JUDGMENT OF THE COURT (Third Chamber)

27 October 2011 *

In Case C-47/10 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 27 January 2010,

Republic of Austria, represented by E. Riedl, acting as Agent, assisted by M. Núñez Müller and J. Dammann, Rechtsanwälte,

appellant,

the other parties to the proceedings being:

Scheucher-Fleisch GmbH, established in Ungerdorf (Austria),

Tauernfleisch Vertriebs GmbH, established in Flattach (Austria),

* Language of the case: German.

Wech-Kärntner Truthahnverarbeitung GmbH, established in Glanegg (Austria),

Wech-Geflügel GmbH, established in Sankt Andrä (Austria),

Johann Zsifkovics, resident in Vienna (Austria),

represented by J. Hofer and T. Humer, Rechtsanwälte,

applicants at first instance,

European Commission, represented by V. Kreuschitz and A. Stobiecka-Kuik, acting as Agents, with an address for service in Luxembourg,

defendant at first instance,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta (Rapporteur) and G. Arestis, J. Malenovský and T. von Danwitz, Judges,

Advocate General: Y. Bot,
Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 14 April 2011,

after hearing the Opinion of the Advocate General at the sitting on 9 June 2011,

gives the following

Judgment

1 By its appeal, the Republic of Austria asks the Court of Justice to set aside the judgment of the General Court of the European Union of 18 November 2009 in Case T-375/04 *Scheucher-Fleisch and Others* v *Commission* [2009] ECR II-4155, ('the judgment under appeal'), in which the General Court annulled Commission decision C(2004) 2037 final of 30 June 2004 on State aid NN 34A/2000 regarding the regarding the quality and label programmes 'AMA-Biozeichen' and 'AMA-Gütesiegel' ('the contested decision'), established by the Republic of Austria for the benefit of the agri-food sector.

Legal context

2 Recitals 1 to 3, and recital 8 in the preamble to 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) state:

'(1) Whereas, without prejudice to special procedural rules laid down in regulations for certain sectors, this Regulation should apply to aid in all sectors; whereas, for the purpose of applying Articles [73] and [87] of the Treaty, the Commission has specific competence under Article [88] thereof to decide on the compatibility of State aid with the common market when reviewing existing aid, when taking decisions on new or altered aid and when taking action regarding non-compliance with its decisions or with the requirement as to notification;

(2) Whereas the Commission, in accordance with the case-law of the Court of Justice of the European Communities, has developed and established a consistent practice for the application of Article [88] of the Treaty and has laid down certain procedural rules and principles in a number of communications; whereas it is appropriate, with a view to ensuring effective and efficient procedures pursuant to Article [88] of the Treaty, to codify and reinforce this practice by means of a regulation;

(3) Whereas a procedural regulation on the application of Article [88] of the Treaty will increase transparency and legal certainty;

...

(8) Whereas in all cases where, as a result of the preliminary examination, the Commission cannot find that the aid is compatible with the common market, the formal investigation procedure should be opened in order to enable the Commission to gather all the information it needs to assess the compatibility of the aid and to allow the interested parties to submit their comments; whereas the rights of the interested parties can best be safeguarded within the framework of the formal investigation procedure provided for under Article [88(2)] of the Treaty'.

3 Article 1 of Regulation No 659/1999 states:

'For the purposes of this Regulation:

...

(h) "interested party" shall mean any Member State and any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, in particular the beneficiary of the aid, competing undertakings and trade associations.'

4 Under Chapter II of that regulation, headed 'Procedure regarding notified aid', Article 4, headed 'Preliminary examination of the notification and decisions of the Commission' provides:

'1. The Commission shall examine the notification as soon as it is received. Without prejudice to Article 8, the Commission shall take a decision pursuant to paragraphs 2, 3 or 4.

2. Where the Commission, after a preliminary examination, finds that the notified measure does not constitute aid, it shall record that finding by way of a decision.

3. Where the Commission, after a preliminary examination, finds that no doubts are raised as to the compatibility with the common market of a notified measure, in so far as it falls within the scope of Article [87(1) EC], it shall decide that the measure is compatible with the common market … The decision shall specify which exception under the Treaty has been applied.

4. Where the Commission, after a preliminary examination, finds that doubts are raised as to the compatibility with the common market of a notified measure, it shall decide to initiate proceedings pursuant to Article [88(2) EC]...

5. The decisions referred to in paragraphs 2, 3 and 4 shall be taken within two months. That period shall begin on the day following the receipt of a complete notification. The notification will be considered as complete if, within two months from its receipt, or from the receipt of any additional information requested, the Commission does not request any further information. The period can be extended with the consent of both the Commission and the Member State concerned. Where appropriate, the Commission may fix shorter time limits.

6. Where the Commission has not taken a decision in accordance with paragraphs 2, 3 or 4 within the period laid down in paragraph 5, the aid shall be deemed to have been authorised by the Commission. The Member State concerned may thereupon implement the measures in question after giving the Commission prior notice thereof, unless the Commission takes a decision pursuant to this Article within a period of 15 working days following receipt of the notice.'

5 Under Chapter II, Article 6(1) of that regulation, headed 'Formal investigation procedure', provides:

'The decision to initiate the formal investigation procedure shall summarise the relevant issues of fact and law, shall include a preliminary assessment of the Commission as to the aid character of the proposed measure and shall set out the doubts as to its compatibility with the common market. The decision shall call upon the Member State concerned and upon other interested parties to submit comments within a prescribed period which shall normally not exceed one month. In duly justified cases, the Commission may extend the prescribed period.'

6 Under Chapter III, headed 'Procedure regarding unlawful aid', Article 13 of Regulation No 659/1999 provides, under the heading 'Decisions of the Commission':

'1. The examination of possible unlawful aid shall result in a decision pursuant to Article 4(2), (3) or (4). In the case of decisions to initiate the formal investigation procedure, proceedings shall be closed by means of a decision pursuant to Article 7. If a Member State fails to comply with an information injunction, that decision shall be taken on the basis of the information available.

2. In cases of possible unlawful aid and without prejudice to Article 11(2), the Commission shall not be bound by the time-limit set out in Articles 4(5), 7(6) and 7(7).

3. The provisions of Article 9 apply mutatis mutandis.'

7 Under Chapter VI, entitled 'Interested parties', Article 20 of that regulation states, under the heading 'Rights of interested parties':

'1. Any interested party may submit comments pursuant to Article 6 following a Commission decision to initiate the formal investigation procedure. Any interested party which has submitted such comments and any beneficiary of individual aid shall be sent a copy of the decision taken by the Commission pursuant to Article 7.

