President of the Second Chamber of the General Court granted that application for leave to intervene.

17 By the judgment under appeal, the General Court rejected the five pleas in law put forward by Mediaset.

18 As a preliminary matter, in paragraphs 45 to 47 of the judgment under appeal, the General Court rejected as inadmissible the fifth plea, alleging a manifest error of assessment as regards the determination of the scope of Article 4(1) of the 2004 Finance Law, on the ground that that plea had been raised for the first time in the reply and at the hearing. Thus, the General Court found that, pursuant to Article 44(1)(c), read in conjunction with Article 48(2), of its Rules of Procedure, according to which an application must state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based, new pleas in law may not be introduced in the course of proceedings unless they are based on matters of law or of fact which come to light in the course of the procedure, and that consequently the fifth plea had been raised out of time.

19 The General Court then went on to examine the first plea, alleging an infringement of Article 87(1) EC. In the course of examination of the second part of that plea, relating to the absence of any economic benefit conferred on Mediaset, the General Court stated, in paragraph 60 of the judgment under appeal, that the measure at issue could not benefit a consumer who decided to purchase or rent equipment exclusively for the reception of digital satellite television signals. Consequently, that measure did not meet the requirement of technological neutrality imposed by the Commission for aid measures relating to the digital television market.

20 The General Court observed, in paragraph 61 of the judgment under appeal, that the question whether broadcasters would necessarily have financed the acquisition of digital decoders in the absence of the measure at issue, on which Mediaset based several of its arguments, was irrelevant as regards the assessment of that measure's categorisation as State aid. In paragraph 62 of the judgment under appeal, the General Court held that what was important in that regard was whether the subsidising of digital decoders created an advantage for terrestrial broadcasters such as Mediaset. In recitals 82 to 95 of

the contested decision, the Commission set out in detail all the reasons for its finding that the measure at issue constituted an economic advantage in favour of terrestrial broadcasters such as Mediaset. The General Court approved that reasoning and noted, in particular, that the Commission was correct to observe that building up an audience is a crucial part of the business of broadcasters of television programmes and that the measure at issue, inter alia, enabled those broadcasters to consolidate their existing position on the market – as compared with the position of new competitors – in terms of brand image and customer retention.

21 The first part of the first plea, relating to the concept of an indirect beneficiary, examined in paragraphs 74 to 79 of the judgment under appeal, was likewise rejected. Basing itself on paragraph 108 of its judgment of 4 March 2009 in Case T-424/05 *Italy* v *Commission*, the General Court noted that an advantage granted directly to certain natural or legal persons who are not necessarily undertakings may constitute an indirect advantage, and hence State aid, for other natural or legal persons who are undertakings. Indeed, if that were not the case, Article 87(2)(a) EC, under which aid having a social character, granted to individual consumers, is compatible with the common market provided that it is granted without discrimination related to the origin of the products concerned, would be superfluous. Lastly, Mediaset's arguments relating to the Commission's failure to justify its decision to narrow down the concept of indirect beneficiaries to digital terrestrial broadcasters and cable operators offering pay-TV services, thereby excluding digital terrestrial broadcasters and cable operators not offering such services, as well as decoder manufacturers, were rejected as ineffective since satellite broadcasters could not in any event benefit from the measure at issue.

22 As to the third part of the first plea, alleging the absence of selectivity of the measure at issue, the General Court held, in paragraphs 82 to 85 of the judgment under appeal, that it was inadmissible because the arguments raised in that regard did not meet the requirements of clarity and precision laid down in Article 44(1)(c) of its Rules of Procedure. The General Court observed that, in criticising the Commission for confusing the concepts of selectivity and discrimination, Mediaset failed to explain how the fact that aid was applied in a discriminatory manner, in the sense that it benefited only certain categories of undertaking, did not permit the inference that it was selective for the purposes of Article 87(1) EC.

23 Lastly, in paragraphs 95 to 111 of the judgment under appeal, the General Court rejected in their entirety the arguments put forward under the fourth part of the first plea, relating to the absence of distortion of competition. The General Court observed, in essence, that the measure at issue distorts competition because it places at an advantage broadcasters using one technology rather than another, thereby infringing the principle of technological neutrality. Mediaset's arguments seeking to demonstrate that this advantage would be offset by other circumstances were irrelevant because they would not affect the existence of this distortion, even on the supposition that they were established. As to the argument based on Commission Decision C(2007) 4286 final of 25 September 2007 on aid (N 103/2007) for the acquisition of digital decoders and for the adaptation of antennas in Soria, the General Court held that, by contrast to the measure at issue, the measure under examination in the Soria decision was able to benefit all digital television broadcasting technologies. The General Court took the view that Mediaset's argument based on legal certainty was manifestly unfounded because the Commission had expressed its doubts as to whether there was indeed no breach of

the principle of technological neutrality by the measure at issue as soon as the formal investigation procedure pursuant to Article 88(2) EC was initiated.

24 The General Court began its consideration of the second plea, alleging manifest error of assessment and error in law in assessing the compatibility of the measure at issue with the common market under Article 87(3)(c) EC, by rejecting, in paragraphs 114 to 117 of the judgment under appeal, the Commission's argument that some of Mediaset's claims were inadmissible because they lacked clarity; the General Court then went on to reject, in paragraphs 125 to 130 of the judgment under appeal, the first part of that plea, alleging an error in concluding that the measure at issue did not address the market failures. The General Court held that the Commission was right to take the view that the mandatory nature of the date laid down for digitisation in Italy was such as to resolve the problem of coordination among operators on the terrestrial television market and accordingly, the subsidy for the purchase of digital decoders was unnecessary. As for the arguments that the measure at issue offset costs to consumers and promoted innovation, and that digitisation involved the existence of externalities, the General Court observed that those circumstances could not, however, justify the exclusion of the satellite platform from the scope of the measure at issue, which represents unjustified technological discrimination.

25 As regards the second part of the second plea, alleging an error in concluding that the measure at issue was neither a necessary nor a proportionate instrument for addressing the market failures, the General Court held, in paragraphs 133 to 135 of the judgment under appeal, that Mediaset's arguments that the measure at issue was necessary and proportionate for those purposes could not, even if well founded, justify the exclusion of satellite broadcasters from the benefit of the measure, because it was precisely the absence of technological neutrality that had led the Commission to find that the aid at issue was incompatible with the common market.

26 In response to the third plea, alleging infringement of Article 253 EC, the General Court started by recalling, in paragraphs 140 to 147 of the judgment under appeal, the requirements of its case-law with regard to the statement of reasons and noted in particular that, as regards the existence of a distortion of competition in the common market, the Commission is not required to carry out an economic analysis of the actual situation on the relevant markets, of the market share of the undertakings in receipt of the aid, of the position of competing undertakings or of trade flows between Member States. In the case of aid granted unlawfully, the Commission is not required to demonstrate the actual effect which that aid has had on competition and on trade between Member States because, were the position otherwise, such a requirement would ultimately give Member States which grant unlawful aid an advantage over those which notify the aid at the planning stage. In particular, the Commission merely needs to establish that the aid at issue is of such a kind as to affect trade between Member States and distorts or threatens to distort competition. It does not have to define the market in question.

