JUDGMENT OF THE GENERAL COURT (Second Chamber)

15 June 2010 (*)

(State aid – Telecommunications – Subsidised purchase of digital decoders – Decision declaring the aid incompatible with the common market and ordering its recovery – Concept of State aid – Exclusion of decoders for the reception of television programmes broadcast by satellite – Advantage – Selective nature – Adverse effect on competition – Obligation to state reasons)

In Case T-177/07,

Mediaset SpA, established in Milan (Italy), represented by K. Adamantopoulos, G. Rossi, E. Petritsi and A. Nucara, lawyers, and by D. O'Keeffe and P. Boyle, Solicitors,

applicant,

European Commission, represented by B. Martenczuk, G. Conte and E. Righini, acting as Agents,

defendant,

supported by

Sky Italia Srl, established in Rome (Italy), represented initially by F.E. González Díaz and D. Gerard, and subsequently by F.E. González Díaz, lawyers,

intervener,

APPLICATION for the 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 GENERAL COURT (Second Chamber),

composed of I. Pelikánová, President, K. Jürimäe (Rapporteur) and S. Soldevila Fragoso, Judges,

Registrar: K. Pocheć, Administrator,

having regard to the written procedure and further to the hearing on 3 June 2009,

gives the following

Judgment

Background to the dispute

1 Article 4(1) of legge n. 350 – Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2004) (Law No 350 relating to the provisions for drawing up the annual and pluriannual budget of the [Italian] State) of 24 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'.

2 Article 1(211) of legge n. 311 – Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2005) (Law No 311 relating to the provisions for drawing up the annual and pluriannual budget of the State) of 30 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.

3 That scheme ceased to apply on 1 December 2005.

4 In Italy, the first step in the digitisation of television ('TV') signals was the adoption of legge n. 66 – Conversione in legge, con modificazioni, del decreto-legge 23 gennaio 2001, n. 5, recante disposizioni urgenti per il differimento di termini in materia di trasmissioni radiotelevisive analogiche e digitali, nonché per il risanamento di impianti radiotelevisivi (Law No 66, converting into law, with amendments, Decree-Law No 5 of 23 January 2001 making urgent provision for the postponement of deadlines relating to analogue and digital broadcasting, and for the updating of broadcasting installations) of 20 March 2001, 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:

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

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

6 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 provided the Commission with further information and maintained that the Italian Government had refinanced the measure in question by Article 1(211) of the 2005 Finance Law.

7 On 3 May 2005, Sky Italia Srl also filed a complaint in respect of the same provisions of the 2004 Finance Law and the 2005 Finance Law.

8 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) ('the decision to initiate the formal investigation procedure') in respect of Article 4(1) of the 2004 Finance Law and Article 1(211) of the 2005 Finance Law (taken together, 'the

measure at issue'). In that decision, the Commission called on interested parties to submit their comments on that measure.

9 On 24 January 2007, the Commission adopted Decision 2007/374/EC 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').

10 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.

11 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 because, even though the transition from analogue to digital TV 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. Nonetheless, the Commission expressed the view that, in so far as the measure at issue could be regarded as aid to producers of decoders, it would 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, lastly, (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.

12 Consequently, the Commission ordered the recovery of the State 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.

13 The enacting terms of the contested decision provide as follows:

'Article 1

The scheme which the Italian Republic has unlawfully implemented for digital terrestrial broadcasters offering pay-TV services and cable pay-TV operators constitutes State aid which is incompatible with the common market.

Article 2

1. The Italian Republic shall take all necessary measures to recover from the beneficiaries the aid defined in Article 1.

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective implementation of the Decision. The

sums to be recovered shall include interest from the date on which the aid was at the disposal of the beneficiaries until the date of its recovery.

3. The interest to be recovered under paragraph 2 shall be calculated in accordance with the procedure laid down in Articles 9 and 11 of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article [88 EC] [OJ 2004 L 140, p. 1].

Article 3

The Italian Republic shall inform the Commission, within two months of notification of this Decision, of the measures taken to comply with it. It will provide this information using the questionnaire attached to this Decision.

The Italian Republic shall submit within the same period of time referred to in the first paragraph the documents giving evidence that the recovery proceedings have been initiated against the beneficiaries of the unlawfully granted and incompatible aid.

Article 4

This Decision is addressed to the Italian Republic.'

14 By Decision C(2006) 6630 final of 24 January 2007, the Commission declared to be compatible with the common market the aid implemented by the Italian Republic under legge n. 266 – Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (legge finanziaria 2006) (Law No 226 relating to the provisions for drawing up the annual and pluriannual budget of the State) of 23 December 2005 ('the 2006 Finance Law') for the purchase of digital decoders with an open application program interface in 2006 ('the decision concerning 2006'). Unlike the subsidies covered by the contested decision, the subsidies at issue in the decision concerning 2006 were found to be 'technologically neutral' since 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, provided that they were 'open' decoders as opposed to 'proprietary' decoders.

Procedure and forms of order sought

15 By application lodged at the Registry of the Court on 23 May 2007, the applicant – Mediaset SpA ('Mediaset'), a digital terrestrial programmes broadcaster – brought an action against the contested decision.

16 By document lodged at the Court Registry on 5 September 2007, Sky Italia requested leave to intervene in the present proceedings in support of the Commission. By order of 10 January 2008, the President of the Second Chamber of the Court granted leave to intervene.

17 Mediaset claims that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

18 The Commission, supported by Sky Italia, contends that the Court should:

– dismiss the action;

– order Mediaset to bear the costs.

Admissibility of Annex A8 to the application

Arguments of the parties

19 The Commission, supported by Sky Italia, contends that Annex A8 to the application, entitled 'The Italian Broadcasting Sector: Short summary of the historical, legislative and market context' ('Annex A8'), and any references to it should be declared inadmissible and that its contents should not be taken into account by the Court. Annex A8, it is argued, contains numerous arguments and submissions of fact and of law which are not to be found in the application. Consequently, Annex A8 and the references to it in the application are in breach of the requirement, set out in Article 21(1) of the Statute of the Court of Justice and in Article 44(1) of the Rules of Procedure of the General Court, that the subject-matter of the dispute and the pleas in law on which it is based must be set out in the application itself.

20 In response, Mediaset claims that all the pleas in law put forward in support of its action are set out in the application and that, in consequence, the plea that Annex A8 and the references to that annex are inadmissible, as put forward by the Commission, is irrelevant and unfounded.

Findings of the Court

21 As a preliminary point, it should be noted that there are five references to Annex A8 in the application: in paragraphs 11 and 109 and in footnotes 57, 94 and 115.

22 As regards the first reference, in paragraph 11 of the application, it should be pointed out that this is made in the introductory paragraph of the second section, which is entitled 'Factual background' and which comes before the section entitled 'Legal grounds of annulment' (the third section). The purpose of that reference to Annex A8 is to place before the Court an account of the legislative background and the market context, in relation to which the measure at issue should be examined.

23 Consequently, as regards that first reference, the Commission cannot criticise Mediaset for referring to Annex A8.

24 As regards the last four references, which are made in the third section, entitled 'Legal grounds of annulment', it should be borne in mind that, even though the body of the application may be supported and supplemented, with regard to specific points, by references to extracts of documents appended thereto, the annexes have a purely evidential and instrumental function (Case T-84/96 *Cipeke* v *Commission* [1997] ECR II-2081, paragraph 34). Accordingly, the annexes cannot serve as a basis for developing a plea set out in summary form in the application by putting forward complaints or arguments which are not contained in that application. The applicant must indicate in the application the specific complaints on which the Court is asked to rule and, at the very least in summary form, the legal and factual particulars on which those complaints are based (Case C-52/90 *Commission* v *Denmark* [1992] ECR I-2187, paragraph 17;

the order in Case T-85/92 *De Hoe* v *Commission* [1993] ECR II-523, paragraph 20; and Case T-340/03 *France Télécom* v *Commission* [2007] ECR II-107, paragraph 167).

25 In the present case, the Court finds that the last four references are intended, as is apparent from Mediaset's written pleadings, to illustrate the arguments set out in support of the pleas put forward.

26 Thus, footnote 57 illustrates the statement that 'the obligation to go digital imposes a burden on the terrestrial broadcasters and the applicant that is not imposed on those operating on other broadcasting platforms'.

27 Likewise, footnote 94 illustrates the statement that '[t]he subsidy compensated for the costs in relation to the performance of specific legal obligations, to which only the terrestrial platform was subjected'.