2. Any interested party may inform the Commission of any alleged unlawful aid and any alleged misuse of aid. Where the Commission considers that on the basis of the information in its possession there are insufficient grounds for taking a view on the case, it shall inform the interested party thereof. Where the Commission takes a decision on a case concerning the subject matter of the information supplied, it shall send a copy of that decision to the interested party.

3. At its request, any interested party shall obtain a copy of any decision pursuant to Articles 4 and 7, Article 10(3) and Article 11.'

8 Article 64 of the Rules of Procedure of the General Court concerns measures of organisation of procedure before the General Court and Article 81 of those rules concerns the content of judgments of the General Court.

Background to the dispute

9 The facts giving rise to the dispute were set out in paragraphs 1 to 12 of the judgment under appeal. For the purposes of the present appeal, it is necessary to note the following background to the case.

10 In 1992, the Republic of Austria adopted the Federal Law on the establishment of the market-regulating agency 'Agrarmarkt Austria' (Bundesgesetz über die Errichtung der Marktordnungsstelle 'Agrarmarkt Austria') (BGBl. 376/1992; 'the AMA-Gesetz 1992').

11 That law created a public-law corporation, Agrarmarkt Austria ('AMA'), the function of which is the promotion of agricultural marketing. The operational activities of AMA are the responsibility of Agrarmarkt Austria Marketing GmbH ('AMA Marketing'), a wholly-owned subsidiary of AMA. One of those activities consists in encouraging the production, treatment, processing and sale of agricultural products in Austria by allocating the AMA bio-label and the AMA quality label ('the AMA labels') to certain agricultural products.

12 In order to promote its activities, AMA collects contributions which must be paid, in particular, for the slaughter of cattle, calves, pigs, lambs, sheep and poultry.

13 Scheucher-Fleisch GmbH, Tauernfleisch Vertriebs GmbH, Wech-Kärntner Truthahnverarbeitung GmbH, Wech-Geflügel GmbH, and the sole trader Johann Zsifkovics (together 'Scheucher-Fleisch and Others') are undertakings specialising in the slaughter and butchering of animals and, therefore, are subject to the payment of

contributions to AMA. The same applies to Gandits GmbH. The products from those undertakings are, however, not entitled to the AMA labels.

14 Following receipt of the complaints of Scheucher-Fleisch and Others as well as Grandits GmbH, the Commission decided on 15 February 2000 to request the Austrian authorities to submit information to it on the marketing activities of AMA Marketing and AMA. In the light of the responses from those authorities, the Commission decided to initiate the procedure laid down in Article 88(3) EC and to categorise the measures in question as 'non-notified State aid'; it informed the Austrian authorities of this by letter dated 19 June 2000. Following a request from the Republic of Austria which was received by the Commission on 8 March 2003, the Commission decided to divide the procedure in two, depending on whether the measures were adopted before or after 26 September 2002. As it clear from the contested decision, the aid measures after that date were treated as notified State aid. It is that notified aid which forms the subject-matter of the procedure culminating in the adoption of the contested decision.

15 By the contested decision, the Commission decided not to raise any objection to the measures taken by AMA or AMA Marketing concerning the quality programmes and AMA labels as from 26 September 2002, finding that they were aid compatible with EU law under Article 87(3)(c) EC.

Proceedings before the General Court and the judgment under appeal

16 By application lodged at the Registry of the General Court on 17 September 2004, Scheucher-Fleisch and Others and Grandits GmbH brought an action for the annulment of the contested decision. By order of the President of the Sixth Chamber of the General Court of 4 February 2009, Grandits GmbH's discontinuance was officially recorded.

17 The action for annulment brought by Scheucher-Fleisch and Others was based, in essence, on three grounds, namely breach of the rules of procedure, breach of Article 87(3)(c) EC, and breach of the suspension clause laid down in Article 88(3) EC and in Article 3 of Regulation No 659/1999.

18 The first plea in law of Scheucher-Fleisch and Others was sub-divided into four parts alleging, first, the lack of notification to the Commission of the aid at issue, breach of the procedural guarantees provided for by Article 88(2) EC, breach of the duty to state the reasons for a decision and breach of the principle that the Commission must act within a reasonable time. In the second part of the first plea in law, Scheucher-Fleisch and Others maintained that the Commission should have opened the formal investigation procedure, in accordance with Article 4(4) of Regulation No 659/1999, because there were doubts as to the compatibility of the measures in question with the common market.

19 The Commission opposed the action, claiming that it was inadmissible and, in the alternative, that it lacked merit.

20 In order to decide on the inadmissibility raised by the Commission, the General Court analysed, firstly, the extent to which Scheucher-Fleisch and Others were directly concerned by the contested decision. In that regard, the General Court held, at paragraph 37 of the judgment under appeal, that the AMA labels had been issued prior to the contested decision and that the demand for payment addressed by AMA to Grandits GmbH concerned contributions due for a period covering, at least partially, the period of application of the measures referred to by the contested decision. Consequently, the General Court found that the possibility of the Austrian authorities deciding not to grant the aid at issue was purely theoretical and that Scheucher-Fleisch and Others were therefore, for the purposes of the fourth paragraph of Article 230 EC, directly concerned by the contested decision.

21 Secondly, the General Court reviewed whether Scheucher-Fleisch and Others were individually concerned by the contested decision. In that regard, it found that, based on the pleas in law relied on, it had to analyse, first, their standing to bring proceedings to enforce their procedural rights and, second, their standing to bring proceedings for the purpose of challenging the contested decision's substance.

22 As regards the standing of Scheucher-Fleisch and Others to bring proceedings to enforce their procedural rights, the General Court held, at paragraph 53 of the judgment under appeal, that the beneficiaries of the aid at issue are not only retailers but also all undertakings forming part of the chain of production and distribution specific to the AMA labels. In this case, the General Court held that Scheucher-Fleisch and Others were slaughtering and butchering undertakings competing with those entitled to those labels and they also operated on the same geographical market. The General Court inferred that Scheucher-Fleisch and Others had the necessary standing to bring proceedings in so far as they sought to enforce their procedural rights under Article 88(2) EC and it declared the second part of their first plea in law admissible.

23 On the other hand, as regards Scheucher-Fleisch and Others' standing to bring proceedings for the purpose of challenging the substance of the contested decision, the General Court held, at paragraphs 60 and 61 of the judgment under appeal, that they had not shown that their position on the market could be substantially affected by the aid which was the subject of the contested decision and, therefore, held the first and fourth parts of the first plea in law as well as the third plea in law to be inadmissible.