27 As to the argument that the contested decision contains an inadequate statement of reasons in terms of showing that there is a distortion or threat of distortion of competition, the General Court pointed out, in paragraph 148 of the judgment under appeal, that, in recitals 102 to 114 of the contested decision, the Commission examined the effect of the measure at issue on competition and on trade between the Member States. In particular

the General Court observed, in paragraph 156 of that judgment, that it is apparent from recitals 113 and 114 of the contested decision that the Commission found that the broadcasting and network services markets are open to international competition and that, by the selective favouring of certain broadcasters or network operators, competition is distorted at the expense of economic operators which might come from other Member States. Thus, the General Court found, in paragraphs 155 and 157 of the judgment under appeal, that the Commission had provided an adequate statement of reasons in the contested decision as regards the effects of the measure at issue on competition and as regards the question of whether it was likely to affect trade between Member States.

28 The General Court also noted, in paragraph 158 of the judgment under appeal, that the Commission had examined, in recital 80 of the contested decision, whether the measure at issue involved the use of State resources and, in recitals 81 to 101 of that decision, whether the measure at issue conferred a selective economic advantage on the recipients. Thus, the Commission presented in an appropriate manner, in the contested decision, the reasons why the measure at issue had to be classified as State aid. The General Court also stressed, in paragraph 159 of that judgment, that it follows from the express terms of the contested decision – in particular from recitals 104, 135 and 140 thereof – that the incompatibility of the measure at issue was closely linked to the breach of the principle of technological neutrality. Lastly, concerning the position of decoder manufacturers, the General Court held, in paragraph 160 of that judgment, that the Commission had provided a statement of reasons for the contested decision to the requisite legal standard by observing, in particular in recital 168 of the contested decision, that the measure at issue was, in any event, compatible with the common market as regards those manufacturers given that they could all gain from it.

29 The General Court also rejected the fourth plea, alleging infringement of Article 14 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [88] EC (OJ 1999 L 83, p. 1) and breach of the principle of the protection of legitimate expectations and the principle of legal certainty. It recalled, in paragraphs 169 and 170 of the judgment under appeal, that the removal of unlawful aid by means of recovery is the logical consequence of a finding that it is unlawful and that, under Article 14(1) of Regulation No 659/1999, where negative decisions are taken in cases of unlawful aid, the Commission is to decide that the Member State concerned is to take all necessary measures to recover the aid from the beneficiary unless, in so doing, the Member State would be contravening a general principle of European Union ('EU') law.

30 The General Court observed, in paragraph 173 of the judgment under appeal, that, in view of the mandatory nature of the review of State aid by the Commission under Article 88 EC, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure. The General Court expressed the view, in paragraphs 176 and 177 of that judgment, that the two exceptional circumstances relied on by Mediaset were not such as to give rise to a legitimate expectation on its part in the present case. First, the reference in paragraph 3.4.2 of the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 30 July 2004 on interoperability of digital interactive TV services (COM(2004) 541 final) did not constitute a guarantee on the Commission's

part as regards the lawfulness of a measure such as that at issue. Secondly, the argument that the indirect form of the aid at issue could have given rise to a legitimate expectation also had to be rejected because, like any diligent economic operator, Mediaset ought to have known that the indirect nature of that aid would have no bearing on its classification as aid, or on its recovery.

31 As to the alleged breach of the principle of legal certainty, the General Court observed, in paragraph 181 of the judgment under appeal, that, according to settled case-law, no provision requires the Commission, when ordering the recovery of aid declared incompatible with the common market, to fix the exact amount of the aid to be recovered. It is sufficient for the Commission's decision to include information enabling the addressee of the decision to work out that amount itself, without overmuch difficulty. In addition, the General Court observed, in paragraphs 182 and 184 of the judgment under appeal, that, again according to settled case-law, in the absence of pertinent provisions, the recovery of aid which has been declared incompatible with the common market is to be carried out in accordance with the rules and procedures laid down by national law and it is consequently for the national court, if a case is brought before it, to rule on the amount of State aid which the Commission has ordered to be recovered, if necessary after referring a question to the Court of Justice for a preliminary ruling.

Forms of order sought by the parties to the appeal

32 Mediaset claims that the Court should:

– set aside the judgment under appeal in its entirety;

– accept the application at first instance for the annulment of the contested decision;

– in the alternative, refer the case back to the General Court; and

– order the Commission and the intervener to pay the costs of the proceedings at first instance and on appeal.

33 The Commission contends that the Court should:

– dismiss the appeal as partially inadmissible and partially unfounded; and

– order Mediaset to pay the costs.

34 Sky Italia requests that the Court:

– dismiss the appeal;

– uphold the judgment under appeal; and

– order Mediaset to pay the costs incurred by Sky Italia.

The appeal

35 In support of its appeal, Mediaset relies on eight grounds of appeal, of which the first two concern the rejection, on grounds of inadmissibility, of certain of its pleas at first instance and the other six the rejection, on the merits, of the other pleas relied on before the General Court.

36 According to settled case-law, Article 87(1) EC prohibits State aid 'favouring certain undertakings or the production of certain goods', that is to say, selective aid (see Case C-66/02 *Italy* v *Commission* [2005] ECR I-10901, paragraph 94, and Case C-88/03 *Portugal* v *Commission* [2006] ECR I-7115, paragraph 52). As regards appraisal of the condition of selectivity, Article 87(1) EC requires assessment of whether, under a particular legal regime, a national measure is such as to favour 'certain undertakings or the production of certain goods' in comparison with others which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation (see, to that effect, Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 41; Case C-308/01 *GIL Insurance and Others* [2004] ECR I-4777, paragraph 68; and Case C-172/03 *Heiser* [2005] ECR I-1627, paragraph 40). In order to determine whether a measure is selective, it is therefore appropriate to examine whether, within the context of a particular legal system, that measure constitutes an advantage for certain undertakings in comparison with others which are in a comparable factual and legal situation (*Portugal* v *Commission*, paragraph 56).

37 The finding that the measure at issue is not technologically neutral, in that digital satellite decoders are excluded from the benefit of the subsidy granted to consumers by that measure, is one of the main factors in the analysis undertaken by the Commission in the contested decision. The Commission takes the view, in essence, that the fact that the measure is not technologically neutral allows it to draw the conclusion that the measure was selective and distorted competition within the meaning of Article 87(1) EC, and that the distortion of competition was such that the aid at issue could not be declared compatible with the common market under Article 87(3)(c) EC. Since the General Court approved that analysis in the judgment under appeal, the objective of several of the grounds of appeal is to demonstrate that that analysis was unlawful.

38 The grounds of appeal put forward by Mediaset in support of the present appeal must be examined by the Court in the light of those considerations.

The first ground of appeal: error in law by reason of the rejection, as being inadmissible, of the fifth plea advanced at first instance

Arguments of the parties

39 Mediaset maintains that, under Article 44(1)(c) of the Rules of Procedure of the General Court, read in conjunction with Article 48(2) thereof, the General Court ought to have accepted the admissibility of the fifth plea for annulment advanced at first instance, to the effect that the measure at issue did not exclude digital satellite decoders from its scope, provided that they used 'open' standards rather than 'proprietary' standards. Mediaset argues that that plea was not a new plea raised for the first time at the hearing before the General Court, as it had already raised that matter in its application, inter alia in paragraphs 77, 83, 95, 111, 120, 127 and 140, as well as in its reply. In addition, the Commission relied, in its defence, on a decision which it adopted only after the action

had been brought, which constitutes a new fact. According to Mediaset, the error of law thus committed by the General Court led it to assess the scope of the measure at issue incorrectly and therefore to characterise it wrongly as not being technologically neutral.