28 Furthermore, as regards the reference in paragraph 109, it is expressly stated that 'as stated [in Annex A8], the analogue broadcasters have not enjoyed any privileges, neither in relation to frequencies, nor to the market'.

29 Lastly, footnote 115 illustrates the statement that '[t]he measure is proportional because it is limited to the extra cost of interoperability and interactivity and to the cost imposed specifically on the Applicant in relation to the performance of its specific legal obligations'.

30 It follows from the above observations that, contrary to the assertions made by the Commission, the last four references to Annex A8 are intended to support the arguments set out in Mediaset's written pleadings. Furthermore, in its written pleadings, Mediaset has not set out in summary form any plea or argument which it subsequently developed in Annex A8.

31 Consequently, the Commission errs in maintaining that Annex A8 should be regarded as inadmissible and should not be taken into account by the Court. The Commission's plea must therefore be rejected as unfounded.

Admissibility of the annexes to the application which have not been translated into the language of the case

Arguments of the parties

32 The Commission notes that a number of annexes (A1, A2, A3, A4, A7, A11, A12 and Al3) have been submitted by Mediaset only in Italian, contrary to Article 35(3) of the Rules of Procedure, under which they should have been accompanied by a translation into the language of the case.

33 Mediaset states in reply that, if the Court so requests, it will provide the relevant annexes to the application in the language of the case, in accordance with Article 35 of the Rules of Procedure.

Findings of the Court

34 The first, second and third subparagraphs of Article 35(3) of the Rules of Procedure provide as follows:

‘The language of the case shall be used in the written and oral pleadings of the parties and in supporting documents, and also in the minutes and decisions of the [General] Court.

Any supporting documents expressed in another language must be accompanied by a translation into the language of the case.

In the case of lengthy documents, translations may be confined to extracts. However, the [General] Court may, of its own motion or at the request of a party, at any time call for a complete or fuller translation.’

35 Furthermore, the second subparagraph of Article 7(5) of the Instructions to the Registrar of the Court (OJ 2007 L 232, p. 1) provides:

‘Where documents annexed to a pleading or procedural document are not accompanied by a translation into the language of the case, the Registrar shall require the party concerned to make good the irregularity if such a translation appears necessary for the purposes of the efficient conduct of the proceedings.’

36 In the present case, it should first be pointed out that the Commission did not expressly request that the Court require Mediaset to produce a translation of Annexes A1, A2, A3, A4, A7, A11, A12 and A13 into the language of the case. The Commission merely observed, in a parenthetical remark made in footnote 15 to the defence, that those annexes to the application were submitted by Mediaset only in Italian and were not accompanied by a translation into the language of the case.

37 Furthermore, contrary to the assertions made by the Commission, in the light of the purpose of the Rules of Procedure and the Instructions to the Registrar, it must be held that, in the absence of a request from a party to that effect, it is only if the translation into the language of the case appears necessary for the purposes of the efficient conduct of the proceedings that it is for the Registrar to have it carried out (see, to that effect, Case T-29/01 *Puente Martín* v *Commission* [2002] ECR-SC I-A-157 and II-833, paragraph 40).

38 In the present case, in the absence of a request to that effect on the part of the parties, the Court did not deem it necessary to require the translation of Annexes A1, A2, A3, A4, A7, A11, A12 and A13 into the language of the case. The reasons are as follows: (i) Annexes A1 to A4 were produced pursuant to procedural requirements for the purposes of identifying the parties and their representatives; (ii) Annex A7 reproduces the act which is the subject-matter of the present action for annulment and which was published in the *Official Journal of the European Union* after the present action had been brought, having been translated into all the official languages of the European Union, including the language of the present case; and (iii) Annexes A11, A12 and A13 reproduce relevant provisions of national law; the substance of which was set out – where the provisions were not quoted in full – in recitals 7, 6 and 10 respectively of the contested decision, so that it can reasonably be presumed that the author of that decision is able to understand the contents.

39 It follows from the above arguments that the Commission errs in criticising Mediaset for not producing a translation of Annexes A1, A2, A3, A4, A7, A11, A12 and A13 into the language of the case.

The pleas in law

40 In support of its action, Mediaset relies in the application on four pleas in law, alleging: (i) infringement of Article 87(1) EC; (ii) manifest error of assessment and manifest error of law in assessing the compatibility of the measure at issue with the common market under Article 87(3)(c) EC; (iii) infringement of Article 253 EC; and (iv) 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.

41 At the hearing, Mediaset put forward a plea alleging, in essence, that the Commission made a manifest error of assessment as regards the determination of the scope of Article 4(1) of the 2004 Finance Law.

42 It is necessary to determine whether that last plea is admissible and then to rule on the merits of the four pleas put forward at the stage of the application.

Admissibility of the plea alleging manifest error of assessment as regards the determination of the scope of Article 4(1) of the 2004 Finance Law

Arguments of the parties

43 At the hearing, Mediaset expressly challenged the view that, under Article 4(1) of the 2004 Finance Law, digital satellite broadcasters were denied the benefit of the measure at issue. In reply to a question from the Court asking it to state at what stage of the written procedure it had put forward that plea, Mediaset replied by referring to paragraph 69 et seq. and paragraph 76 of its reply.

44 When asked by the Court at the hearing to respond to Mediaset's challenge, the Commission and Sky Italia maintained that, as the plea had been put forward belatedly, it should be declared inadmissible.

Findings of the Court

45 It should be borne in mind that, pursuant to Article 44(1)(c), read in conjunction with Article 48(2) of the Rules of Procedure, an application must state the subject-matter of the proceedings and a summary of the pleas in law on which the application is based and that no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

46 In the present case, it is apparent from Mediaset's statements at the hearing that it did not put that plea forward in the application, but in the reply. Furthermore, Mediaset does not seek to maintain that that plea is based on matters of law or of fact which came to light in the course of the procedure.

47 Consequently, in accordance with the provisions of the Rules of Procedure referred to in paragraph 45 above, the plea alleging manifest error of assessment as regards the determination of the scope of Article 4(1) of the 2004 Finance Law must be rejected as inadmissible.

The first plea: infringement of Article 87(1) EC

48 The first plea alleges infringement of Article 87(1) EC inasmuch as the Commission found that the measure at issue constitutes State aid for the purposes of that provision. The plea is divided into four parts which relate respectively to (i) the concept of an indirect beneficiary; (ii) the absence of an economic advantage; (iii) the absence of selectivity in the nature of the measure at issue; and, lastly, (iv) the absence of distortion of competition.

The second part of the first plea, relating to the absence of an economic advantage

– Arguments of the parties

49 First, Mediaset submits that the measure at issue did not confer on it an economic advantage, such as the creation of a business opportunity. In the contested decision, the Commission claimed incorrectly and without any evidence that that measure enabled broadcasters to avoid bearing the cost of subsidising decoders, a business practice which it described, incorrectly, as common on the market. According to Mediaset, that claim is accurate only as regards subscription-based TV operators on account of the stable contractual relationships which they establish with their subscribers. In the absence of such a stable contractual relationship, digital terrestrial TV broadcasters would have no interest in subsidising the acquisition of interoperable decoders, for they would then be exposed to the problem of free riding, as their competitors would benefit from the subsidy in the same way. Instead, the measure at issue benefited consumers, who are able to acquire decoders which support open technology.

50 Secondly, Mediaset submits that the measure at issue did not secure for it any advantage in terms of better penetration of the pay-TV market or in terms of audience creation. In that respect, it denies that the measure at issue enabled it to create an audience for pay-TV or to access the pay-TV market at a low cost. First, the quality and characteristics of the programmes broadcast determine consumer preferences, not the price of a decoder. Second, the advantages secured by the measure at issue would have benefited any digital terrestrial operator, even a potential one. Lastly, the measure at issue ensures and guarantees the continued existence of the generalist and free-of-charge model of universally accessible analogue TV during the transition to digital TV.

51 Furthermore, Mediaset claims, the Commission disregarded the investments made by Mediaset for digitisation and also in order to cover the costs of launching pay-TV. Likewise, Mediaset submits that the advantages referred to by the Commission could have benefited any digital terrestrial pay-TV operator, especially future new competitors on the market, and that that effect is inherent in any measure in favour of digital TV, even the most technologically neutral.