24 Finally, the General Court also stated, at paragraphs 63 and 64 of the judgment under appeal, that the third part of the first plea in law as well as the second plea in law, were admissible only insofar as they were directed at bringing proceedings to enforce the procedural rights which Scheucher-Fleisch and Others derived from Article 88(2) EC. According to the General Court, Scheucher-Fleisch and Others maintained, by their second plea in law, that their procedural rights under that provision had been infringed when the contested decision was adopted. Moreover, the third part of their

first plea in law also supported the second part of that plea in law, since the lack of an adequate statement of reasons did not make it possible for the parties concerned to ascertain the justification for the Commission's conclusion on the absence of serious difficulties, or for the Court to carry out its review.

25 Concerning the substance, the General Court held, at paragraph 84 of the judgment under appeal, that when the Commission examined the compatibility of the aid at issue with the common market, the principal provisions of Paragraph 21a of the AMA-Gesetz 1992 referred only to national products. Equally, the General Court held, at paragraph 85 of the judgment under appeal, that the Commission was aware of that question, insofar as negotiations had taken place on that subject between that institution and the Austrian authorities.

26 In the light of those findings, the General Court held, at paragraphs 85 and 86 of its judgment, that even if AMA's directives stipulated no condition as to the origin of products, the fact remained that the restriction to national products in Paragraph 21a(1) of the AMA-Gesetz 1992 raised doubts as to the compatibility of the aid at issue with the Community Guidelines for State aid for advertising of products listed in Annex I to the EC Treaty and of certain non-Annex I products (OJ 2001 C 252, p. 5), since those Guidelines did not allow such a restriction.

27 Consequently, the General Court held, at paragraphs 86 to 88 of the judgment under appeal that the assessment of the compatibility of the aid at issue with the common market raised serious difficulties which ought to have led the Commission, by applying Article 4(4) of Regulation No 659/1999, to initiate the procedure provided for by Article 88(2) EC. Accordingly, the contested decision had to be annulled, and there was no need to examine the third part of the first plea in law or the second plea in law.

Procedure before the Court of Justice and the forms of order sought

28 By its appeal, the Republic of Austria claims that the Court of Justice should:

— set aside the judgment under appeal in its entirety;

— settle the dispute by rejecting the application seeking annulment of the contested decision, either as inadmissible or as unfounded; and

— order Scheucher-Fleisch and Others to pay the costs both of the action for annulment and of the appeal.

29 The Commission supports the form of order sought by the Republic of Austria and claims that the Court should:

— set aside the judgment under appeal in its entirety;

— rule definitively on the substance and dismiss the action for annulment as inadmissible or, at least, as unfounded; and

— order Scheucher-Fleisch and Others to pay the costs both of the appeal and of the action for annulment.

30 Scheucher-Fleisch and Others maintain all the pleas in law which they had developed in their pleadings lodged with the General Court and claim that the Court of Justice should:

— dismiss the appeal in its entirety; and

— order the Republic of Austria to pay the costs.

The main appeal

31 The Republic of Austria relies on five grounds of appeal in support of its appeal, namely breach of the fourth paragraph of Article 230 EC, breach of Article 88(2) EC, breach of the rules governing the burden of proof resulting from Articles 88(2) EC and the fourth paragraph of Article 230 EC, breach of Article 81 of the Rules of Procedure of the General Court regarding the grounds of judgments, and, finally, breach of Article 64 of the same rules, concerning the measures of organisation of procedure. The Commission fully supports the appeal, approves of all the grounds of appeal made by the Republic of Austria, and puts forward supplementary grounds of appeal.

32 Scheucher-Fleisch and Others dispute all the grounds of appeal.

The first ground of appeal

33 By its first ground of appeal, the Republic of Austria, supported by the Commission, pleads breach of the fourth paragraph of Article 230 EC by the judgment under appeal, on the ground that Scheucher-Fleisch and Others were not directly and individually concerned by the contested decision, so that the action for annulment of that decision should have been declared inadmissible.

34 Scheucher-Fleisch and Others dispute that ground of appeal and state that the General Court was right to declare their action for annulment admissible.

The first part of the first ground of appeal

— Arguments of the parties

35 By the first part of the first ground of appeal, the Republic of Austria takes the view, first, as regards the necessity for the applicants to be individually concerned by the contested decision, that the fact of being considered as an 'interested party' for the purpose of Article 1(h) of Regulation No 659/1999 does not necessarily lead to the existence of standing for the applicants, in that the fourth paragraph of Article 230 EC requires, in that regard, that an applicant be substantially affected by that measure. According to that Member State, there is a discrepancy on that point in the judgment under appeal in so far as it recognises that Scheucher-Fleisch and Others were not substantially affected by the aid forming the subject-matter of the contested decision,

while declaring some of the pleas in law relied on by those undertakings admissible, including the pleas in law linked to the substance of that decision.

36 According to that Member State, given that Scheucher-Fleisch and Others put forward pleas seeking both to safeguard the procedural rights allegedly granted to them in the context of a formal investigation procedure of the aid at issue and to challenge the substance of the contested decision, they had, in accordance with the case-law of the Court of Justice, to show a particular situation regarding that aid, and even that the grant of the aid substantially affected them. However, once the General Court found that there was no such situation or effect, it had to declare the action inadmissible in its entirety.

37 The Commission adds that the case-law on which the judgment under appeal is based, namely Case C-198/91 *Cook* v *Commission* [1993] ECR I-2487, paragraph 23, and Case C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 17, is incompatible with the fourth paragraph of Article 230 EC. It indicates, moreover, the points of EU law which, in its view, run counter to that case-law, in particular the role of the interested parties in the context of the procedure under Article 88(2) and (3) EC, the scheme of Articles 230, 241 and 234 EC, which presupposes a comprehensive system of appeals, the limits to opening the formal investigation procedure arising from Article 87 EC, and the contradictions of that case-law, exacerbated, according to the Commission, by the misinterpretation of that case-law by the judgment under appeal.

38 Second, as regards the requirement, for Scheucher-Fleisch and Others, to be directly concerned by the contested decision, the Republic of Austria notes that that decision did not necessarily mean that AMA Marketing would grant the requests for the promotion measures at issue and that they were granted only under an individual decision. Consequently, Scheucher-Fleisch and Others were not directly concerned by the measures of general scope which comprise the AMA-Gesetz 1992, or by the contested decision. Furthermore, according to that Member State, Scheucher-Fleisch and Others freely decided to waive the measures at issue.