40 The Commission argues in reply that if, as Mediaset submits, the fifth plea at first instance was not, in reality, a new plea but an amplification of the other pleas raised in the application, the rejection of that plea in itself did not prejudice Mediaset since the General Court dealt with all those other pleas. In addition, the Commission and Sky Italia dwell on the fact that, at the hearing, Mediaset called into question for the first time the finding made by the Commission in the contested decision that digital satellite decoders were excluded from the scope of the measure at issue. In its pleadings, by contrast, Mediaset asserted only that the exclusion of digital satellite decoders was justified by certain of their characteristics and that digital decoders capable of receiving both terrestrial and satellite signals and which used 'open' standards could be eligible for the subsidy.

41 Sky Italia also notes that the interpretation of a provision of national law by the General Court is tantamount to an assessment of a factual element. In any event, the General Court in fact carried out an assessment of the scope of the measure at issue, at paragraphs 55 to 60 of the judgment under appeal, and reached the conclusion, on the facts as established, that satellite decoders were excluded from its scope.

Findings of the Court

42 It follows from Article 44(1)(c), in conjunction with Article 48(2), of the Rules of Procedure of the General Court that the application initiating proceedings must contain, inter alia, a summary of the pleas in law relied on, and that new pleas in law may not be introduced in the course of proceedings unless they are based on matters of law or of fact which have come to light in the course of the procedure (order in Case C-430/00 P *Dürbeck* v *Commission* [2001] ECR I-8547, paragraph 17).

43 In the present case, it is not apparent from any of the seven paragraphs of the application at first instance in which Mediaset claims that it disputed the scope of the measure at issue, nor from a reading of the application in its entirety, that Mediaset adequately raised in the application the fifth plea to the effect that the measure at issue did not exclude digital satellite decoders from its scope provided that they used 'open' and not 'proprietary' standards.

44 Admittedly, Mediaset claims, in certain paragraphs of that application, that the measure at issue did not adversely affect satellite broadcasters and satisfied the test of technological neutrality. However, the argument put forward in support of that proposition consists, in essence, of Mediaset's claim that not extending the scope of that measure to digital satellite decoders was justified, since, in particular, there was no supply of 'open' standard digital satellite decoders on the market and it was unlikely that such a supply would come into being in the brief period during which the measure at issue was to be applied. The only example mentioned by Mediaset in its application at first instance of a situation in which a digital satellite decoder could have come within the scope of the measure at issue is the sale of a 'hybrid' decoder, in other words, a decoder which was both a terrestrial decoder and a satellite decoder.

45 It is clear that those arguments cannot be equated with the fifth plea raised at first instance. None of those arguments, even if established, would have enabled the General Court to conclude that the measure at issue could be applied to any digital satellite decoder other than a 'hybrid' decoder.

46 It must be observed, in particular, that, in paragraph 95 of the judgment under appeal, the General Court expressly rejected the argument that Sky Italia could benefit from the measure at issue by offering 'hybrid' decoders, pointing out that such an argument highlighted the selective nature of that measure. Accordingly, the General Court took into account the fact that 'hybrid' decoders were covered by the measure at issue, but held that decoders which were exclusively satellite decoders were excluded from it, irrespective of whether they used 'open' or 'proprietary' standards.

47 Lastly, the fact that the Commission relied, in the defence which it submitted to the General Court, on a decision which it adopted only after the introduction of the action has no effect on the lawfulness, scope or interpretation of the contested decision. That does not therefore constitute a new fact within the meaning of Article 48(2) of the General Court's Rules of Procedure.

48 It follows from the foregoing that the first ground of appeal must be rejected.

The second ground of appeal: error in law by reason of the rejection, as being inadmissible, of the third part of the first plea raised at first instance

Arguments of the parties

49 Mediaset submits that the General Court erred in law in rejecting as inadmissible the third part of the first plea raised at first instance, alleging absence of selectivity in the nature of the measure at issue, on the ground that that part of the plea was not set out sufficiently clearly and precisely in the application at first instance. Mediaset claims that that error in law is very apparent from reading the application, and in particular paragraph 61 thereof. Mediaset's criticism of the Commission in that part of the plea is that it took the view that the measure at issue was selective because, by reason of the fact that it was not technologically neutral, it was discriminatory.

50 Mediaset's arguments are challenged by the Commission and by Sky Italia, which raise several objections. First, discrimination is not an argument put forward by the Commission in the contested decision to conclude that the measure at issue is selective. In any event, in accordance with Article 87(1) EC, the exclusion of satellite broadcasters from the benefit of the measure at issue was one element that properly entitled the Commission to conclude that the measure was selective and distorted competition. Furthermore, Sky Italia argues that the second ground of appeal requires a fresh assessment of the facts by the Court and is therefore inadmissible.

Findings of the Court

51 It is unnecessary to rule on the admissibility of this ground of appeal since it is clearly unfounded (see, by analogy, Joined Cases C-465/09 P to C-470/09 P *Diputación Foral de Vizcaya and Others* v *Commission* [2011] ECR I-0000, paragraph 115).

52 As has been stated in paragraph 42 of the present judgment, under Article 44(1)(c) of the Rules of Procedure of the General Court, the application initiating proceedings must contain, inter alia, a summary of the pleas in law on which the application is based.

53 In the present case, the third part of the first plea in law was set out in a single paragraph of six lines in the application submitted at first instance and amounts to the assertion that the fact that there is discrimination between different operators in the granting of a subsidy is not sufficient ground for holding that subsidy to be selective.

54 However, in accordance with the case-law cited in paragraph 36 of the present judgment, a national measure which discriminates between undertakings, in the sense that it is liable to place some of them at an advantage compared with others, is to be regarded as selective and therefore as constituting State aid within the meaning of Article 87(1) EC. That is the case, for instance, where a measure subsidises the purchase by consumers of a product which is used by an undertaking for the provision of a service while the purchase of the product used by another undertaking for the provision of a similar service is not subsidised.

55 Accordingly, only if Mediaset had advanced arguments in support of the view that the measure at issue might not be selective, despite being discriminatory, would the third part of the first plea in law raised at first instance have satisfied the requirements of Article 44(1)(c) of the General Court's Rules of Procedure. There are, however, no such arguments in the application submitted at first instance.

56 In those circumstances, the General Court was correct to reject, in paragraph 84 of the judgment under appeal, the third part of the first plea in law raised before it as inadmissible on the ground that Mediaset had not explained how the fact that aid is applied in a discriminatory manner does not permit the inference that it is selective for the purposes of Article 87(1) EC. It follows that the second ground of appeal must be rejected.

The third ground of appeal: error in law in that the General Court relied solely on the alleged selectivity of the measure at issue in order to conclude that it had created an economic advantage for Mediaset

Arguments of the parties

57 Mediaset maintains that the General Court failed to have regard to the fact that, under Article 87(1) EC, two separate conditions must be met in order for a national measure such as the one at issue to be characterised as State aid. Thus, the Commission must establish not only that an aid measure is selective, in the sense that it applies only to certain undertakings or to the production of certain goods, but also that it confers an economic advantage on a recipient, in the sense that it favours that recipient. Since the General Court's examination of whether there was such an economic advantage was neither autonomous nor adequate, the General Court's analysis was unlawful.