52 Thirdly, Mediaset maintains that the subsidy represents the extra costs of interactive and interoperable decoders, a fact which the Commission also acknowledged in recital 85 of the contested decision.

53 Mediaset maintains that the arguments put forward by Sky Italia concerning the advantages from which Mediaset allegedly benefited – namely, ‘risk-free’ entry into a new market, commercial endorsement by public authorities and access to low-cost capital – should be held inadmissible or, in any event, rejected as unfounded.

54 The Commission, supported by Sky Italia, contends that this part of the plea should be rejected.

– Findings of the Court

55 As a preliminary point, in order to rule on the merits of the second part of the first plea and the other three parts of that plea, it is necessary to examine the scope of Article 4(1) of the 2004 Finance Law and of Article 1(211) of the 2005 Finance Law in order to determine whether the measure at issue could benefit both the digital terrestrial platform and the digital satellite platform.

56 In that regard, it should be pointed out that, under the first sentence of Article 4(1) of the 2004 Finance Law, a State subsidy of EUR 150 (reduced to EUR 70 by the 2005 Finance Law) was to be paid to every user of the broadcasting service who had fulfilled his obligations regarding payment of the relevant subscription fee for the year in progress and who purchased or rented equipment for the reception, free-to-air and at no cost to the user or to the content provider, of TV signals transmitted using digital terrestrial technology and the associated interactive services.

57 Under those provisions, it should be pointed out that – as the Commission rightly stated in recital 7 of the contested decision – in order to benefit from the measure at issue, it was necessary first to satisfy a number of cumulative conditions, including that of purchasing or renting equipment for the reception of digital terrestrial TV signals.

58 Moreover, it should be noted that, in paragraph 122 of the application, Mediaset expressly complained that the Commission produced two decisions – namely, the contested decision and the decision concerning 2006 – which are mutually contradictory as regards the compatibility with the common market of the measure at issue and of the measure provided for under the 2006 Finance Law even though, according to Mediaset, both measures relate to factual circumstances which are essentially similar. In support of that claim, Mediaset maintains that the only reason that the finding of incompatibility made by the Commission in the contested decision was subsequently reversed in the decision concerning 2006 lies in the fact that the Italian legislature had introduced additional wording so that satellite broadcasters were specifically covered.

59 Thus, it is apparent from paragraph 122 of the application that Mediaset does not dispute that, when adopting the 2006 Finance Law, the legislature ultimately considered it necessary for satellite broadcasters to be expressly mentioned in the provisions describing the scope of the measure.

60 It follows from the above findings that the measure at issue clearly could not benefit a consumer who decided to purchase or rent equipment exclusively for the reception of digital satellite TV signals. Consequently, that measure did not meet the requirement of technological neutrality imposed by the Commission for aid measures relating to the digital TV market.

61 First and foremost, it should be pointed out that, contrary to the assertions made by Mediaset, the question whether broadcasters would necessarily have financed the acquisition of decoders in the absence of the measure at issue is irrelevant as regards the assessment of that measure’s categorisation as State aid.

62 What is important in that regard is whether the subsidising of decoders created an advantage for terrestrial broadcasters such as Mediaset. In that connection, it should be pointed out that, 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. In that regard, the Commission specifically and correctly observed that building up an audience is a crucial part of the business for broadcasters of TV programmes.

Furthermore, it should be pointed out that the Commission set out the reasons why, rightly, it considered that the aid measure at issue created an incentive for consumers to switch from the analogue to the digital terrestrial mode, while limiting the costs that digital terrestrial TV broadcasters had to bear, enabling 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.

63 For the same reason, it is necessary to reject Mediaset's argument that terrestrial broadcasters did not have any interest in subsidising decoders because, as their competitors would have benefited from the subsidy in the same way, they would have been exposed to the problem of free riding. In any event, the fact that Mediaset shares the advantage arising from the subsidy with other broadcasters does not negate the advantageous nature of the measure at issue with regard to Mediaset.

64 Similarly, the fact that the measure at issue is very advantageous for consumers, given that it reduces the price of more sophisticated decoders to the price level of basic decoders, has no bearing on the fact that that measure also constitutes an advantage for terrestrial broadcasters and cable operators.

65 As regards the argument that the characteristics of the programmes broadcast – not the price of a decoder – determine the choice made by TV viewers, it must be held that, although those characteristics may influence the choice made by TV viewers, the fact remains that the price of a decoder is a decisive factor which a TV viewer takes into account in making that choice. In the present case, the subsidy granted directly to consumers automatically had the effect of prompting a reduction in the purchase or rental price of equipment for the reception of digital terrestrial TV signals. Such a price reduction is liable to affect the choice of consumers who are mindful of costs.

66 As regards the argument that the measure at issue ensures and guarantees the continued existence of the generalist and free-of-charge model of TV during digitisation, it should be pointed out that that is not capable of putting in question the classification of the measure at issue as State aid for the purposes of Article 87(1) EC. Such a circumstance could at the very most be a factor which must be taken into account for the purposes of considering the compatibility of the measure at issue with the common market under Article 87(3) EC.

67 For the same reason, it is necessary to reject Mediaset's argument that the subsidy was necessary because, in normal business circumstances, it would not voluntarily bear the extra cost necessary for the purchase of interoperable decoders.

68 It follows from all of the above considerations that, without there being any need to rule on the admissibility and the merits of the arguments put forward by Sky Italia, the Commission was right to find that the measure at issue enabled cable operators and digital terrestrial broadcasters – of which Mediaset is one – to benefit, as compared with satellite broadcasters, from an advantage for the purposes of Article 87(1) EC and that the second part of the first plea must therefore be rejected as unfounded.

The first part of the first plea, relating to the concept of an indirect beneficiary

– Arguments of the parties

69 Mediaset submits that the Commission was wrong to find – basing its decision on Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857 and Case C-382/99 *Netherlands* v *Commission* [2002] ECR I-5163 – that the measure at issue, of which the direct beneficiaries are the final consumers, constitutes an advantage for the purposes of Article 87(1) EC from which certain operators benefit indirectly.

70 First, Mediaset argues that those two judgments are irrelevant in the present case. The treatment of indirect beneficiaries should be different where the direct benefit is conferred on individual consumers rather than on undertakings. Since the direct and primary beneficiaries of the measure at issue are not pursuing an economic activity, that measure automatically falls outside the scope of Article 87(1) EC.

71 Secondly, Mediaset argues that it is not at all evident why the Commission chose arbitrarily to narrow down the concept of indirect beneficiaries to include only digital terrestrial broadcasters offering pay-TV services and cable pay-TV operators. In particular, Mediaset maintains that digital terrestrial broadcasters and cable operators in general are capable of benefiting indirectly from the measure at issue. Furthermore, Mediaset maintains that the Commission arbitrarily excluded decoder manufacturers from the category of beneficiaries of the measure at issue.

72 At the stage of the reply, Mediaset states that it does not deny that there can be indirect beneficiaries of State aid, but that it disputes the way in which the conditions for the application of the concept of indirect beneficiary were applied in the contested decision.

73 The Commission contends, first, that Article 87(1) EC does not lay down any requirement concerning the way in which the aid must be granted. Secondly, the provisions of Article 87(2)(a) EC would be entirely superfluous if, as Mediaset claims, aid granted in the first place to consumers could never be regarded as State aid for the purposes of Article 87(1) EC. Thirdly, Mediaset's view is inconsistent with the judgment in *Netherlands* v *Commission*, paragraph 69 above, which confirms that both the direct beneficiary and the indirect beneficiary can be regarded as recipients of State aid for the purposes of Article 87(1) EC. Fourthly, the Commission contends that, if Mediaset's reasoning were to be followed and if, accordingly, aid to consumers could never constitute State aid, State aid rules could easily be circumvented by granting consumers subsidies conditional on the purchase of specific goods or services. Fifthly, the Commission disputes Mediaset's claim that it arbitrarily chose to restrict the concept of indirect beneficiaries and to target only terrestrial broadcasters and cable operators offering pay-TV services.

– Findings of the Court

74 It is common ground that the measure at issue did not directly benefit operators on the digital TV market such as Mediaset.

75 It should be borne in mind, however, that Article 87 EC prohibits aid granted by a State or through State resources in any form whatsoever, without drawing a distinction as to whether the aid-related advantages are granted directly or indirectly. The case-law has thus acknowledged that an advantage granted directly to certain natural or legal persons who are not necessarily undertakings may constitute an indirect advantage, hence State aid, for other natural or legal persons who are undertakings (judgment of 4 March 2009 in Case T-424/05 *Italy* v *Commission*, not published in the ECR, paragraph 108).