39 Scheucher-Fleisch and Others oppose the first part of the first ground of appeal.

— Findings of the Court

40 As the Court noted in Case C-83/09 P *Commission* v *Kronoply and Kronotex* [2011] ECR I-4441, Article 4 of Regulation No 659/1999 provides for a phase during which the aid measures notified undergo a preliminary examination, the purpose of which is to enable the Commission to form an initial view as to whether that aid is compatible with the common market. On completion of that phase, the Commission is to make a finding either that the measure does not constitute aid or that it falls within the scope of Article 87(1) EC. In the latter case, it may be that the measure does not raise doubts as to its compatibility with the common market; on the other hand, it is also possible that the measure may raise such doubts (*Commission* v *Kronoply and Kronotex*, paragraph 43).

41 If, following the preliminary examination, the Commission finds that, notwithstanding the fact that the measure notified falls within the scope of Article 87(1) EC, it does not raise any doubts as to its compatibility with the common market, the Commission is to adopt a decision not to raise objections under Article 4(3) of Regulation No 659/1999 (*Commission* v *Kronoply and Kronotex*, paragraph 44).

42 Where the Commission adopts such a decision, it declares not only that the measure is compatible with the common market, but also – by implication – that it refuses to initiate the formal investigation procedure laid down in Article 88(2) EC and Article 6(1) of Regulation No 659/1999 (*Commission* v *Kronoply and Kronotex*, paragraph 45).

43 However, the lawfulness of a decision not to raise objections, adopted under Article 4(3) of Regulation No 659/1999, depends on whether there are doubts as to the compatibility of the aid with the common market. Since such doubts must trigger the initiation of a formal investigation procedure in which the interested parties referred to in Article 1(h) of Regulation No 659/1999 can participate, it must be held that any interested party within the meaning of the latter provision is directly and individually concerned by such a decision (*Commission* v *Kronoply and Kronotex*, paragraph 47).

44 The beneficiaries of the procedural guarantees provided for in Article 88(2) EC and Article 6(1) of Regulation No 659/1999 cannot ensure that those guarantees are respected, unless it is possible for them to challenge before the EU judicature the decision not to raise objections, and, consequently, the specific status of 'interested party' within the meaning of Article 1(h) of Regulation No 659/1999, in conjunction with the specific subject-matter of the action, is sufficient to distinguish individually, for the purposes of the fourth paragraph of Article 230 EC, the applicant contesting a decision not to raise objections (*Commission* v *Kronoply and Kronotex*, paragraphs 47 and 48).

45 In the present case, it is apparent from paragraph 10 of the judgment under appeal that, by their action, Scheucher-Fleisch and Others sought the annulment of a decision not to raise objections under Article 4(3) of Regulation No 659/1999. Secondly, in paragraph 53 of the judgment under appeal, the General Court found, in essence, that the appellants had to be regarded as interested parties within the meaning of Article 1(h) of Regulation No 659/1999.

46 It follows that, contrary to what the Republic of Austria and the Commission claim, the General Court did not err in law by declaring the action for annulment of the contested decision admissible.

47 It is true that, as is apparent from paragraphs 47 to 49, 60 and 61 of the judgment under appeal, in addition to the ground seeking to safeguard their procedural rights under Article 88(2) EC, Scheucher-Fleisch and Others also relied on pleas in law linked to the substance of the contested decision, and that the General Court held that those parties had not shown that their position on the market could be substantially affected by the aid which was the subject of the contested decision.

48 However, it is apparent from paragraph 64 of the judgment under appeal that the General Court considered those pleas in law only in order to determine whether the procedural rights which Scheucher-Fleisch and Others derive from Article 88(2) EC had been infringed. For that purpose, the General Court considered the substantive arguments made by the those parties, in order to determine, in fact, whether those arguments were such as to support the plea in law expressly made by Scheucher-Fleisch and Others regarding the existence of serious difficulties justifying initiation of the procedure referred to in that provision.

49 In that regard, notwithstanding that those substantive arguments were not ultimately used, as is apparent from paragraph 88 of the judgment under appeal, it cannot be validly contended that the General Court thereby altered the subject-matter of the action for annulment.

50 Where an applicant seeks the annulment of a decision not to raise objections, it essentially contests the fact that the Commission adopted the decision in relation to the aid at issue without initiating the formal investigation procedure, thereby infringing the applicant's procedural rights. In order to have its action for annulment upheld, the applicant may invoke any plea to show that the assessment of the information and evidence which the Commission had at its disposal during the preliminary examination phase of the measure notified should have raised doubts as to the compatibility of that measure with the common market. The use of such arguments cannot, however, have the consequence of changing the subject-matter of the application or altering the conditions of its admissibility. On the contrary, the existence of doubts concerning that compatibility is precisely the evidence which must be adduced in

order to show that the Commission was required to initiate the formal investigation procedure under Article 88(2) EC and Article 6(1) of Regulation No 659/1999 (*Commission* v *Kronoply and Kronotex*, paragraph 59).

51 Consequently, the first part of the first ground of appeal must be rejected as unfounded.

The second part of the first ground of appeal

— Arguments of the parties

52 The Republic of Austria claims that Scheucher-Fleisch and Others were not interested parties within the meaning of Article 88(2) EC and Article 1(h) of Regulation No 659/1999. Scheucher-Fleisch and Others were only potentially and indirectly affected by the aid at issue, which they had, moreover, conceded.

53 In that regard, the Commission claims that Scheucher-Fleisch and Others stated in their application that only the retailers benefited from AMA's activities, which means, in its view, that Scheucher-Fleisch and Others were not directly affected by the contested decision, since the aid authorised by the contested decision did not result in direct effects on their legal situation, but only economic repercussions.

54 Moreover, according to the Commission, the statement included in the judgment under appeal that the beneficiaries of the aid at issue are all the undertakings forming part of the chain of production and distribution specific to the AMA labels is inaccurate, given that the AMA's activities also benefit undertakings external to AMA's chain of production and distribution, including therefore Scheucher-Fleisch and Others.

55 Scheucher-Fleisch and Others also oppose the second part of the first ground of appeal.

— Findings of the Court

56 The second part of the first ground of appeal, according to which Scheucher-Fleisch and Others cannot be regarded as interested parties within the meaning of Article 1(h) of Regulation No 659/1999, amounts, in essence, to discussing the General Court's assessment of the facts, and the probative value of the evidence submitted to it.