58 Mediaset insists that the measure at issue was not selective on the ground that digital satellite decoders were excluded from the benefit of the measure at issue, arguing that such decoders, and particularly those marketed by Sky Italia, all used a 'closed' or

‘proprietary’ technology, whereas only digital decoders using ‘open’ technology could benefit from the measure at issue.

59 The Commission and Sky Italia challenge the assertion that the General Court relied solely on the selectivity of the measure at issue to find that there was an economic advantage. In fact, the General Court stated that the subsidies to consumers paid under the measure at issue are advantages to the terrestrial broadcasters concerned because they help them to build up an audience, which is a crucial part of their business, and because they may influence the choice of consumers in favour of a particular television programme broadcaster. Sky Italia argues, again, that, by the third ground of appeal, Mediaset is requesting that the Court reassess the facts: accordingly, this ground of appeal is inadmissible. Sky Italia adds that, since the Italian Republic acted as a public authority in the context of the present case, rather than as an investor, a detailed economic assessment of the measure at issue was not in any event required.

60 In response to Mediaset’s arguments concerning the actual selectivity of the measure and, in particular, the claim that Sky Italia could not have benefited from the aid in any event, since it was not using ‘open’, interoperable digital decoders when the measure at issue was adopted, the Commission argues that it is impossible to know what that undertaking’s commercial choice would have been if ‘open’ digital satellite decoders had been eligible for the subsidy at issue. Sky Italia launched its own ‘proprietary’ decoders only after the adoption of the 2004 Finance Law, with the result that that choice could have been influenced by the criteria laid down in the measure at issue.

Findings of the Court

61 It is unnecessary to rule on the admissibility of this ground of appeal since it is clearly unfounded (see paragraph 51 of the present judgment and the case-law cited).

62 In accordance with the case-law cited in paragraph 36 of the present judgment, in order to determine whether a measure is selective, it is appropriate to examine whether that measure constitutes an advantage for certain undertakings in comparison with others which are in a comparable factual and legal situation. Accordingly, contrary to what is claimed by Mediaset, the conditions relating to the selectivity of a State aid measure and the creation of an economic advantage for a recipient are not entirely independent of each other. A measure may be considered to be selective only if it is likely to create such an advantage for one recipient while not doing so for other persons whose situation is comparable to that of the recipient.

63 Further, contrary to what is claimed by Mediaset, the General Court stated expressly, in paragraphs 62 to 68 of the judgment under appeal, the economic advantages – correctly identified, in the view of the General Court, by the Commission in the contested decision – created by the measure at issue for terrestrial broadcasters such as Mediaset.

64 In particular, the General Court made the point that building up an audience, which is made easier by the measure at issue, represents a crucial part of the business of television programme broadcasters. The General Court also observed that the measure at issue offered an incentive to consumers to switch from analogue to digital terrestrial mode, while limiting the costs that digital terrestrial television broadcasters had to bear, and enabled those same broadcasters to consolidate their existing position on the market

– as compared with the position of new competitors – in terms of brand image and customer retention.

65 As regards the contention, relied on by Mediaset, that only digital decoders using an 'open' technology were eligible for the subsidy provided for by the measure at issue, with the result that no digital satellite decoder available on the market at the material time could qualify because all such decoders used 'closed' and 'proprietary' technology, that has no effect on the soundness of the conclusion reached by the General Court as to the selectivity of that measure. Suffice it to observe that the measure at issue still remains selective because it permits the granting of a subsidy to digital terrestrial decoders using an 'open' technology, while excluding from that subsidy digital satellite decoders using such technology. As the Commission correctly points out, it is impossible to know what commercial choice would have been made by satellite broadcasters, such as Sky Italia, in relation to the use of 'open' or 'closed' technology, if digital satellite decoders using 'open' standards had been able to qualify for that subsidy.

66 It follows from the foregoing that the third ground of appeal must be rejected.

The fourth ground of appeal: error in law in the interpretation and application of Article 87(1) EC

Arguments of the parties

67 Mediaset argues, first of all, that the General Court committed an error of law in the interpretation and application of Article 87(1) EC in so far as it endorsed the conclusion adopted by the Commission that the measure at issue conferred an economic advantage on Mediaset, even though that conclusion was based on mere assumptions which were purely abstract and totally devoid of any evidence that the measure in question would give rise to 'audience creation' and 'low-cost market penetration'. Mediaset claims that the General Court also erred in finding, in paragraph 65 of the judgment under appeal, that the price of a decoder is a decisive factor in the choice of consumers. The General Court should have examined the real effects of the measure at issue, rather than confine itself to repeating the Commission's analysis of the alleged, but unsubstantiated, significance of the price of decoders as a criterion determining the choice of consumers and of the link between the measure at issue and low-cost penetration of the pay-TV market.

68 Next, Mediaset criticises the General Court for committing a manifest distortion of the facts established in the contested decision, inasmuch as it misconstrued the significance, in that decision, of the advantage to Mediaset of the fact that the measure at issue allowed it allegedly to access, under particularly favourable conditions, specifically the pay-TV market, which distorted competition on that market. Mediaset disputes that analysis by the Commission in any event, but states, in this context, that the General Court, because of its incorrect reading of the contested decision, substituted its own reasoning for that adopted by the Commission and further erred in its statement of reasons.

69 Lastly, Mediaset argues that the General Court misconstrued the arguments put forward in the first part of its first plea. Thus, the General Court wrongly categorised Mediaset as

an indirect beneficiary of the measure at issue. Far from contesting that aid to consumers could ever be classified as State aid within the meaning of Article 87 EC, Mediaset argued at first instance that, where the direct beneficiary of a subsidy is a consumer, a link must be demonstrated between that subsidy and the alleged indirect beneficiary, something which the Commission was unable to do in the present case. Mediaset takes issue with the reference made by the General Court, in paragraph 76 of the judgment under appeal, to Article 87(2)(a) EC, stating that it never claimed that aid to consumers cannot constitute indirect aid to economic operators. Its argument relates to the specific conditions applicable to such categorisation.

70 According to the Commission and Sky Italia, the issues as to whether the subsidy paid gave rise to an economic advantage in favour of terrestrial digital broadcasters, in the form of increased audiences, and whether the price of a decoder is a decisive factor of viewer choice are matters which fall within the assessment of the facts. Consequently, Mediaset's arguments in relation to those facts must be rejected as inadmissible. To the extent that Mediaset relies on a 'manifest distortion of the facts' by the General Court in regard to the existence of an economic advantage in favour of Mediaset, Sky Italia observes that Mediaset has provided no evidence capable of proving that there was such a distortion. In any event, Sky Italia is of the view that the General Court examined the evidence to support the existence of an economic advantage and concluded, rightly, that the measure at issue had conferred such an advantage on Mediaset.

71 Moreover, even if the price of a decoder is not the only element which determines consumer choice, it follows, according to the Commission, from basic economic logic that a significant reduction in the price of the decoder will have the effect of increasing demand for the service for the reception of which it is necessary. Sky Italia observes that the measure in question also created an incentive for consumers to switch from analogue to digital terrestrial mode, instead of opting for an alternative platform, such as satellite. The Commission argues that the fact that the General Court mentioned digital terrestrial television in general and not pay-TV services in particular, in paragraphs 62 and 68 of the judgment under appeal, in no way undermines the validity of its reasoning.