76 Mediaset's argument that a subsidy granted to consumers cannot be categorised as State aid to traders providing consumer goods or services is also inconsistent with 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. As the Commission contends, if Mediaset's argument were to be accepted, that provision would be superfluous.

77 Lastly, the complaint made by Mediaset regarding the lack of clarity as to why the Commission narrowed down the concept of indirect beneficiaries to digital terrestrial broadcasters offering pay-TV services and cable pay-TV operators must be rejected as ineffective. Even if, as Mediaset claims, the Commission should have considered all digital terrestrial broadcasters and cable operators to be capable of benefiting indirectly from the measure at issue, it must be held that that in no way alters the fact that, as was pointed out in paragraphs 55 to 60 above, satellite broadcasters could not benefit from the measure at issue.

78 For the same reason, the complaint alleging that the Commission arbitrarily excluded decoder manufacturers from the category of beneficiaries of the measure at issue must be rejected as ineffective.

79 It follows from the above considerations that the Commission was right to categorise Mediaset as an indirect beneficiary of the measure at issue. The first part of the first plea must therefore be rejected as unfounded.

The third part of the first plea, relating to the absence of selectivity in the nature of the measure at issue

– Arguments of the parties

80 Mediaset claims that the Commission erred in law in categorising the measure at issue as selective because of its allegedly discriminatory nature. The Commission confused the concept of selectivity with the alleged discrimination and thus failed properly to establish that the selectivity criterion had been fulfilled.

81 The Commission contends that there is no evidence to support this claim on the part of Mediaset. The selectivity of the advantage conferred by the measure at issue on digital terrestrial broadcasters of pay-TV services and cable pay-TV operators is demonstrated by the fact that that advantage is enjoyed by no other undertaking and, specifically, by no satellite broadcasters. Accordingly, the third part of the first plea is also unfounded.

– Findings of the Court

82 It should be stated at the outset that, at the hearing, in reply to a question from the Court asking it to clarify the arguments put forward in support of the third part of the first plea, Mediaset stated that, unlike selectivity, which constitutes a fundamental element for the purposes of categorising a measure as State aid for the purposes of Article 87(1) EC, discrimination is not referred to in that provision. Mediaset added that the Commission had confused discrimination and selectivity and that, when it stated that there was discrimination, its position was not technologically neutral.

83 It should be borne in mind that, under Article 44(1)(c) of the Rules of Procedure, all applications are to specify the subject-matter of the dispute and to include a brief statement of the pleas in law on which the application is based. According to case-law, that statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application, if necessary, without any further information (Case T-387/94 *Asia Motor France and Others* v *Commission* [1996] ECR II-961, paragraph 106, and Case T-113/96 *Dubois et Fils* v *Council and Commission* [1998] ECR II-125, paragraph 29). In order to guarantee legal certainty and the sound administration of justice it is necessary, if an argument is to be admissible, for the basic legal and factual particulars relied upon to be stated, at least in summary form, coherently and intelligibly in the application itself (see, to that effect, order of the Court in Case T-110/98 *RJB Mining* v *Commission* [2000] ECR II-2971, paragraph 23 and the case-law cited, and Case T-195/00 *Travelex Global and Financial Services and Interpayment Services* v *Commission* [2003] ECR II-1677, paragraph 26).

84 In the present case, the arguments put forward by Mediaset in support of the third part of the first plea, both in its written pleadings and at the hearing, do not meet the requirements of clarity and precision laid down in Article 44(1)(c) of the Rules of Procedure. At no time does Mediaset explain how the fact that aid is applied in a discriminatory manner – in the sense that it benefits, as the Court has stated with regard to the measure at issue in paragraphs 57 and 60 above, only certain groups of undertakings – does not permit the inference that it is selective for the purposes of Article 87(1) EC.

85 The third part of the first plea must therefore be rejected as inadmissible.

The fourth part of the first plea, relating to the absence of distortion of competition

– Arguments of the parties

86 In the first place, Mediaset maintains that the Commission made a manifest error of assessment in concluding that the measure at issue unduly distorts competition in the common market.

87 First, Mediaset submits that any satellite operator, including Sky Italia, could also have benefited from the subsidy by offering ‘hybrid’ decoders, that is to say, decoders which are both terrestrial and satellite decoders. The subsidy would then have covered the additional costs for the incorporation of the necessary technology to permit the reception of terrestrial TV. In any event, the fact that Sky Italia’s market performance remained outstanding shows that the subsidies did not materially affect its performance.

88 Secondly, Mediaset claims, account must be taken, in assessing the absence of distortion of competition, of the fact that the rate of value added tax (‘VAT’) applicable to satellite broadcasting platforms is more favourable than that applicable to terrestrial broadcasting platforms. Accordingly, the measure at issue offsets the economic advantage which the application of a reduced rate of VAT confers upon satellite broadcasting platforms. In order to substantiate that argument, Mediaset refers to a complaint relating to infringement of Community law and another complaint relating to State aid filed with the Commission on 13 March 2007. Mediaset claims that the Court should reject as inadmissible the objection of inadmissibility raised by Sky Italia as regards the argument relating to the tax benefit for satellite broadcasters, on the ground that the Commission, in support of which Sky Italia is intervening, did not itself raise that objection.

89 Thirdly, Mediaset submits that, by imposing competitive constraints on the satellite platform, the measure at issue served by contrast to enhance competition. Furthermore, the measure at issue enabled consumers to benefit, for the same price, from decoders giving access to a much richer offer. Lastly, the exclusion of proprietary technologies is inherent in the common interest objective of favouring open standards and does not distort competition. The only distortion of competition between the satellite and terrestrial platforms is that which places terrestrial broadcasters at a disadvantage as a result of Sky Italia's decision to prevent third parties from having access to its encryption technology.

90 Fourthly, Mediaset complains that the Commission adopted two decisions – namely, the contested decision and the decision concerning 2006 – which are mutually contradictory as regards the compatibility with the common market of the measure at issue and of that provided for under the 2006 Finance Law, even though they were adopted in factual circumstances which are essentially similar. In support of that argument, Mediaset maintains that the only reason that the finding of incompatibility made by the Commission in the contested decision was subsequently reversed in the decision concerning 2006 lies in the fact that the Italian legislature introduced additional wording so that satellite broadcasters are specifically covered.

91 Fifthly, at the stage of the reply, Mediaset – basing its argument 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 Soria Decision') – also complains that the Commission adopted the contested decision in an arbitrary manner. Mediaset states that, in recital 16 of the Soria Decision, the Commission declared the measure under examination compatible with the common market on the ground that technological neutrality was respected because 'the subsidised decoders may support not only the reception of DTT, but also cable, satellite and/or IPTV broadcasting'. According to Mediaset, the measure under examination in the Soria Decision provided that its application was conditional on the fact that the DTT decoders would be interactive and interoperable and could therefore also receive the signals of other platforms, as in the present case.

92 In the second place, the measure at issue does not breach the principle of equal treatment of digital broadcasters. The difference in treatment between digital platforms is justified by the fact that they are in different situations. In any event, a possible breach of that principle would be objectively justified in view of the true characteristics of the relevant market at the time and the promotion of open standards. According to Mediaset, the satellite platform was not expressly included, precisely because there was no satellite offering based on an open standard and no likelihood of such an offering being forthcoming within the short period during which the measure applied. Furthermore, Mediaset maintains that the satellite platform was characterised by the presence of a *de facto* monopolist – namely, Sky Italia – which was able to raise relevant barriers to market entry. Lastly, Mediaset submits that, after the amendment made by the 2006 Financial Law to allow the subsidising of all interoperable decoders, Sky Italia did not retain the decoders which were capable of benefiting from the subsidy.

93 In the third place, Mediaset maintains that, since it is far from obvious from the contested decision whether the problem which rendered the measure incompatible was the issue of technological neutrality or the alleged low-cost access to the relevant market, the Commission was in breach of the principle of legal certainty. In support of that argument, Mediaset refers to the arguments set out in the context of the fourth plea in law.