57 In that regard, according to settled case-law, it is clear from Article 225 EC and the first paragraph of Article 58 of the Statute of the Court of Justice that the General Court has exclusive jurisdiction, first, to find the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it and, second, to assess those facts. When the General Court has found or assessed the facts, the Court of Justice has jurisdiction under Article 225 EC to review the legal characterisation of those facts by the General Court and the legal conclusions it has drawn from them (see Case C-487/06 P *British Aggregates* v *Commission* [2008] ECR I-10515, paragraph 96 and case-law cited).

58 However, the Court of Justice has no jurisdiction to establish the facts or, in principle, to examine the evidence which the General Court accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced to it. That appraisal does not therefore constitute, save where the clear sense of that evidence has been distorted, a point of law which is subject, as such, to review by the Court of Justice (see *British Aggregates* v *Commission*, paragraph 97).

59 In addition, it is important to note that distortion must be obvious from the documents in the Court's file, without any need to carry out a new assessment of the facts and the evidence (see Case C-399/08 P *Commission* v *Deutsche Post* [2010] ECR I-7831, paragraph 64 and case-law cited).

60 In the present case, first, the Republic of Austria and the Commission have not expressly relied on distortion of the evidence regarding the finding in paragraph 53 of the judgment under appeal that Scheucher-Fleisch and Others were slaughtering and butchering undertakings competing with those entitled to the aid at issue and operating on the same geographical market, and that they were, therefore, 'interested parties' for the purpose of Article 1(h) of Regulation No 659/1999.

61 Second, it is apparent from paragraphs 51 to 53 of the judgment under appeal that the General Court based that finding on the preamble to the contested decision, on the analysis of the aid at issue, and on the information provided by written response in the context of the action for annulment.

62 Consequently, even if Scheucher-Fleisch and Others stated in their application that only retailers, and not slaughterhouses, benefited from the aid at issue, it must be noted, firstly, that they corrected that statement during the proceedings and secondly,

that the General Court's finding is based not only on the statement of Scheucher-Fleisch and Others, but also on the contested decision, as well as the analysis of the aid at issue, evidence which neither the Republic of Austria nor the Commission have challenged.

63 In those circumstances, the General Court cannot be accused of having distorted the facts in this case, regarding the categorisation of Scheucher-Fleisch and Others as 'interested parties' for the purpose of Article 1(h) of Regulation No 659/1999.

64 Consequently, the second part of the first ground of appeal must be rejected as in part inadmissible and in part unfounded.

65 It follows that the first ground of appeal must be dismissed in its entirety.

The second ground of appeal

Arguments of the parties

66 By its second ground of appeal, the Republic of Austria, supported by the Commission, considers that the judgment under appeal infringed Article 88(2) EC in finding that the assessment of the compatibility of the aid at issue with the common market

raised serious difficulties which should have led the Commission to initiate the formal investigation procedure provided for in that provision.

67 That Member State complains that the General Court based itself exclusively on Paragraph 21a(1) of the AMA-Gesetz 1992 and disregarded the other matters of law and of fact taken into consideration by the Commission, in particular the fact that the contested decision concerned only measures after 26 September 2002 and that the AMA directives in force at that time enabled those measures to be applied to all products originating from the EU.

68 The Commission adds that the judgment under appeal effectively criticises it of not having checked the lawfulness of the AMA directives which were amended by the Republic of Austria and entered into force from 26 September 2002. That institution submits that it adopted the contested decision in the context of its wide discretion in that field and on the basis of the Austrian authorities' undertaking that only those amended directives would be applied to the aid at issue, and not Paragraph 21a(1) of the AMA-Gesetz 1992. Furthermore, the Commission's task is, in its view, principally economic and social and it does not have the power to assess the lawfulness of notified measures in the light of national laws.

69 Scheucher-Fleisch and Others oppose this ground of appeal and submit that there were serious difficulties in this case for assessing the compatibility of the aid at issue with the common market, which required the Commission to initiate the formal procedure under Article 88(2) EC.

Findings of the Court

70 First of all, it should be borne in mind that, according to settled case-law, the procedure under Article 88(2) EC is essential whenever the Commission has serious difficulties in determining whether aid is compatible with the common market. It follows that the Commission may restrict itself to the preliminary examination under

Article 88(3) EC when taking a decision in favour of aid only if it is able to satisfy itself after an initial examination that the aid is compatible with the common market. If, on the other hand, the initial examination leads the Commission to the opposite conclusion or if it does not enable it to resolve all the difficulties involved in determining whether the aid is compatible with the common market, the Commission is under a duty to carry out all the requisite consultations and for that purpose to initiate the procedure under Article 88(2) EC (see Case C-431/07 P *Bouygues and Bouygues Télécom* v *Commission* [2009] ECR I-2665, paragraph 61 and case-law cited).

71 The concept of serious difficulties is an objective one and their existence must be looked for not only in the circumstances in which the contested measure was adopted but also in the assessments upon which the Commission relied (see *Bouygues and Bouygues Télécom* v *Commission*, paragraph 63).

72 It follows that, as has been recalled in paragraphs 43 and 50 of the present judgment, the lawfulness of a decision not to raise objections, based on Article 4(3) of Regulation No 659/1999, depends on the question whether the assessment of the information and evidence which the Commission had at its disposal during the preliminary examination phase of the measure notified should objectively have raised doubts as to its compatibility with the common market, given that such doubts must lead to initiating a formal investigation procedure in which the interested parties referred to in Article 1(h) of that regulation may participate.

73 In the present case, first, contrary to what the Republic of Austria claims, the judgment under appeal did not fail to take account of the fact that the contested decision concerned only measures after 26 September 2002 and that the AMA directives in force at that time enabled those measures to be applied to all products originating from the EU.

74 It is apparent from paragraphs 79 to 83 of the judgment under appeal that the General Court took account not only of those two elements, but also the fact that the Austrian authorities had undertaken to the Commission to amend Paragraph 21a(1) of the AMA-Gesetz 1992, an amendment which took effect on 1 July 2007, and the fact that that law provided for other marketing measures, without restricting them to national products.

75 However, as is apparent from paragraphs 84 to 87 of the judgment under appeal, all of those elements were not considered by the General Court to be sufficient to hold that the restriction to national products in Paragraph 21a(1) of the AMA-Gesetz 1992 raised no doubts as to the compatibility of the aid at issue with the common market and that, consequently, the Commission could be released from its obligation to initiate the procedure under Article 88(2) EC, pursuant to Article 4(4) of Regulation No 659/1999.