72 The Commission states that it does not understand the purpose of Mediaset's arguments concerning the concept of an indirect beneficiary. It observes that Mediaset appears no longer to be challenging the fact that aid to consumers may constitute State aid, owing to the fact that it also benefits undertakings which are its indirect beneficiaries. As to Mediaset's argument questioning the relevance of Article 87(2)(a) EC, the Commission states that, as is apparent from paragraph 76 of the judgment under appeal, that provision would be superfluous if, as stated at first instance by the appellant, aid to consumers could never be regarded as State aid within the meaning of Article 87(1) EC by reason of the fact that it indirectly benefits undertakings.

Findings of the Court

73 As is clear from Article 58 of the Statute of the Court of Justice of the European Union, an appeal is to be limited to points of law. The General Court therefore has sole jurisdiction to establish and assess the relevant facts and to assess the evidence, save where such facts and evidence have been distorted (see, to that effect, Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraphs 49 and 66; Joined Cases

C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 194; and Case C-182/99 P *Salzgitter* v *Commission* [2003] ECR I-10761, paragraph 43).

74 To the extent that Mediaset's criticism of the General Court is that the latter endorsed the Commission's conclusion that the measure at issue conferred an economic advantage on Mediaset, when that conclusion was based on mere assumptions, suffice it to state that Mediaset is here calling into question findings of fact which are under the sole jurisdiction of the General Court. Such matters as whether the measure at issue permitted audience creation and low-cost market penetration, whether the price of a decoder is a determining factor in consumers' choice of platform and whether there is a link between the measure at issue and low-cost penetration of the pay-TV market are matters which come within the General Court's assessment of the facts.

75 Further, as is clear from paragraphs 10 to 13 of the judgment under appeal, the Commission took the view, in the contested decision, that the grant by the Italian Republic of a subsidy for the purchase, in 2004 and 2005, of certain digital terrestrial decoders constituted State aid for the purposes of Article 87(1) EC to digital terrestrial broadcasters offering pay-TV services and to digital cable pay-TV operators. Consequently, the scope of the finding, in Article 1 of the contested decision, of the existence of aid incompatible with the common market and, therefore, the scope of the judgment under appeal itself, extends only to the economic advantage created for those specific beneficiaries.

76 It follows that, since the General Court, in paragraphs 62 to 68 of the judgment under appeal, analysed the question whether the measure at issue created an advantage for terrestrial broadcasters such as the appellant, that examination must necessarily be interpreted as relating specifically to the advantage conferred on terrestrial broadcasters offering pay-TV services. The fact that that interpretation of the judgment under appeal is correct is confirmed by the reference, in paragraph 62 of that judgment, to recitals 82 to 95 of the contested decision, in which the Commission's analysis is indeed focussed on the market in pay-TV services. Further, there is nothing in the analysis made in paragraphs 62 to 68 of the judgment under appeal to preclude such an interpretation.

77 In those circumstances, the argument whereby Mediaset criticises the General Court for having manifestly distorted the facts established in the contested decision, on the ground that it misconstrued the significance of the advantage to Mediaset represented by the fact that the measure at issue allowed it allegedly to access the pay-TV market specifically, must be rejected. The analysis carried out in paragraphs 62 to 68 of the judgment under appeal concerns precisely that market.

78 Lastly, to the extent that Mediaset claims that the General Court misconstrued the arguments put forward in the first part of its first plea at first instance, it is appropriate to quote the wording of the relevant part of its application at first instance. In paragraph 23 of that application, Mediaset stated that it 'does not dispute that … a State aid measure may in some circumstances confer an advantage directly on the recipient, or indirectly through a third party' but that 'the legal treatment of indirect beneficiaries should differ where the direct benefit is conferred on individual consumers rather than undertakings'. In paragraph 26 of that application, Mediaset explained that difference in

treatment by maintaining that 'when the direct and primary beneficiaries are not carrying out an economic activity and in particular are final consumers, then the measure does not fall within the ambit of Article 87(1) EC in the first place'.

79 Those quotations are sufficient to refute Mediaset's argument that it had claimed at first instance that, where the direct beneficiary of a subsidy is a consumer, a link must be demonstrated between that subsidy and the alleged indirect beneficiary, a link which the Commission did not establish in the present case. These also constitute a sufficient ground on which to reject Mediaset's argument taking issue with the reference made by the General Court, at paragraph 76 of the judgment under appeal, to Article 87(2)(a) EC, on the ground that that it never claimed that aid to consumers cannot constitute indirect aid to economic operators.

80 It is clear from the passages of the application at first instance quoted in paragraph 78 of the present judgment that Mediaset's argument in the application consisted precisely of the claim that aid of which the direct beneficiaries are consumers cannot constitute indirect aid to economic operators under any circumstances, with the result that the nature of the link between that aid and the alleged indirect beneficiary is of no relevance.

81 In those circumstances, the General Court correctly understood Mediaset's arguments as they were set out in the application at first instance. Further, the General Court did not err in law in rejecting them, in paragraphs 75 and 76 of the judgment under appeal, on the ground that aid the direct beneficiaries of which are consumers can none the less constitute indirect aid to economic operators. As stated by the General Court in paragraph 76 of its judgment, Article 87(2)(a) EC would be superfluous if aid granted to individual consumers could never constitute State aid because, if that were the case, the question of its compatibility with the common market would never arise.

82 For the remainder, Mediaset confined itself, in paragraph 27 of its application at first instance, to taking issue with the exclusion of other indirect beneficiaries, including decoder manufacturers and digital terrestrial broadcasters not offering pay-TV services. The General Court was entitled to reject that argument as ineffective, in paragraphs 77 and 78 of the judgment under appeal, since it could not, even if established, affect the conclusion that Mediaset had indirectly benefited from a selective subsidy.

83 In the light of the foregoing, the fourth ground of appeal must be rejected.

The fifth ground of appeal: error in law in the application of Article 87(3)(c) EC, and failure to provide an adequate statement of reasons, in that the General Court failed to deal with all of the relevant pleas raised by Mediaset at first instance

Arguments of the parties

84 Mediaset maintains that the General Court erred in law in the application of Article 87(3)(c) EC, and that the judgment under appeal was vitiated by a failure to provide an adequate statement of reasons, by omitting to deal with all the relevant pleas raised by Mediaset. In particular, the General Court did not consider the substance of the plea set out by Mediaset in paragraphs 93 to 96 of the application at first instance, alleging a manifest error of assessment by the Commission by reason of the fact that it declared

the aid in question to be incompatible with the common market without correctly appraising its economic context. In particular, the General Court failed to analyse 'a number of important arguments listed in paragraph 95 of the application'.

85 Nor did the General Court assess the plea, set out in paragraphs 121 to 129 of the application at first instance, alleging a manifest error of assessment committed by the Commission because of its insufficient and contradictory examination of the relevant markets, and the manifest contradiction between its approach in the contested decision and its approach in the decision concerning 2006, which also gave rise to an infringement of the principle of legal certainty. Mediaset states that the General Court also failed to provide an adequate statement of reasons in that regard, thereby infringing Article 36 of the Statute of the Court of Justice.