94 The Commission, supported by Sky Italia, contends, first, that Mediaset has not adduced evidence of the manifest error of assessment which it allegedly made in finding that the measure at issue distorts competition by favouring digital terrestrial broadcasters. Secondly, Mediaset errs in claiming that the difference in treatment between digital platforms is justified by the fact that they are in different situations. Mediaset also errs in claiming that there was no satellite offering based on an open standard at the time when the measure at issue was adopted. Thirdly, in the contested decision, the Commission found the measure at issue incompatible on the ground that it did not comply with the principle of technological neutrality. Consequently, the Commission confirmed its consistent position that the compatibility with the common market of State aid to digitisation is conditional upon compliance with the principle of technological neutrality.

– Findings of the Court

95 First, as regards the argument that Sky Italia could benefit from the measure at issue by offering 'hybrid' decoders, it should be pointed out that such an argument emphasises the selective nature of that measure. For satellite broadcasters such as Sky Italia to make 'hybrid' decoders available would involve extra cost which would be passed on to consumers in the selling price and would at best be offset by the measure at issue from which those consumers benefit. Accordingly, satellite broadcasters would find themselves in a less favourable position than terrestrial broadcasters and cable operators, who would not have to pass on any additional cost in the selling price of decoders to the consumers benefiting from the measure at issue. The argument must therefore be rejected as unfounded.

96 Nor is it relevant that, after the amendments made to the 2006 Financial Law to allow all interoperable decoders to be subsidised, Sky Italia did not switch from proprietary technology decoders to decoders that could be subsidised. As the Commission stated in recital 110 of the contested decision, that strategy could depend on many factors, such as previous investments by the company, or opting to await the Commission's decision on the compatibility of that new measure.

97 Secondly, as regards the argument that the imposition of competitive constraints on the satellite platform generated more competition, the reasoning on which that argument is based reveals that Mediaset acknowledges the competition between terrestrial and satellite platforms and that that competition is affected by the measure at issue.

98 Furthermore, as regards Mediaset's arguments relating to various circumstances which distort competition in favour of the satellite platform, the fact remains that such arguments are irrelevant for the purposes of assessing whether the measure at issue, in turn, distorts or threatens to distort competition in the market in question.

99 Thirdly, Mediaset's assertion that the contested decision and the decision concerning 2006 were adopted in similar circumstances is manifestly incorrect. As the Court pointed out in paragraphs 57 and 60 above, satellite decoders were excluded from the benefit of the measure at issue. By contrast, as is apparent from paragraph 122 of the application, the 2006 Finance Law also applied to satellite decoders.

100 Fourthly, the Court considers that it cannot uphold the argument that, in the light of the Soria Decision, the contested decision is arbitrary and according to which the conditions for applying the measure under examination in the Soria Decision were the same as for the measure at issue.

101 Admittedly, the wording used by the Commission in recital 16 of the Soria Decision, as quoted in paragraph 91 above, may have misled Mediaset as regards the scope of the measure under examination in that decision.

102 Clearly, however, as contended by the Commission, both the wording of recital 58 of the Soria Decision and the contents of the letter appended to the rejoinder dispel any ambiguity in that regard.

103 As is apparent from recital 58 of the Soria Decision, the Commission expressly stated that the measure under examination in that decision enabled consumers to acquire any type of decoder, thanks to a subsidy which was independent of the technological platform that the consumer might wish to use, be it terrestrial, cable, satellite or (broadband) internet. The Commission expressly concluded, therefore, that the measure was consistent with the principle of technological neutrality.

104 Furthermore, as contended by the Commission and undisputed by Mediaset, the Commission established, before adopting the Soria Decision, that the measure under examination complied with the criterion of technological neutrality. Thus, it emerges from the letter appended to the rejoinder that, in reply to a request to that effect from the Commission, the Spanish authorities had expressly confirmed, by letter of 23 July 2007, that the broadcasting platform was not one of the criteria for the grant of the subsidy, with the result that it was 'possible to subsidise decoders for digital terrestrial TV, broadcasting by cable [or by] satellite …'.

105 In the light of the above findings, it must be held that, by contrast with the measure at issue, the measure under examination in the Soria Decision was able to benefit all digital TV broadcasting technologies. Consequently, as the facts on which the contested decision is based and those underpinning the Soria Decision are manifestly different, Mediaset cannot purport to show that the contested decision is arbitrary by comparing the findings made by the Commission in those decisions. The argument that the contested decision is arbitrary in the light of the Soria Decision must therefore be rejected as unfounded.

106 Fifthly, the following considerations apply as regards the argument that there is no breach of the principle of equal treatment of digital broadcasters and that, in any event, such a breach would be objectively justified.

107 First, as regards Mediaset's claim that the satellite platform was not expressly included in the scope of the measure at issue precisely because there was no satellite offering based on an open standard and no likelihood of such an offering being forthcoming within the short period during which the measure applied, it should be pointed out that – as contended by the Commission – the Commission stated in recital 164 of the contested decision that it was only during 2004 and up to the beginning of 2005 that Sky Italia launched its conversion to a technology with closed standards, a point which Mediaset did not dispute. The Commission was fully entitled, therefore, to conclude in the same recital that Sky Italia would have made a different choice if the measure at issue had also covered the satellite platform.

108 Second, Mediaset's claim that the satellite platform was characterised by the presence of a *de facto* monopolist – namely, Sky Italia – which was able to raise relevant barriers to market entry, is clearly irrelevant for the purposes of assessing whether the measure at issue, in turn, distorts or threatens to distort competition in the market in question.

109 Sixthly, as regards Mediaset's argument alleging that the Commission acted in breach of the principle of legal certainty, it is apparent from the contested decision that this argument is manifestly unfounded. It is clear from the contested decision, in particular from recitals 104, 135 and 140, that the incompatibility of the measure at issue is closely linked to the breach of the principle of technological neutrality. It should also be noted – and Mediaset does not dispute this point – that it is apparent from recital 36 of the contested decision that, in the decision to initiate the formal investigation procedure, the Commission expressed its doubts as to whether there was indeed no breach of the principle of technological neutrality on the part of the measure at issue.

110 It follows from all of the above considerations that the fourth part of the first plea must be rejected as unfounded.

111 In consequence, in the light of the findings made in paragraphs 68, 79, 85 and 110 above, the first plea must be rejected as unfounded in its entirety.

The second plea: manifest error of assessment and manifest error of law in assessing the compatibility of the measure at issue with the common market under Article 87(3)(c) EC

Admissibility of the arguments set out in paragraphs 93 to 96 of the application

– Arguments of the parties

112 The Commission, supported by Sky Italia, contends that the arguments set out by Mediaset in paragraphs 93 to 96 of the application lack clarity. Mediaset merely makes a general reference to its analysis relating to the absence of aid. Moreover, the list of factors which, according to Mediaset, the Commission failed to consider, relate to the question whether State aid existed, not to its compatibility with the common market. Furthermore, Mediaset provides no explanation concerning the factors listed and does not state how the arguments relate to the assessment to be carried out under Article 87(3)(c) EC. For those reasons, the arguments put forward by Mediaset in paragraphs 93 to 96 of the application must be dismissed as inadmissible.

113 Mediaset submits that, whilst the analyses differ according to whether they relate to the existence of the aid or its compatibility, the fact remains that they are technically linked. Accordingly, the arguments relating to aid support the grounds for annulment relating to compatibility without their admissibility being affected.

– Findings of the Court

114 In the first place, in paragraphs 93 to 96 of the application, Mediaset claims that the Commission made a manifest error of assessment in the application of Article 87(3)(c) EC. In that regard, Mediaset refers to its analysis regarding the absence of aid. Moreover, it submits that, in the contested decision, the Commission did not analyse the economic context of the measure at issue. The Commission did not point out, first, that the measure at issue provided for subsidies to promote a technology fostered by the European Union, namely an open technology allowing interoperability and interactivity; or, secondly, that the subsidies represented the additional costs of that technology; or, thirdly, that the subsidies were consistent with EU recommendations; or, fourthly, that the subsidies did not confer an economic advantage. Lastly, the Commission did not take into account the fact that the actual distortion of competition on the market was due to a policy favouring closed standards; or that a difference existed between

closed and open standards; or the fact that the subsidy offset the costs associated with the performance of legal obligations.

115 In the second place, far from containing arguments to support the second plea, the explanations in paragraphs 93 to 96 of the application, which are set out in Section 3.2(a), entitled ‘The defendant engaged in a manifest error of assessment’, seek to introduce arguments in support of the three parts of the second plea, which are set out in Section 3.2(b), entitled ‘The defendant exceeded the scope of its discretion and engaged in a manifest error of appraisal of the facts and of evaluation of the situation in reaching the conclusion that the measure [at issue] was not compatible with Article 87(3)(c) EC’.