76 In so doing, the General Court did not err in law.

77 In that regard, it cannot be reasonably maintained that the doubts raised by that restriction in the AMA-Gesetz 1992 ought to have been dismissed in view of the entry into force of the AMA directives as from 26 September 2002 and the undertaking from the Austrian authorities that only those directives would be applied to the aid at issue.

78 It is not disputed that during the preliminary examination phase of the measure at issue there was a discrepancy between the basic law regulating that measure, the AMA-Gesetz 1992, and its implementing rules, namely the AMA directives. Although the former contained a restriction which raised doubts as to the compatibility of the aid at issue with the common market, that is to say, the restriction of the measure to national products, the latter did not.

79 Accordingly, the compatibility or incompatibility of the aid at issue was capable of being directly affected by that discrepancy at the level of national law, the scope of the measure at issue appearing to be radically different according to whether the AMA-Gesetz 1992 or the AMA directives were applicable.

80 In those circumstances, that discrepancy ought to have objectively raised doubts as to the compatibility of the aid at issue with the common market, despite the undertaking from the Austrian authorities that those directives alone would be applied to the aid at issue.

81 Such an undertaking was not such as to render legally impossible the application of the AMA-Gesestz 1992 and therefore the restriction likely to render the aid at issue incompatible with the common market. As regards the basic law, the AMA labels allocated by the Austrian authorities in breach of the restriction in that law could have been disputed, *prima facie* successfully, before the national courts by virtue of the principle of the hierarchy of norms.

82 Moreover, the Court has consistently held in analogous contexts of infringement proceedings that the incompatibility of national legislation with EU provisions can be finally remedied only by means of national provisions of a binding nature which have the same legal force as those which must be amended, and mere administrative practices cannot be regarded as constituting the proper fulfilment of obligations under EU law (see, to that effect, Case C-197/96 *Commission* v *France* [1997] ECR I-1489, paragraph 14, and Case C-358/98 *Commission* v *Italy* [2000] ECR I-1255, paragraph 17).

83 It follows that the Commission's statement that its decision was adopted in the context of the wide discretion which it enjoys in that field, and that its task is principally economic and social so that it does not have the power to assess the lawfulness of measures notified to it with regard to national laws, is without merit.

84 In this respect, it must be recalled that, firstly, as regards the area of State aid, although the Commission enjoys a broad discretion the exercise of which involves economic assessments which must be made in a European Union context, that does not imply that the European Union judicature must refrain from reviewing the Commission's interpretation of economic data (see Case C-290/07 P *Commission* v *Scott* [2010] ECR I-7763, paragraph 64) and, *a fortiori*, from reviewing the interpretation of a question regarding the effects of the discrepancy between a basic law and its implementing regulation, such a review being of a strictly legal nature.

85 Secondly, while it is not for the Commission to rule on the relationship, under national law, between the AMA directives and the AMA-Gesetz 1992, it is however required to take account of any discrepancies appearing between two pieces of national legislation, in particular if it appears that a scheme for aid includes a restriction, such as that set out in Paragraph 21a(1) of that law which raises serious doubts regarding its compatibility with the common market.

86 Moreover, neither the discrepancy between the AMA-Gesetz and the AMA directives nor the undertaking of the Austrian authorities concerning confirmation of the inapplicability of the restriction of that law appear in the contested decision, which was limited, at paragraphs 46, 52 and 66, to confirming the lack of the restriction regarding origin after 26 September 2002.

87 Accordingly, the second ground of appeal must be rejected as unfounded.

The third to fifth grounds of appeal

Arguments of the parties

88 By its third ground of appeal, the Republic of Austria, supported by the Commission, complains that the judgment under appeal infringed the rules governing the burden of proof under Articles 88(2) EC and the fourth paragraph of Article 230 EC, on the ground that that judgment did not take account of the fact that Scheucher-Fleisch and Others had not proved their status as interested parties nor the existence of serious difficulties in assessing the compatibility of the aid at issue with the common market.

89 According to the Commission, the General Court not only ignored the statement of Scheucher-Fleisch and Others that only retailers benefited from the activities of the AMA, which means, *a contrario*, that those parties were excluded from that benefit, but the General Court also gave Scheucher-Fleisch and Others the opportunity to show how their status of interested parties by means of the questions which had been put to them. In so doing, the General Court influenced the result of its investigation.

90 In the context of its fourth ground of appeal, the Republic of Austria, also supported by the Commission, considers that the judgment under appeal fails to fulfil the duty

to state reasons under Article 81 of the Rules of Procedure. According to the Republic of Austria, such a failure is evident in particular from the contradictory grounds in the judgment under appeal and the failure to analyse the AMA directives, as noted in the first and in the second grounds of appeal. The Commission claims that if the annulment of the contested decision by the judgment under appeal is said to be based on the discrepancy between the AMA-Gesetz 1992 and the AMA directives, that judgment ought to have assessed whether that discrepancy could, in fact, lead to annulment of the contested decision. It is clear that its assessment regarding the aid at issue would have been the same if it had initiated the formal investigation procedure. Besides, according to the case-law of the Court, the Commission must exercise due diligence and take account of the interest of Member States in being informed of the position quickly in this area.

91 By its fifth ground of appeal, the Republic of Austria, supported by the Commission, complains that the judgment under appeal infringed Article 64 of the Rules of Procedure of the General Court because the Court did not of its own motion collect decisive information concerning the standing of Scheucher-Fleisch and Others and the lack of impact of Paragraph 21a(1) of the AMA-Gesetz 1992.

92 Scheucher-Fleisch and Others oppose all those grounds of appeal. In particular, as regards the fifth ground of appeal, they do not agree with the finding in the judgment under appeal that they had not shown that they were substantially affected by the aid forming the subject-matter of the contested decision. According to those parties, the beneficiaries of the AMA labels were competitors whose offers were thereby promoted, whilst they and their customers had to finance their advertising by their own means. It follows that they were doubly affected by the contested decision, in so far as they bore, firstly, the cost of financing that aid, and secondly, a competitive disadvantage. In summary, according to Scheucher-Fleisch and Others, they were not able to benefit from the measure of support, but had to contribute to it and finance their own advertising themselves.

Findings of the Court

93 By those third to fifth grounds of appeal, which should be dealt with together, the Republic of Austria and the Commission complain that the General Court, first, did not observe the burden of proof, did not of its own motion collect decisive information in the case, and influenced its investigation, and, second, did not provide sufficient grounds for the judgment under appeal. Scheucher-Fleisch and Others criticise the judgment under appeal in so far as it did not find that they were substantially affected by the contested decision.