86 The Commission contends that the fifth ground of appeal should be rejected, asserting that Mediaset does not state in a sufficiently specific manner which of its arguments the General Court ignored. Thus, this ground of appeal does not meet the requirements for an appeal, which must state clearly the grounds on which the appellant relies. As for the arguments relating to the alleged inadequate analysis of the relevant market in the context of the evaluation of the compatibility of the aid at issue with the common market, the Commission contends, again, that these are presented too imprecisely and must, for that reason, be rejected as inadmissible. In any event, the General Court did not need to undertake a more detailed analysis of the relevant market because the unjustifiable exclusion of the satellite platform from the benefit of the measure at issue resulted in an unnecessary distortion of competition which could not be justified by any legitimate objective.

87 Sky Italia contends that, by the fifth ground of appeal, Mediaset is requesting the Court to reassess the facts and to substitute its own assessment for that already carried out by the General Court. In any event, since Mediaset refers to its own arguments concerning the existence of aid, the response of the General Court on that question also provides a response on the question of the compatibility of the aid at issue with the common market.

Findings of the Court

88 According to settled case-law, the obligation on the General Court to state reasons does not require it to provide an account which follows exhaustively, one after the other, all the arguments put forward by the parties to the case. The reasoning of the General Court may therefore be implicit on condition that it enables the persons concerned to know the reason for the General Court's decision and provides the Court of Justice with sufficient material for it to exercise its power of review (see, inter alia, the judgment of 22 May 2008 in Case C-266/06 P *Evonik Degussa* v *Commission*, paragraph 103; Case C-583/08 P *Gogos* v *Commission* [2010] ECR I-0000, paragraph 30; and Case C-260/09 P *Activision Blizzard Germany* v *Commission* [2011] ECR I-0000, paragraph 84).

89 Further, it follows from Article 256 TFEU, the first paragraph of Article 58 of the Statute of the Court and Article 112(1)(c) of the Rules of Procedure of the Court that an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal (Case C-248/99 P *France* v *Monsanto and Commission* [2002] ECR I-1,

paragraph 68 and the case-law cited). A ground of appeal put forward in support of an appeal wherein the appellant does no more than merely refer back to its arguments put forward in another context does not meet that requirement, and must therefore be rejected as insufficiently substantiated (order in Case C-51/95 P *Unifruit Hellas* v *Commission* [1997] ECR I-727, paragraph 33).

90 The General Court observed, in paragraph 115 of the judgment under appeal, that the explanations put forward in paragraphs 93 to 96 of the application before it sought to introduce arguments in support of the three parts of the second plea. Accordingly, the General Court reclassified those arguments as falling under the three parts concerned. It examined two of those parts explicitly, in paragraphs 118 to 134 of the judgment under appeal, before rejecting the second plea in its entirety in paragraph 135 of the judgment.

91 Regard being had to that reclassification, the judgment under appeal does indeed contain a response to the arguments put forward in paragraphs 93 to 96 of the application at first instance. That being the case, and since there is no precise indication of which specific arguments the General Court allegedly failed to take into account, it must be held, first, that the General Court's statement of reasons for rejecting the arguments in those paragraphs satisfied the requisite legal standard and, secondly, that the arguments put forward by Mediaset in that regard in its appeal do not comply with the requirements stated in paragraph 89 of this judgment.

92 It is, moreover, clear that the General Court did not give an explicit response, as part of its examination of the second plea relied on at first instance, to the arguments put forward in paragraphs 121 to 129 of the application, which constitute the third part of that plea, alleging a manifest error of assessment and an inadequate analysis of the relevant market with reference to the fact that the measure at issue had allegedly distorted competition in the common market, a contradiction in the approach adopted by the Commission and a disregard of the general principle of legal certainty.

93 However, in paragraphs 86 to 111 of the judgment under appeal, the General Court examined in detail, in the context of the first plea alleging an infringement of Article 87(1) EC, concerning the existence of aid, the fourth part of that plea, claiming that there was no distortion of competition. In rejecting that fourth part of the first plea in its entirety, the General Court analysed arguments which are substantially the same as those put forward by Mediaset in paragraphs 121 to 129 of its application at first instance. In particular, the General Court examined and rejected Mediaset's arguments based on the alleged contradiction between the contested decision and the decision concerning 2006, in paragraph 99 of the judgment under appeal, and also the arguments in support of an alleged breach of the principle of legal certainty, in paragraph 109 of the judgment, in which the General Court expressly stated that the incompatibility of the measure at issue with the common market was closely linked to the breach of the principle of technological neutrality.

94 In those circumstances, the judgment under appeal does indeed contain a response to the arguments relating to the compatibility of the measure at issue with the common market, put forward within the third part of the second plea in paragraphs 121 to 129 of the application at first instance. It is clear from reading the judgment as a whole that the General Court did carry out a thorough examination of the question whether the

measure at issue caused a distortion of competition, raised by Mediaset in the arguments concerned.

95 That being the case, given that there are no more precise indications of the arguments which the General Court allegedly failed to take into account, according to Mediaset, it must be held, first, that the General Court's statement of reasons for rejecting the arguments in paragraphs 121 to 129 of the application at first instance satisfied the requisite legal standard and, secondly, that the arguments put forward by Mediaset in that regard in its appeal do not comply with the requirements stated in paragraph 89 of this judgment.

96 In the light of the foregoing, the fifth ground of appeal must be rejected.

The sixth ground of appeal: error in law in the interpretation and application of Article 87(3)(c) EC

Arguments of the parties

97 Mediaset maintains that the General Court committed an error of law in the interpretation and application of Article 87(3)(c) EC by reason of the fact that it found that the Commission had lawfully declared the measure at issue incompatible with the common market on the sole ground that it excluded satellite decoders from its scope and, by the application of that selective criterion, infringed the principle of technological neutrality. In addition, Mediaset criticises the General Court for approving the Commission's approach of assuming that there was an economic advantage in favour of Mediaset, without undertaking the requisite economic and factual analysis, especially as regards the distortion of competition on the pay-TV market.

98 The General Court also approved, wrongly, the Commission's approach whereby that advantage is, by definition, always incompatible with the common market, without any assessment of the significance of that alleged advantage in the light of the principles of proportionality and necessity, in order to identify its net effects on competition in the relevant market, as required by Article 87(3)(c) EC. Such an analysis ought, inter alia, to have included a proper balancing test of the net advantages provided by the measure at issue and the net costs in terms of specific distortions on the pay-TV market.

99 The Commission and Sky Italia counter that the unwarranted exclusion of the satellite platform from the benefit of the measure at issue constitutes an element of distortion that is sufficient to render the aid in question incompatible with the common market. In support of that contention, Sky Italia relies on paragraph 69 of the judgment of 6 October 2009 in Case T-21/06 *Germany* v *Commission.* Concerning the alleged failure to analyse the effects of distortion on the pay-TV market, the Commission states that the mere fact that Sky Italia, which was the main competitor of Mediaset, was excluded from the benefit of the aid, implies, in itself, the existence of a distortion of competition on the market. According to Sky Italia, Mediaset is seeking, by the sixth ground of appeal, to have the facts reassessed.