116 Accordingly, in paragraph 96 of the application, which comes before Section 3.2(b), Mediaset claims that by failing to appraise the economic context correctly, the Commission committed a manifest error of assessment of the measure at issue and consequently committed a manifest error in concluding that that measure was incompatible with the common market.

117 It follows from the above observations that the plea of inadmissibility raised by the Commission in relation to the alleged arguments set out in paragraphs 93 to 96 of the application must be rejected as unfounded.

The first part of the second plea: error in concluding that the measure at issue does not address market failures

– Arguments of the parties

118 Mediaset claims, on the basis of the the following four reasons, that the Commission committed a manifest error of assessment and insufficiently examined the relevant market in concluding that the measure at issue was incompatible with Article 87(3)(c) EC.

119 First, Mediaset disputes the conclusion drawn in the contested decision according to which the existence of a mandatory date for digitisation rendered the measure at issue inappropriate. That conclusion is not only at odds with the Commission’s previous decisions regarding digital terrestrial TV, but also shows that the Commission failed adequately to appreciate the existence of the market failure linked to the problem of coordination between the operators on the market.

120 Secondly, Mediaset submits that the measure at issue represented compensation for the digitisation costs which consumers would have had to bear in order to obtain an interoperable and interactive, open-technology decoder.

121 Thirdly, Mediaset claims that the contested decision failed to recognise the existence of externalities as a market failure. In that regard, in the contested decision, the Commission arbitrarily and without any objective justification concluded that it is normal for terrestrial broadcasters to subsidise open-technology decoders and thus incur the costs of free riding. However, Mediaset had no interest in subsidising the decoders to the benefit of competitors since it could easily have continued to reap the benefits of the analogue market.

122 Moreover, the Commission failed to take into account the fact that the measure at issue did not distort competition: rather, it promoted the use of open standards and interactivity in accordance with EU recommendations. Furthermore, referring to Annex A8, Mediaset submits that the Commission has failed to understand the relevant regulatory background and market

evolution. Lastly, Mediaset claims that, in the contested decision, the Commission also failed to take into consideration the costs linked to the regulatory uncertainties which still exist in relation to the allocation of frequencies and submits that the Commission erred in claiming in recital 157 of the contested decision that analogue licences were granted without competitive bidding or time-limits.

123 Fourthly, Mediaset alleges that the Commission has failed to substantiate why the measure at issue did not promote innovation, although it acknowledges that that measure allowed the price for interactive decoders to be reduced and brought into line with the price of basic decoders.

124 The Commission contends that Mediaset's reasoning is manifestly wrong and based on a 'distorted' reading of the contested decision. The Commission explicitly accepted that the measure at issue could be aimed at a common interest objective, namely the switchover to digital broadcasting and to open and interactive standards in that context. Moreover, the fact that the measure at issue could address certain market failures was not categorically excluded. However, none of those considerations could justify exclusion of the satellite platform from the scope of the subsidy.

– Findings of the Court

125 First, calling in question the Commission's assessment that subsidies for the purchase of digital decoders were not necessary to correct the problem of coordination between the operators on the market, as that problem had already been dealt with through the setting of a mandatory date for digitisation, Mediaset alleges infringement of Article 87(3)(c) EC. In order to be compatible with the common market for the purposes of Article 87(3)(c) EC, aid must pursue an objective in the common interest and must be necessary and proportionate for that purpose. The common interest objective purportedly pursued by the measure at issue is to address a market failure relating, in particular, to the problem of coordination between operators, which is the cause of a barrier to the development of digital broadcasting. Without there being any need to examine whether, as Mediaset claims, the Commission adopted a different position in the contested decision from that applied in previous decisions on digital terrestrial TV, the Court considers that, in the present case, the mandatory nature of the date laid down for digitisation is such as to resolve the problem of coordination among operators and, accordingly, the subsidy for the purchase of digital decoders was unnecessary.

126 As the Commission states in recital 146 of the contested decision, incumbent broadcasters had to take the fixing of a statutory deadline for switch-off of the analogue mode as an established fact and, as a consequence, had to develop new commercial strategies. In any event, as was stated in recital 147 of the contested decision, owing to the size of the terrestrial TV market in Italy, the risk of a critical mass of consumers not being reached, owing to a problem of coordination among operators, was not so great that commercial operators were unable to cope with it. Mediaset's argument must therefore be rejected.

127 Secondly, as regards the argument that the measure at issue offset costs to consumers, it should be pointed out that – as the Commission states in recital 148 of the contested decision – although such an argument justifies aid to consumers, it does not justify the discrimination between the different platforms, in so far as there is no need to guide consumers towards one digital platform in particular, as is the case with the measure at issue. The argument must therefore be rejected as unfounded.

128 Thirdly, Mediaset's claim that the Commission failed in the contested decision to recognise the existence of externalities as a market failure is incorrect. In recital 160 of the contested decision, the Commission expressly accepts the existence of the externalities involved in digitisation and the possible free-riding issues. However, as stated by the Commission in the same recital, such circumstances cannot justify the fact that the measure at issue is selectively aimed at terrestrial TV and excludes the satellite platform. Accordingly, the argument must be rejected as unfounded.

129 Fourthly, Mediaset's argument that the Commission has failed to substantiate why the measure at issue did not promote innovation must be rejected for the same reasons. It is true that the Commission expressly acknowledged, in recital 162 of the contested decision, that the measure at issue brought the price of interactive decoders into line with that of simpler models without interactive services. However, even though the measure at issue, through the use of interactive and interoperable decoders, promotes innovation, the fact remains that such promotion cannot, as is apparent from paragraphs 57 and 60 above, justify the exclusion of the satellite platform from the benefit of the measure at issue.

130 It follows from all of the above considerations that the first part of the second plea must be rejected as unfounded.

The second part of the second plea: error in concluding that the measure at issue was neither a necessary nor a proportionate instrument for addressing the market failures

– Arguments of the parties

131 Mediaset claims that the Commission made a manifest error of assessment in concluding that the measure at issue was neither a necessary nor a proportionate instrument for addressing the market failures. With regard to the proportionality of the measure in particular, Mediaset submits that the measure was limited to the extra cost of interoperability and interactivity and to the specific costs incurred by Mediaset in the performance of its legal obligations, and that the measure was of limited duration and ceased to apply on 1 December 2005.

132 The Commission contends that Mediaset's arguments must be rejected as unfounded since they do not take account of the principle of technological neutrality.

– Findings of the Court

133 Even if Mediaset were correct in claiming that the measure at issue was necessary and proportionate to address the market failures, the fact remains that such a factor could not justify the exclusion of satellite broadcasters from the benefit of that measure.

134 Given that it is precisely the absence of technological neutrality that led the Commission to find that the aid was incompatible with the common market, the arguments put forward in support of the second part of the second plea must be rejected.

135 It follows from all of the above considerations that the second plea must be rejected as unfounded.

The third plea: infringement of Article 253 EC

Arguments of the parties

136 Mediaset submits that the contested decision does not contain an adequate statement of reasons and that it therefore infringes Article 253 EC as regards both the existence of State aid and its compatibility with the common market.

137 As regards the existence of aid, Mediaset complains inter alia that the Commission did not explain the true source of the distortion or the threat of distortion of competition in the common market. First, the Commission did not correctly identify at the outset the relevant market or the market situation. Secondly, the Commission failed to examine in the contested decision the question whether the distortion was real or likely. Furthermore, the Commission failed to give an adequate statement of reasons for excluding decoder manufacturers from the category of beneficiaries of the measure at issue. Lastly, it failed in particular to give sufficient reasoning regarding the alleged creation of an audience and the alleged low-cost penetration of the pay-TV market.

138 As regards the analysis of the compatibility of the measure at issue with the common market, the contested decision does not state whether the problem is the alleged failure to comply with the technological neutrality criterion or the alleged low-cost pay-TV penetration.

139 The Commission, supported by Sky Italia, contends that its decision contains an adequate statement of reasons and is consistent with the requirements of Article 253 EC.