94 First, it must be noted that, although Scheucher-Fleisch and Others criticise part of the judgment under appeal in their response to the fifth ground of appeal, they do not claim that that judgment should be set aside in part, nor that the Court of Justice should either rule itself definitively on that part, or refer the case back to the General Court for a ruling on that point.

95 Consequently, as that criticism was not put forward in support of the forms of order sought in Scheucher-Fleisch and Others' response to the appeal, it should not be regarded as constituting a cross-appeal.

96 As regards the third and fifth grounds of appeal, in so far as it is claimed that the General Court ought not to have adopted the measures of organisation of procedure and put questions to the parties in relation to Scheucher-Fleisch and Others' status as interested parties, it must be noted that, in accordance with what is stated in paragraph 43 of this judgment, the fact that a person has that status may be decisive, as in this case, as regards the admissibility of its action for annulment.

97 According to settled case-law, the rule laid down in the fourth paragraph of Article 230 EC that proceedings brought by a natural or legal person against a decision not addressed to that person are admissible only if the decision is of direct and individual concern to that person raises an absolute bar to proceedings which the Community judicature may examine at any time, even of its own motion (Case C-362/06 P *Sahlstedt and Others* v *Commission* [2009] ECR I-2903, paragraph 22 and the case-law cited).

98 Consequently, the General Court cannot be criticised for having, of its own motion, adopted measures in order to inform itself of Scheucher-Fleisch and Others' status as interested parties, for it did so in the course of considering whether there was an absolute bar to proceeding.

99 Moreover, the General Court is the sole judge of any need to supplement the information available to it in respect of the cases before it. Whether or not the evidence before it is sufficient is a matter to be appraised by it alone and is not subject to review by the Court of Justice on appeal, except where that evidence has been distorted or the inaccuracy of the findings of the General Court is apparent from the documents in the case-file (see Case C-385/07 P *Der Grüne Punkt - Duales System Deutschland* v *Commission* [2009] ECR I-6155, paragraph 163 and case-law cited).

100 Therefore, the General Court cannot be criticised for having put, before and at the hearing, a series of detailed questions to the parties in order to supplement the information already available to it and for having drawn certain conclusions from the replies given by the parties to those questions in the context of pleas in law validly raised by those parties. Similarly, the Republic of Austria and the Commission cannot criticise the General Court, at the appeal stage, for not having adopted other measures of organisation which they had not asked it to adopt in the proceedings before it, the Republic of Austria not having participated in them, and which they do not precisely describe in the present proceedings before the Court.

101 It follows that the Republic of Austria and the Commission cannot reasonably claim that the General Court infringed the rules on the burden of proof, nor that it unduly influenced the investigation, nor of not having adequately supplemented the information which it had available to it.

102 In essence, those arguments essentially discuss the assessment of the facts by the General Court regarding Scheucher-Fleisch and Others' status as an interested party, for the purposes of Article 88(2) EC, and the existence of serious difficulties when assessing whether the aid at issue was compatible with the common market.

103 The third and fifth grounds of appeal which raise such questions are inadmissible in this appeal. In any event, they are without basis for the reasons set out in the answer to the first and second grounds of appeal.

104 As regards the fourth ground of appeal, it must be noted that the General Court's duty under Article 36 and the first paragraph of Article 53 of the Statute of the Court of Justice to state reasons for its judgments does not require the General Court to provide an account that follows exhaustively and one by one all the arguments articulated by the parties to the case. The reasoning may therefore be implicit, on condition that it enables the persons concerned to know why the measures in question were taken and provides the Court of Justice with sufficient material for it to exercise its powers of review (see *Bouygues and Bouygues Télécom* v *Commission*, paragraph 42 and case-law cited).

105 In the present case, the arguments made by the Republic of Austria essentially discuss questions forming the subject-matter of the first and second grounds of appeal and must, consequently, be rejected for the reasons set out in the answer to those grounds of appeal.

106 In particular, as regards the argument regarding the alleged contradictory nature of the grounds of the judgment under appeal, it must be noted that, in accordance with the case-law referred to at paragraph 50 of this judgment, an applicant who is directly and individually concerned by a Commission decision due to his status as an interested party for the purposes of Article 88(2) EC may invoke any plea such as to show that that institution should have had serious doubts as to the compatibility of an aid measure with the common market, and therefore, that it ought to have initiated the formal investigation procedure under that provision. Accordingly, the fact that the General Court assessed the pleas in law linked to the substance of the contested decision in order to assess whether Scheucher-Fleisch and Others' procedural rights had been breached is not incompatible with its finding, at paragraphs 60 and 61 of the judgment under appeal, that they had not shown that their position on the market could be substantially affected by the aid which was the subject of the contested decision.

107 The Court of Justice also rejects the Commission's argument alleging failure to state reasons for the judgment under appeal because the General Court, first, did not assess whether the discrepancy between the AMA-Gesetz 1992 and the AMA directives should have led to annulment of the contested decision, and, second, did not establish that the assessment of that decision by the Commission would have been the same if it had initiated the formal investigation procedure.

108 It must be recalled that the object of the action for annulment was a decision not to raise objections under Article 88(3) EC.

109 As has been pointed out at paragraphs 40 to 42 of this judgment, the preliminary procedure giving rise to such a decision has the sole purpose of enabling the Commission to form an initial view as to whether the aid at issue is compatible with the common market. Therefore, the General Court cannot encroach on the Commission's powers by finding that the Commission's assessment would have been the same if it had initiated the formal investigation procedure.

110 Moreover, given that the existence of serious doubts as to the compatibility of a measure with the common market is sufficient for the Commission to be under an obligation to initiate that formal investigation procedure, the General Court did not have to explain, in the judgment under appeal, why the discrepancy which it had noted between the AMA-Gesetz 1992 and the AMA directives had to lead to the annulment of the contested decision.

111 The Court of Justice has already had occasion to hold that the decision not to raise objections under Article 88(3) EC, which is taken within a short period of time, must simply set out the reasons for which the Commission takes the view that it is not faced with serious difficulties in assessing the compatibility of the aid at issue with the common market, and that even a succinct statement of reasons for that decision must be regarded as sufficient for the purpose of satisfying the requirement to state adequate reasons laid down in Article 253 TFEU if it nevertheless discloses in a clear and unequivocal fashion the reasons for which the Commission considered that it was not faced with serious difficulties, the question of whether the reasoning is well founded being a separate matter (see Case C-333/07 *Régie Networks* [2008] ECR I-10807, paragraphs 65, 70 and 71).