Findings of the Court

100 Mediaset maintains, in essence, that the General Court committed an error in law in the application of Article 87(3)(c) EC because it did not find fault with the Commission's

finding that that provision was not applicable on the sole ground that the measure at issue was not technologically neutral and was for that reason selective.

101 That being the case, and taking into consideration the fact, as observed in paragraph 73 of the present judgment, that the General Court has sole jurisdiction to establish and assess the relevant facts and to assess the evidence, the Court must examine, within the framework of this appeal, whether the selectivity of State aid stemming from the fact that it is not technologically neutral can be sufficient, in appropriate circumstances, to render Article 87(3)(c) EC inapplicable.

102 According to that provision, aid to facilitate the development of certain economic activities or of certain economic areas may be considered to be compatible with the common market where such aid does not adversely affect trading conditions to an extent contrary to the common interest.

103 It is clear that the measure at issue enabled consumers, according to the findings of fact made by the General Court, to benefit from a subsidy solely when they purchased a digital terrestrial decoder using 'open' standards and not when they purchased a digital satellite decoder using such standards. However, of necessity, such a measure is liable, owing to the fact that it places a consumer in a more favourable situation when he purchases such a terrestrial decoder than when he purchases such a satellite decoder, to favour the marketing and sales of terrestrial decoders and, accordingly, to affect trading conditions in the common market.

104 It follows that such an aspect of selectivity as regards technology affecting an aid measure may be enough in itself to cause a distortion which is sufficient ground for holding that measure to be incompatible with the common market.

105 In those circumstances, the General Court did not commit any error in law in rejecting the arguments put forward by Mediaset at first instance, in particular in paragraphs 127 to 129 and 133 of the judgment under appeal, on the ground that the various factors relied on by Mediaset could not justify the exclusion of satellite broadcasters from the benefit of the measure at issue.

106 As regards the alleged failure to carry out a specific examination of the economic advantage conferred and of the distortion of competition created in the pay-TV market, it must be recalled, as stated in paragraphs 75, 76 and 93 of the present judgment, that, taking into consideration the scope of the contested decision, the economic analysis carried out by the General Court in the judgment under appeal, particularly in paragraphs 95 to 111 thereof, in which it examined whether the measure at issue caused a distortion of competition, must be regarded as taking into account, in particular, the situation on that market.

107 Given that the General Court did examine, contrary to what is claimed by Mediaset, whether the measure at issue caused a distortion of competition in the pay-TV market, it is sufficient to declare, for the remainder, that the specific content of that analysis falls within the scope of the assessment of facts carried out by the General Court which, in accordance with the case-law cited in paragraph 73 of the present judgment, cannot be examined by the Court in an appeal.

108 It follows that the sixth ground of appeal must be rejected in its entirety.

The seventh ground of appeal: error in law and inadequate statement of reasons stemming from the fact that the General Court did not respond adequately to the third plea raised at first instance

Arguments of the parties

109 Mediaset claims that the General Court erred in law and that the judgment under appeal is deficient because of a failure to provide an adequate statement of reasons owing to the fact that it did not respond adequately to Mediaset's third plea at first instance, set out in paragraph 133 et seq. of the application, claiming that the statement of reasons in the contested decision was inappropriate and contradictory in regard to the analysis of the compatibility of the measure at issue with the common market. Mediaset challenges, in particular, the absence of analysis of the pay-TV market and complains that the General Court relied exclusively, in that regard, on an alleged infringement of technological neutrality. According to Mediaset, the General Court misconstrued its arguments and therefore wrongly rejected them, particularly in paragraph 159 of the judgment under appeal.

110 According to the Commission, the only substantive argument raised by the appellant in this ground of appeal appears to be the allegedly inadequate nature of the examination by the General Court of a specific distortion of competition on the pay-TV market. However, Mediaset had already put forward that argument in the sixth ground of appeal. The Commission therefore refers to its reply to that ground of appeal. According to Sky Italia, Mediaset seeks, once again, by the seventh ground of appeal, to have the facts reassessed. In any event, the General Court examined the effects of the measure at issue on the pay-TV market in paragraphs 150 to 155 of the judgment under appeal.

Findings of the Court

111 As a preliminary point, it must be observed that the seventh ground of appeal concerns whether the General Court was justified in rejecting the third plea put forward at first instance, set out in paragraph 133 et seq. of the application, which alleged an infringement of an essential procedural requirement in relation to the statement of reasons for measures, pursuant to Article 253 EC. The seventh ground of appeal concerns therefore the examination by the General Court of a plea relating to an alleged breach of the obligation to state reasons, which is a plea distinct from those concerning the substantive legality of a measure (see, to that effect, Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraphs 66 and 67).

112 To the extent that Mediaset intended that the present ground of appeal should also challenge the substantive findings made in the judgment under appeal in relation to the incompatibility of the measure at issue with the common market, this ground of appeal overlaps with the fifth and sixth grounds of appeal previously examined in the present judgment. In any event, the seventh ground of appeal does not identify, with sufficient precision, in what way the substantive reasoning in the judgment under appeal is unlawful, as required in accordance with the case-law cited in paragraph 89 of this judgment.

113 Furthermore, it has been consistently held that the statement of reasons required by Article 253 EC must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure adopted and to enable the competent court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations (*Commission* v *Sytraval and Brink's France*, paragraph 63 and the case-law cited).

114 Mediaset's specific complaint is that the General Court failed to examine whether there was a failure to state reasons in the contested decision in regard to the compatibility of the aid at issue with the common market, owing to the fact that it examined the alleged distortions of competition exclusively in the light of Article 87(1) EC, whereas Mediaset had also claimed that there was a failure to state reasons concerning the examination of those distortions in the light of Article 87(3)(c) EC.

115 It must be recalled, in this regard, that, in recital 167 of the contested decision, which features under the heading 'Avoiding unnecessary distortions' and is part of the examination of the compatibility of the measure at issue with the common market, in the light of Article 87(3)(c) EC, the Commission expressly refers to the section of the contested decision relating to its examination of the existence of aid in the light of Article 87(1) EC headed 'Distortion of competition', to be found in recitals 102 to 112 of that decision. As observed by the Commission, the General Court expressly reviewed the sufficiency of the latter part of the statement of reasons for the contested decision in paragraphs 148 to 155 of the judgment under appeal.

116 In those circumstances, in the same way as it has been held in paragraph 95 of the present judgment that the General Court's statement of reasons for rejecting the arguments put forward in paragraphs 121 to 129 of the application at first instance satisfied the requisite legal standard by responding, in paragraphs 95 to 111 of the judgment under appeal, to analogous arguments relating to the existence of aid, it must be held that the examination of the statement of reasons for the contested decision carried out by the General Court in paragraphs 148 to 155 of that judgment is sufficient to justify the rejection of the seventh ground of appeal in so far as it relates to distortions of competition.

117 Lastly, in so far as Mediaset challenges the absence of analysis, in the judgment under appeal, of the pay-TV market and criticises the General Court for relying exclusively, as regards the incompatibility of the measure at issue with the common market, on an alleged infringement of technological neutrality, it must be observed that the General Court held, in paragraph 159 of that judgment, that, according to the contested decision, the incompatibility of the measure at issue was closely linked to the infringement of the principle of technological neutrality. The General Court refers, in that regard, to recitals 104, 135 and 140 of the contested decision and to paragraph 109 of its judgment.