Findings of the Court

140 It should be borne in mind first that, according to settled case-law, a plea based on infringement of Article 253 EC is a separate plea from one based on a manifest error of assessment. While the former, which alleges absence of reasons or inadequacy of the reasons stated, goes to an issue of infringement of essential procedural requirements and, involving a matter of public policy, must be raised by the Court of its own motion, the latter, which goes to the substantive legality of a decision, is concerned with the infringement of a rule of law relating to the application of the Treaty and can be examined by the Court only if raised by Mediaset. The obligation to state reasons is thus a separate question from that of the merits of those reasons (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 67).

141 Secondly, according to settled case-law, the statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure, so as to enable the persons concerned to ascertain the reasons for it so that they can defend their rights and ascertain whether or not the measure is well founded and to enable the Court to exercise its power of review (*Commission* v *Sytraval and Brink's France*, paragraph 140 above, paragraph 63; Joined Cases T-228/99 and T-233/99 *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission* [2003] ECR II-435, paragraph 278; and Case T-109/01 *Fleuren Compost* v *Commission* [2004] ECR II-127, paragraph 119).

142 Furthermore, it is not necessary for the statement of reasons to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (Case C-17/99 *France* v *Commission* [2001] ECR I-2481, paragraph 36; Joined Cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to

T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98 *Alzetta and Others* v *Commission* [2000] ECR II-2319, paragraph 175; and *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, paragraph 141 above, paragraph 279).

143 In particular, the Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned and it is sufficient if it sets out the facts and the legal considerations having decisive importance in the context of the decision (Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraph 31, and *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, paragraph 141 above, paragraph 280). Thus, the Court of Justice has already held that the Commission was not required to define its position on matters which were manifestly irrelevant or insignificant or plainly of secondary importance (*Commission* v *Sytraval and Brink's France*, paragraph 140 above, paragraph 64).

144 Thirdly, with regard to the categorisation of a measure as aid, the obligation to state reasons requires that the reasons which led the Commission to consider that the measure concerned falls within the scope of Article 87(1) EC be stated (*Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, paragraph 141 above, paragraph 281).

145 Fourthly, as regards the existence of a distortion of competition in the common market, it should be borne in mind that, according to settled case-law, while the Commission must at the very least refer to the circumstances in which aid was granted in the statement of the reasons for its decision where those circumstances show that the aid is such as to affect trade between Member States and to distort or threaten to distort competition, it 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. Furthermore, in the case of aid granted illegally, the Commission is not required to demonstrate the actual effect which that aid has had on competition and on trade between Member States. If that were the case, such a requirement would ultimately give Member States which grant unlawful aid an advantage over those which notify the aid at the planning stage (see, to that effect, Case T-55/99 *CETM* v *Commission* [2000] ECR II-3207, paragraphs 100, 102 and 103; Case T-152/99 *HAMSA* v *Commission* [2002] ECR II-3049, paragraph 225; and Case T-198/01 *Technische Glaswerke Ilmenau* v *Commission* [2004] ECR II-2717, paragraph 215).

146 In particular, the Commission merely needs to establish that the aid in question 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 (see judgment of the Court of 6 September 2006 in Joined Cases T-304/04 and T-316/04 *Italy and Wam* v *Commission*, not published in the ECR, paragraph 64, and Case T-25/07 *Iride and Iride Energia* v *Commission* [2009] ECR II-0000, paragraph 109 and the case-law cited).

147 It is in the light of that case-law that it must be determined whether, in the present case, the Commission provided an adequate statement of reasons for the contested decision.

148 In the first place, 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, it should be pointed out that, in recitals 102 to 114 of the contested decision, the Commission examines the effect of the measure at issue on competition and on trade between the Member States.

149 First, as regards the effect of the measure at issue on competition, it should be noted that, in recitals 102 to 111 of the contested decision, the Commission examined the effect of the measure at issue on competition as regards broadcasters. Thus the Commission stated, in recital 105 of the contested decision, that it wished to maintain the position it had expressed in the decision to initiate the formal investigation procedure, to the effect that the advantage granted to broadcasters and operators of terrestrial networks was detrimental to broadcasters using different platforms.

150 In order to support its position in that regard and thus establish, in accordance with Article 87(1) EC, that the measure at issue threatens to distort competition by granting a selective advantage, the Commission stated in recital 106 of the contested decision that there is a certain degree of substitutability between the pay-TV digital terrestrial offer and the pay-TV offer available on satellite. In those circumstances, it concluded that once 'the digital terrestrial platform has successfully launched and established pay-TV services – also thanks to the subsidised decoders – it will be able to compete with similar services provided on alternative platforms'.

151 Moreover, it should be pointed out that, in recital 107 of the contested decision, the Commission made sure that it supported its finding by relying on developments in other Member States.

152 Furthermore, in recital 109 of the contested decision, the Commission stated that the Autorità garante della concorrenza e del mercato (National Competition Authority) had itself taken the view that broadcasters using different types of platforms could be regarded as potential competitors on the Italian pay-TV market.

153 In addition, in recital 111 of the contested decision, the Commission, first, relied on a study which indirectly confirms that access to the pay-TV market at the reduced cost is distorting competition and, secondly, stated that the figures provided by Sky Italia also tended to support the view that there is a degree of competition on the pay-TV market.

154 Lastly, it should be pointed out that, in recital 108 of the contested decision, the Commission emphasised quite specifically the fact that the measure at issue came at a critical time, that is to say, at a time when many analogue terrestrial TV viewers were faced with the transition to digital TV and had to choose between investing in equipment for receiving satellite transmissions or terrestrial transmissions.

155 It follows from all of the above considerations that the Commission was not in breach of its obligation to state reasons regarding the effects of the measure at issue on competition.

156 Secondly, as regards the effect of the measure at issue on trade between Member States, 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 selectively favouring certain broadcasters or network operators, competition is distorted at the expense of economic operators which might come from other Member States. The Commission concluded, therefore, that the measure at issue affects trade between Member States.

157 In the light of the case-law referred to in paragraphs 145 and 146 above, the Commission must be regarded as having provided an adequate statement of reasons in the contested decision

as regards the question whether the measure at issue is likely to affect trade between Member States.

158 Moreover, even supposing that Mediaset sought, more generally, to claim that there had been infringement of Article 253 EC as regards the Commission's categorisation, in the contested decision, of the measure at issue as State aid for the purposes of Article 87(1) EC, it should be pointed out that, in that decision, the Commission examined compliance with all the conditions laid down in Article 87(1) EC. First, in recital 80 of the contested decision, it examined whether the measure at issue involved the use of State resources. Secondly, in recitals 81 to 101 of the contested decision, it examined whether the measure at issue conferred a selective economic advantage on the recipients. Thirdly, in recitals 102 to 112 of the contested decision, it ascertained whether the measure at issue distorted or threatened to distort competition. Fourthly and lastly, in recitals 113 and 114 of the contested decision, the Commission assessed whether the measure at issue was capable of affecting trade between Member States.

159 In the second place, Mediaset complains that the Commission did not state in the contested decision whether the reason why it declared the measure at issue to be incompatible with the common market was linked to failure to respect the technological neutrality criterion or the alleged low-cost pay-TV penetration. In that regard, suffice it to note that, as the Court has already held in paragraph 109 above, it is clear from the contested decision – in particular, from recitals 104, 135 and 140 – that the incompatibility of the measure at issue is closely linked to the breach of the principle of technological neutrality and that, in the decision to initiate the formal investigation procedure, the Commission had expressed its doubts as to the need for the measure at issue to breach the principle of technological neutrality. Consequently, the present argument must also be rejected as unfounded.

160 In the third place, concerning the position of decoder manufacturers, the Commission provided a statement of reasons for the contested decision to the requisite legal standard. As regards the existence of aid, after reiterating the doubts which it had entertained at the time of initiating the formal investigation procedure, the Commission found in recitals 120 to 123 of the contested decision that distortion of competition at the level of decoder manufacturers could not be entirely ruled out. However, it added that, in any event, the measure at issue was compatible with the common market with regard to those manufacturers. In that regard, the Commission maintained in recital 168 of the contested decision that the measure at issue should be regarded as necessary and proportionate for attaining a common interest objective, given that all the decoder manufacturers, including those located in other Member States, could gain from it.

161 Consequently, it must be held that the Commission provided an adequate statement of reasons as regards the findings in the contested decision that the measure at issue was covered by Article 87(1) EC and that it was incompatible with the EC Treaty.

162 It follows from all of the above considerations that the contested decision complies with the requirements of Article 253 EC. The third plea must therefore be rejected as unfounded.