112 Consequently, the judgment under appeal cannot be criticised for failure to give reasons in that regard, the question whether the assessment regarding the compatibility would have been the same or not once the formal investigation procedure was initiated being a separate matter to that requirement to give reasons.

113 Consequently, the third to fifth grounds of appeal must be rejected as in part inadmissible and in part unfounded.

114 It follows that the main appeal must be dismissed in its entirety.

The additional appeal

Arguments of the parties

115 In its response to the appeal, the Commission argues, in support of the argument that Scheucher-Fleisch and Others were not directly and individually concerned by the contested decision, that the contributions at issue were not a component of the aid authorised by that decision.

116 In that regard, the Commission points out that the judgment under appeal explained that Scheucher-Fleisch and Others were directly affected by the contested decision, in view of their obligation to pay a contribution to AMA. According to the Commission, it is apparent from the case-law of the Court, in particular Joined Cases C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04 *Distribution Casino France and Others* [2005] ECR I-9481, that taxes do not fall within the scope of the provisions of EU law concerning State aid unless they constitute the method of financing an aid measure, so that they form an integral part of that measure due to hypothecation between the tax and the aid, in the sense that revenue from the tax is necessarily allocated for financing the aid.

117 According to the Commission, the judgment under appeal is, on that point, vitiated by an error of law, in so far as in the AMA scheme there is no link between the contributions and the amount of the aid granted, as the Verwaltungsgerichtshof (Administrative Court) has already held on several occasions.

118 Consequently, the Commission takes the view that the action brought by Scheucher-Fleisch and Others ought to have been held inadmissible.

119 The Republic of Austria agrees with the Commission's reasoning and maintains that the lack of hypothecation in this case is confirmed by the fact that the measures financed by the AMA are not quantifiable by reference to the various beneficiaries and that the measures are applied independently of the revenue from the contributions.

120 In that regard, that Member State points out that, under Paragraph 21j(1) of the AMA-Gesetz 1992, the contributions are used to cover AMA's administrative collection costs and must also be used for the measures listed in Paragraph 21a of that law.

121 Scheucher-Fleisch and Others maintain that that ground is new and that it was neither raised before the General Court nor in the appeal. According to those parties, in AMA's agricultural marketing scheme, there is hypothecation, within the meaning of the case-law referred to by the Commission in support of its submission, between the contributions and the aid at issue, given that the contributions to AMA were the only means which AMA had to promote agricultural marketing. As regards the judgment of the Verwaltungsgerichtshof of 20 March 2006 No 2005/17/0230, Scheucher-Fleisch and Others take the view that it is attributable to a misinterpretation of the case-law of the Court of Justice and point out that the Veraltungsgerichtshof has never made a reference for a preliminary ruling before the Court on this point.

Findings of the Court

122 At the outset, it is important to analyse whether, as Scheucher-Fleisch and Others maintain, the ground of appeal raised in the context of the cross-appeal is new.

123 To allow a party to put forward, for the first time before the Court of Justice, a plea in law regarding the measure contested before the General Court which it has not raised before that court would be to authorise it to bring before the Court of Justice a case of wider ambit than that which came before the General Court, the jurisdiction of the Court of Justice in an appeal being confined to review of the findings of law on the pleas argued before the General Court (see, to that effect, Case C-266/05 P *Sison* v *Council* [2007] ECR I-1233, paragraph 95 and case-law cited).

124 In the present case, that ground of appeal concerns the plea of inadmissibility, which it supplements, and was expressly raised by the Commission before the General Court, according to which the action for annulment of the contested decision was inadmissible since Scheucher-Fleisch and Others were not directly and individually concerned by that decision.

125 The additional appeal is thus admissible.

126 As regards the plea raised by the Commission, it must be noted that, contrary to what it claims, the judgment under appeal did not find that Scheucher-Fleisch and Others were directly concerned by the contested decision on the sole basis of their obligation to pay a contribution to the AMA.

127 It is apparent from paragraph 37 of the judgment under appeal that the General Court relied on, first, the demand for payment addressed to one of those parties and, second, the internet pages of AMA and a retailer which showed that the AMA labels had been issued prior to the contested decision.

128 Furthermore, as is apparent from paragraph 44 of this judgment, any interested party, within the meaning of Article 1(h) of Regulation No 659/1999, is directly and individually concerned by a decision not to raise objections, in so far as it raises pleas for annulment of that decision in order to protect its procedural rights.

129 It follows that the single ground of appeal raised in the additional appeal is tantamount to discussing once more Scheucher-Fleisch and Others' status as an interested party under that provision.

130 In that regard, it is necessary, first, to refer to the reply given to the second part of the first ground of appeal.

131 Second, it must be noted that in their reply and at the hearing, Scheucher-Fleisch and Others complained that they were obliged not only to contribute to the financing of the established scheme, but also suffered the disadvantage linked to the fact that only their competitors benefit from the advertising measures taken by AMA-Marketing.

132 It must, however, be noted that, under Article 1(h) of Regulation No 659/1999, 'interested party' means inter alia any person, undertaking or association of undertakings whose interests might be affected by the granting of aid, that is to say, in particular competing undertakings of the beneficiary of that aid. In other words, that term covers an indeterminate group of addressees, which does not rule out that an indirect competitor of the beneficiary of the aid can be categorised as an interested party, provided that it demonstrates that its interests could be adversely affected by the grant of the aid, and that that undertaking establishes, to the requisite legal standard, that the aid is likely to have a specific effect on its situation (see, to that effect, *Commission* v *Kronoply and Kronotex*, paragraphs 63 to 65 and case-law cited).

133 In the present case, as the judgment under appeal held that Scheucher-Fleisch and Others had to be considered as interested parties within the meaning of Article 1(h) of that regulation, the ground of appeal raised by the Commission in the context of its appeal must be rejected as unfounded.

134 It follows from all the foregoing considerations that the Commission's appeal must be dismissed in its entirety.

Costs

135 Under Article 69(2) of the Rules of Procedure of the Court, applicable to appeal proceedings by virtue of Article 118 of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Scheucher-Fleisch and Others have applied for costs and the Republic of Austria has been unsuccessful, it must be ordered to pay the costs.

136 As Scheucher-Fleisch and Others did not apply for the Commission to be ordered to pay costs, the Commission shall bear its own costs.

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

1. Dismisses the main appeal and the additional appeal;

2. Orders the Republic of Austria to pay the costs;

3. Orders the European Commission to bear its own costs.

[Signatures]