118 It follows that the General Court set out clearly, in the judgment under appeal, the reasons why it took the view that the statement of reasons in the contested decision met

the requisite legal standard in relation to the incompatibility of the measure at issue with the common market, in particular on the basis of a link, established by the Commission, between that incompatibility and technological neutrality.

119 In the light of the foregoing, the seventh ground of appeal must be rejected in its entirety.

The eighth ground of appeal: infringement of Article 14 of Regulation No 659/1999

Arguments of the parties

120 Mediaset submits that the General Court infringed Article 14 of Regulation No 659/1999 by failing to reply to its plea that the contested decision is incompatible with the principle of legal certainty by reason of the fact that its provisions do not make it possible to establish a sound recovery methodology for the aid identified as incompatible. In addition, the General Court erred in law in rejecting the separate plea, advanced at first instance, alleging breach of the principle of legal certainty on the ground that it is for national law and, consequently, the national court to determine the amount of aid to be recovered. Lastly, Mediaset takes issue with the application of the principle of recovery in this case, asserting that the contested decision does not permit restoration of the situation existing prior to payment of the aid in question.

121 The Commission recalls that, in accordance with Article 14(1) of Regulation No 659/1999, it is obliged to order the recovery of unlawful aid, unless such recovery is contrary to a general principle of EU law. The General Court addressed this point in the judgment under appeal and concluded that no general principle of EU law precluded recovery. As to quantification of the unlawful aid, the General Court rightly pointed out that, in accordance with the case-law, the Commission is not obliged to quantify the unlawful aid in its recovery decision. The Commission has merely to set out the elements which allow the Member State concerned, in cooperation with the Commission, to quantify the aid without overmuch difficulty. The contested decision, however, did contain, in recital 191 et seq., detailed guidance on how the unlawful aid at issue could be quantified. In its very general remarks, the appellant does not explain why that guidance was insufficient, or why recovery of that aid would have been impossible. Subsequent events have, moreover, proved that quantification was possible. In cooperation with the Commission, the Italian authorities did in fact quantify that aid, which was reimbursed by the appellant together with interest.

Findings of the Court

122 The General Court first observed, in paragraph 169 of the judgment under appeal, that, according to settled case-law, the removal of unlawful State aid by means of recovery is the logical consequence of a finding that that aid is unlawful. The aim of obliging the Member State concerned to abolish aid found by the Commission to be incompatible with the common market is to restore the previous situation, causing the recipient to forfeit the advantage which it had enjoyed over its competitors (see Case C-310/99 *Italy* v *Commission* [2002] ECR I-2289, paragraph 99, and Case C-277/00 *Germany* v *Commission* [2004] ECR I-3925, paragraph 75 and the case-law cited).

123 Thus, under Article 14(1) of Regulation (EC) No 659/1999,‘[w]here negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary ...

The Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law'. Article 14(3) of that regulation specifies that '… recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision. To this effect and in the event of a procedure before national courts, the Member States concerned shall take all necessary steps which are available in their respective legal systems, including provisional measures, without prejudice to Community law'.

124 Accordingly, the Commission is always obliged to order the recovery of aid which it declares to be incompatible with the common market, unless such recovery would be contrary to a general principle of EU law.

125 None the less, Mediaset expresses the view that the principle of legal certainty precludes, in the present case, recovery of the unlawful aid because the provisions of the contested decision do not make it possible to establish an adequate recovery methodology. The General Court therefore erred in law, according to Mediaset, in the application of that principle by holding that that principle did not preclude recovery in the circumstances of this case.

126 In that regard, the General Court correctly pointed out, in paragraphs 181 to 183 of the judgment under appeal, that no provision of EU law requires the Commission, when ordering the recovery of aid declared incompatible with the common market, to fix the exact amount of the aid to be recovered. It is sufficient for the Commission's decision to include information enabling the addressee of the decision to work out itself, without overmuch difficulty, that amount (see, inter alia, Case C-480/98 *Spain* v *Commission* [2000] ECR I-8717, paragraph 25, and Case C-441/06 *Commission* v *France* [2007] ECR I-8887, paragraph 29). The recovery of aid which has been declared incompatible with the common market is to be carried out in accordance with the rules and procedures laid down by national law (Case C-382/99 *Netherlands* v *Commission* [2002] ECR I-5163, paragraph 90 and the case-law cited). Further, the obligation on a Member State to calculate the exact amount of aid to be recovered forms part of the more general reciprocal obligation incumbent upon the Commission and the Member States of sincere cooperation in the implementation of Treaty rules concerning State aid (*Netherlands* v *Commission*, paragraph 91).

127 Thus, in accordance with the Court's case-law, the Commission can legitimately confine itself to declaring that there is an obligation to repay the aid in question and leave it to the national authorities to calculate the exact amounts to be repaid (Case C-415/03 *Commission* v *Greece* [2005] ECR I-3875, paragraph 40).

128 In the light of the foregoing, the General Court committed no error in law in holding, in paragraphs 184 and 185 of the judgment under appeal, that it is for the national court, if a case is brought before it, to rule on the amount of aid to be recovered, thereby rejecting Mediaset's argument alleging an infringement of the principle of legal certainty.

129 In so far as Mediaset maintains that it was actually impossible or, at least, excessively difficult, within the meaning of the case-law cited in paragraph 126 of this judgment, to establish an adequate methodology for the recovery of the aid at issue on the basis of the

contested decision, it is clear that that raises matters of factual assessment in respect of which the General Court alone has jurisdiction, in accordance with the case-law cited in paragraph 73 of this judgment. To the extent that Mediaset claims that the General Court did not examine that alleged impossibility in the judgment under appeal, Mediaset is maintaining, in essence, that that judgment is vitiated by an inadequate statement of reasons.

130 In that regard, it should be pointed out that, in accordance with the case-law cited in paragraph 88 of this judgment, the obligation to state reasons does not require the General Court to provide an account which addresses exhaustively, one after the other, all the arguments put forward by the parties to the case. It is clear from paragraphs 126 to 128 of the present judgment, in which the Court reviewed the lawfulness of paragraphs 181 to 184 of the judgment under appeal, that the General Court committed no error in law in ruling that it was for the national court to determine the amount of aid to be recovered. That being the case, and taking into consideration the fact, stated in paragraph 12 of the judgment under appeal, that the Commission offered guidance in the contested decision, more specifically in recitals 191 to 207 thereof, on the method for calculating the amount of aid to be recovered, it must be concluded that the General Court's statement of reasons for that aspect of the judgment under appeal satisfied the requisite legal standard.

131 In the light of the foregoing, the eighth ground of appeal must be rejected.

132 Since all of the grounds of appeal put forward by Mediaset have been rejected, the appeal must be dismissed in its entirety.

Costs

133 Under the first paragraph of Article 122 of the Rules of Procedure, where the appeal is unfounded, the Court of Justice is to make a decision as to costs. Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings pursuant to Article 118 of those Rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

134 Since in this case Mediaset has been unsuccessful, it must be ordered to bear its own costs and to pay the costs incurred by the Commission and by Sky Italia, in accordance with the forms of order sought by them.

On those grounds, the Court (Third Chamber) hereby:

1. Dismisses the appeal;

2. Orders Mediaset SpA to bear its own costs and to pay the costs of the European Commission and of Sky Italia Srl.

[Signatures]