The fourth plea: infringement of Article 14 of Regulation No 659/1999 and breach of the principle of the protection of legitimate expectations and the principle of legal certainty

Arguments of the parties

163 Mediaset submits that the contested decision infringes Article 14 of Regulation No 659/1999 inasmuch as, under that provision, the Commission is not to require recovery of the aid if this would be contrary to a general principle of Community law.

164 In the first place, the contested decision is said to breach the principle of the protection of legitimate expectations since exceptional circumstances led Mediaset to believe that the measure did not constitute State aid.

165 In that regard, Mediaset states, first, that it legitimately believed that the measure at issue was consistent with the Commission's policy of promoting digitisation, since the Commission stated in paragraph 3.4.2 of Commission Communication COM(2004) 541 final of 30 July 2004 on interoperability of digital interactive TV services ('the Communication') that direct subsidies to consumers were a possible means by which a Member State could provide an incentive for the purchase of interactive and interoperable decoders, and particularly since the Commission made express reference in the Communication to the Italian subsidies.

166 Secondly, Mediaset argues, since the concept of indirect beneficiaries of State aid was not yet clearly defined in the case-law, a diligent operator could not legitimately be expected to believe that aid to consumers would render it not only an indirect beneficiary of such aid, but also the sole beneficiary, to the exclusion of all other potential indirect beneficiaries. Mediaset submits in that regard that all other potential beneficiaries should also have been regarded as indirect beneficiaries, with all the relevant implications that such a finding would have in terms of recovery.

167 Secondly, the contested decision is also in breach of the principle of legal certainty, since the method of calculation proposed in recitals 191 to 205 of the contested decision as a means of quantifying the amount of aid to be recovered is not effective, transparent or appropriate. First, it is difficult, if not impossible, to establish the exact value of one of the parameters of that method: namely, the number of additional viewers who acquired pay-TV services solely because of the adoption of the measure at issue. In that regard, the Commission has failed to prove that customers bought the subsidised decoders to access the pay-TV services. Secondly, quantifying the aid and the interest on that aid is extremely difficult. In that regard, the Commission should at least have examined the proposed model and perhaps even analysed it in comparison with other possible models, particularly since none of the parties involved in the proceedings could provide any quantification of the alleged aid.

168 The Commission, supported by Sky Italia, contends that the arguments put forward by Mediaset regarding the method of quantification of the aid relate more to the implementation of the decision than to its lawfulness. Consequently, they must be rejected as inadmissible. Furthermore, the contested decision complies with the general principles of Community law of the protection of legitimate expectations and of legal certainty. As a consequence, the Commission was required, pursuant to Article 14 of Regulation No 659/1999, to order recovery of the aid measure at issue.

Findings of the Court

169 First, it should be borne in mind that the the removal of unlawful State aid by means of recovery is the logical consequence of a finding that it is unlawful. The aim of obliging the State concerned to abolish aid found by the Commission to be incompatible with the common market is to restore the previous situation (see Joined Cases T-116/01 and T-118/01 *P & O European*

Ferries (Vizcaya) and Diputación Foral de Vizcaya v *Commission* [2003] ECR II-2957, paragraph 223 and the case-law cited), 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).

170 Secondly, it should be pointed out 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. That provision specifies, however, that the Commission is not to require recovery of the aid if this would be contrary to a general principle of Community law.

171 In the present case, Mediaset maintains that recovery of the aid would be contrary to the principle of the protection of legitimate expectations and the principle of legal certainty.

172 In the first place, as regards the alleged breach of the principle of the protection of legitimate expectations, it should be borne in mind that, according to settled case-law, the right to rely on the principle of the protection of legitimate expectations, which is a fundamental principle, extends to any individual who is in a situation in which it is clear that, by giving him precise assurances, the authorities have led him to entertain legitimate expectations. Regardless of the form in which it is communicated, information that is precise, unconditional and consistent which comes from an authorised and reliable source constitutes such assurance (Joined Cases T-66/96 and T-221/97 *Mellett* v *Court of Justice* [1998] ECR-SC I-A-449 and II-1305, paragraphs 104 and 107). However, a person may not plead breach of the principle unless he has been given precise assurances by the administration (Case T-290/97 *Mehibas Dordtselaan* v *Commission* [2000] ECR II-15, paragraph 59, and Case T-273/01 *Innova Privat-Akademie* v *Commission* [2003] ECR II-1093, paragraph 26).

173 Also, so far as State aid is concerned, it is settled case-law 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. A diligent business operator must normally be in a position to confirm that that procedure has been followed, even if the State in question was responsible for the unlawfulness of the decision to grant aid to such a degree that its revocation appears to be a breach of the principle of good faith (see Joined Cases T-239/04 and T-323/04 *Italy and Brandt Italia* v *Commission* [2007] ECR II-3265, paragraph 154 and the case-law cited).

174 However, Mediaset maintains that, in the present case, its legitimate expectation that the measure at issue was lawful was based on two exceptional circumstances.

175 First, it relies on paragraph 3.4.2 of the Communication, which expressly refers to the measure at issue and states that Member States may grant consumer subsidies.

176 However, contrary to the assertions made by Mediaset, the reference in paragraph 3.4.2 of the Communication does not constitute a guarantee on the part of the Commission as regards the lawfulness of the measure at issue. On the contrary, given that the Commission expressly states in that paragraph that ‘such consumer subsidies need to be technologically neutral and must be notified and conform to State Aid rules’, the Communication could not have led a diligent operator to entertain legitimate expectations as regards the compatibility of the measure at issue

with the rules applicable to State aid. A diligent business operator should have known not only that the measure at issue was not technologically neutral, but also that it had not been notified to the Commission and had not been authorised.

177 Secondly, Mediaset's argument that the indirect form of the aid also constitutes an exceptional circumstance which could have given rise to a legitimate expectation must also be rejected. Like any diligent operator, Mediaset should have known that the indirect nature of the aid has no bearing on its recovery. In that regard, it should be pointed out in particular that, contrary to Mediaset's claims, aid to consumers is a well-established form of aid, as is apparent from Article 87(2)(a) EC, which must be notified and authorised like all the other forms of aid and the potential recipients of which are indirect.

178 The argument relating to breach of the principle of the protection of legitimate expectations must therefore be rejected as unfounded.

179 In the second place, as regards the alleged breach of the principle of legal certainty, it should be pointed out that that principle requires that legal rules be clear and precise and aims to ensure that situations and legal relationships governed by Community law remain foreseeable (Case C-199/03 *Ireland* v *Commission* [2005] ECR I-8027, paragraph 69).

180 That principle is said to have been infringed because, first, it is difficult, if not impossible, to establish the exact value of one of the parameters of the method of calculation set out in the contested decision – namely, the number of additional viewers who acquired pay-TV services because of the measure at issue – and, secondly, quantifying the aid and the interest on that aid is extremely difficult.

181 However, it should be borne in mind 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 recipient to work out that amount itself, without overmuch difficulty (Case C-415/03 *Commission* v *Greece* [2005] ECR I-3875, paragraph 39; Case C-441/06 *Commission* v *France* [2007] ECR I-8887, paragraph 29; and judgment of the Court of Justice of 14 February 2008 in Case C-419/06 *Commission* v *Greece*, not published in the ECR, paragraph 44).

182 Furthermore, according to settled case-law, in the absence of pertinent provisions of Community law, 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. Disputes arising in connection with the enforcement of recovery are a matter for the national court alone (see, to that effect, Case T-354/99 *Kuwait Petroleum (Nederland)* v *Commission* [2006] ECR II-1475, paragraph 68 and the case-law cited).

183 Lastly, it should be added that 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 to cooperate in good faith in the implementation of Treaty rules concerning State aid (*Netherlands* v *Commission*, paragraph 69 above, paragraph 91).

184 It is apparent from the case-law referred to in paragraphs 181 to 183 above that it is 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.

185 Mediaset's argument alleging breach of the principle of legal certainty must therefore be rejected as unfounded.

186 It follows from the findings made in paragraphs 178 and 185 above that the fourth plea must be rejected as unfounded.

187 In conclusion, as none of the pleas put forward in support of the present action is well founded, the action must be dismissed in its entirety.

Costs

188 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission and Sky Italia.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. **Dismisses the action;**

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

Pelikánová Jürimäe Soldevila Fragoso

Delivered in open court in Luxembourg on 15 June 2010.

[Signatures]

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* Language of the case: English.